No. 09-150

In the
Supreme Court of the United States

THE STATE OF MICHIGAN,

PETITIONER,

v.

RICHARD PERRY BRYANT,

RESPONDENT.

On Writ of Certiorari to
the Supreme Court of Michigan

BRIEF FOR THE STATES OF MARYLAND, UTAH, VERMONT, HAWAI'I, NEVADA, ALABAMA, ARKANSAS, DELAWARE, MISSISSIPPI, ARIZONA, OKLAHOMA, MAINE, NEW MEXICO, LOUISIANA, ALASKA, MASSACHUSETTS, WYOMING, WISCONSIN, SOUTH DAKOTA, TEXAS, MINNESOTA, WASHINGTON, IDAHO, VIRGINIA, COLORADO, ILLINOIS, PENNSYLVANIA, OHIO, CONNECTICUT, KANSAS, NEBRASKA, MONTANA, INDIANA, SOUTH CAROLINA, NEW HAMPSHIRE, AND FLORIDA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Are the statements of a gunshot victim regarding his shooting, made immediately after the assault as he was dying of his wounds in the parking lot of a Detroit gas station, "nontestimonial" and thus admissible under the Confrontation Clause of the Sixth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF THE AMICI CURIAE

Crawford v. Washington, 541 U.S. 36 (2003), with its progeny, has redefined the parameters of admissible evidence under the Confrontation Clause of the Sixth Amendment to the Constitution. Lower courts have reached divergent opinions as to what constitutes a testimonial statement under the guidelines set forth in this Court's opinion in the companion cases of Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (2006). This case presents the Court with an opportunity to clarify what constitutes a "testimonial" statement made by a witness.

The amici states have a significant interest in the resolution of this issue. At stake is whether a statement made by a witness in extremis in the immediate context of a traumatic event is necessarily "testimonial" simply because it was made to a police officer and phrased in the past tense. The position of the Michigan Supreme Court was essentially that any remark made to a government official in the past tense was "testimonial" under Hammon. It is important for this Court to clarify that a statement made under circumstances far removed – at least from the declarant's perspective – from a formal interview for purposes of trial is not "testimonial" and does not violate the Confrontation Clause.

STATEMENT

1. On April 29, 2001, Detroit police responded to a report of a shooting and found a car idling in the parking lot of a filling station; the car's operator, Anthony Covington, lay on the ground next to the still-open driver's side door, bleeding profusely from a

gunshot wound to his torso. (J.A. 7, 11). In response to the police inquiry "what happened?" (J.A. 19). Covington, in obvious and severe distress, told police that his neighbor "Rick," later identified as the Respondent, Richard Bryant, shot him through the back door of Bryant's house a few blocks away. (J.A. 12-13). Covington told police that the shooting had transpired within the last half hour. (J.A. 39). Covington had managed to drive away from the scene of the shooting and had made it as far as the gas station. (J.A. 23). After making these statements to the police on the scene, Covington was taken to a nearby hospital by ambulance. He died from his wounds a few hours later. (Pet. App. at 10a).

Police called for backup and went to the house Covington had described, and there found ample evidence that someone had, indeed, been shot on the porch through the door. (Pet. App. at 10a, 17a). Bryant, however, was not in the house when police arrived. He was arrested a year later in California and extradited to stand trial in Michigan. The first trial resulted in a hung jury; a second trial resulted in convictions for second-degree murder and various firearm charges. Id.

2. Bryant's counsel initially moved to suppress the statement Covington made on hearsay grounds. At a preliminary hearing, the State proffered that the statement was admissible both as an "excited utterance" and as a "dying declaration." The State called police witnesses to the stand to describe the circumstances under which the statement was made. Before the prosecution had presented direct evidence regarding Covington's knowledge of his own fatal condition, the court stated that it was satisfied that the

statement was admissible under the "excited utterance" exception to the hearsay rule. Bryant's trials were conducted prior to this Court's decision in Crawford.

3. Bryant appealed his convictions to the Michigan Court of Appeals, challenging the admission of Covington's remarks. After two trips through the appellate system – during which time this Court issued its holdings in Crawford and Davis – the Michigan Supreme Court ruled that Covington's statements were admitted in violation of the Confrontation Clause. The court found that "the only issue" was whether the statements were made "under circumstances objectively indicating that the primary purpose of the [police] interrogation was to . . . meet an 'ongoing emergency,'" and thus would be nontestimonial under Davis, or whether "the primary purpose of this interrogation was to establish or prove past events potentially relevant to later criminal prosecution," and therefore would be inadmissible testimonial hearsay. (Pet. App. at 16a). The court observed that the behavior of the police at the gas station did not indicate they believed that the shooter was nearby; rather, the court said, the police behaved as if "there was no present or imminent criminal threat," id. at 17a, because they did not [take] up a defense position" or "call[] for backup" at the gas station, instead going to, and calling for backup at, the house where the shooting occurred. Id.

Notwithstanding the fact that the police were called to the gas station to respond to a report of a shooting victim, and that they stayed with Covington until EMS arrived, the Michigan court ruled that "[t]he police were at the gas station to investigate a past

crime, not to prevent an ongoing one, and the victim was not "speaking about events as they were actually happening, as in Davis, but was 'describing past events,' as in Crawford and Hammon." Id. at 17a, quoting Davis, 547 U.S. at 827 (alterations omitted). The court held that there was no "ongoing emergency," seeming to find that for Confrontation Clause purposes, a criminal emergency was only "ongoing" while the actual actus reus of the crime was being performed, and that the emergency ended the moment the criminal act was completed. (Pet. App. at 19a-20a). Accordingly, it reversed the lower courts and found that the admission of the statement was error. Michigan petitioned this Court for writ of certiorari.

SUMMARY OF ARGUMENT

A. The statement of the declarant Covington was not "testimonial" in the Crawford sense, and hence was not introduced in violation of Bryant's Sixth Amendment rights. A statement made by a shooting victim as he lay dying on the parking lot of a gas station is far removed from the formal depositions taken by "Marian magistrates," or even the orderly police interrogations conducted in Crawford and Hammon. The Michigan court's focus on whether the statement was rendered in the past or present tense is misguided. The determination of whether a statement is "testimonial" or not ultimately hinges upon the circumstances under which the statement is made. Crawford and its progeny indicate that the question to be asked is not whether the statement was presented in the past or present tense, but whether the statement resembles the "formal" statement to a "magistrate" that the Confrontation Clause was meant to bar – in the words of Davis, whether the parties, questions, and answers

"align[] . . . with their courtroom analogues." 547 U.S. at 828.

Under this analysis, Covington's statement plainly was not "testimonial." While the statement was made to government agents, the police officers who asked him what had happened were attempting to address an ongoing emergency, not collecting testimony for later use. The circumstances under which the statement was made were not "formal," "solemn," calm, or safe. The police were not acting as "magistrates," but as first responders to an emergency; the declarant was not acting as a "witness," but as a shooting victim seeking aid.

The Michigan Supreme Court incorrectly assumed that a statement is "testimonial" unless it fits within a very narrow and sharply circumscribed set of circumstances. It failed to consider the principles behind this Court's analyses of interrogations in Davis and Hammon, which curtail this expansive definition of "testimonial."[1] The reality is that statements ordinarily are not "testimonial" unless they are in some sense "formal statements" specifically intended to constitute evidence against the accused. The Confrontation Clause was meant to preclude courts or the government – through statute, common law, or evidentiary rule – from convicting criminal defendants on the basis of the formal ex parte statements of witnesses who were never called to testify at trial. Most narrowly, the Clause prohibits the abuses of the Marian bail and committal statutes, which allowed

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[1] This Court's decision in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527 (2009), was issued two weeks after the Michigan court filed its opinion in the instant case.

into evidence statements taken from witnesses by justices of the peace after an accused had been arrested for a felony. This Court has recognized that for Sixth Amendment purposes, an unsworn, unrecorded statement to a government official should fare no better than a sworn, recorded one, and that a formal interview by an investigating police officer should be treated as the functional equivalent of a formal committal hearing by a Marian justice of the peace. This does not mean, however, that any statement heard by any government official is barred by the Confrontation Clause, as was made plain by this Court's ruling in Davis. The statement against Bryant was made by a distraught, indeed dying, gunshot victim, in the immediate aftermath of the assault. There was nothing formal about the statement or its circumstances. The remarks were not intended to substitute for trial testimony. Covington was not speaking as a "witness," but as a person in need of assistance. The police officers who elicited his statement were not acting in their roles as investigators and agents of the prosecution; they were acting as first responders addressing an ongoing emergency. The statement undoubtedly is hearsay – but it is not and was never meant to be "testimony."

B. Indeed, Covington's statement would have been admissible in 1791 under the res gestae exception, which confirms the "nontestimonial" result of a valid Crawford analysis. Exceptions to the common law right of confrontation existed when the Sixth Amendment was drafted. By the late 18th and early 19th centuries, criminal courts recognized a limited exception for spontaneous declarations as a part of the res gestae – the "thing done." Covington's statement was

admissible under that theory. The proper question, for Sixth Amendment purposes, is not whether the statement is reliable, but whether it is "testimonial." Statements that were admissible under Framing-era res gestae analysis were not admitted because of their inherent reliability; they were admissible because they were nontestimonial. A statement that is part of the thing done is akin to a "verbal act," such as the statements of coconspirators in the furtherance of a conspiracy, and therefore is not meant to be "testimony" against anyone. Thus, an historical analysis of the admissibility of Covington's statement reaches the same result as an analysis limited strictly to the Crawford concept of "testimony" – a spontaneous statement in the context of an ongoing emergency is not barred by the Confrontation Clause. Therefore, the Michigan Supreme Court was in error when it found the statement inadmissible.

ARGUMENT

In Crawford, this Court established that the Confrontation Clause of the Sixth Amendment barred the admission of "testimonial" hearsay. In Davis, this Court specifically addressed whether statements made to police in the context of an active, ongoing emergency were "testimonial," and concluding that they were not, allowed the admission of such statements. As the State of Michigan argues in its brief, the statement in the instant case was made during an ongoing emergency and the Supreme Court of Michigan therefore erred in finding it to be an inadmissible testimonial statement.

This brief sets forth two additional bases for reversing the Michigan Supreme Court. First, this

Court has repeatedly stressed that statements must bear sufficient "indicia of formality" to be testimonial, and must be intended as a "substitute for trial testimony." The statements in this case were plainly lacking in formality and were not intended to substitute for live testimony. These principles underlie the examination of interrogations the Court undertook in Davis, and it is these principles – not merely the mechanical determination that there was some sort of question asked by a government official – that guide and inform a proper Sixth Amendment analysis.

Second, this Court frequently has noted that some historic exceptions to the common-law right of confrontation predate the framing of the Sixth Amendment, and that these exceptions are at least partially incorporated into the Confrontation Clause. The statement in the instant case constituted a res gestae "spontaneous declaration" that was accepted as an exception to the right of confrontation at the time of the drafting of the Sixth Amendment. An historical analysis of this exception demonstrates that at its root, it parallels the testimonial/nontestimonial analysis set forth in Crawford and its progeny. A true res gestae spontaneous declaration is a part of the "thing done" and not "testimonial" at all. Thus, under the facts presented here, the trial court's finding that this constituted an "excited utterance" was correct. As such, the statement was nontestimonial and admissible without violating the Confrontation Clause.

A. The statement was not testimonial because there was no indication of any formality surrounding its making, and there was no sign that it was intended to substitute for trial testimony.

1. In Crawford and its progeny, this Court required some level of formality and an intent to "substitute" for trial testimony for a statement to be deemed "testimonial." The Michigan court's failure to consider these factors at all led to the erroneous determination that the statements here were "testimonial" hearsay. A review of the facts makes it plain that Covington's statement was neither formal nor intended to substitute for courtroom testimony.

In Crawford, this Court held that by its language, the Clause applies only to "those who 'bear testimony.'" It defined testimony as "a solemn declaration" and observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford, 541 U.S. at 51 (citations omitted). The Court then noted that "various formulations" of the "core class of 'testimonial' statements" included

> ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior

> testimony, or confessions, [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52 (citations omitted). Thus, Crawford itself mentioned formality (and "solemnity") as an element in determining the testimonial nature of a statement, an element entirely consistent with the constitutional imperative to avoid the use of evidence similar to "Marian examinations."

Without question, moreover, the statement at issue in Crawford was "formal" and intended to serve as a substitute for trial testimony. Sylvia Crawford's testimony included almost every possible modern counterpart to a Marian examination: it was made in response to formal questioning by police officers, at a police station, several hours after a suspect had been arrested, and was intended to exonerate the defendant Michael Crawford. 541 U.S. at 38.

The Court's subsequent analysis of "testimonial" versus "nontestimonial" statements in the combined cases of Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (2006), is consistent with this concern about formality. Although the Court focused on the differing circumstances of the interrogations in Davis and Hammon, it did not disregard the requirement of formality mentioned in Crawford. The Davis Court held that the fact that a statement to police was not recorded verbatim did not render it so "informal" as to evade the Clause. Id. at 826. However, the Court held, in order to be "testimonial" in the Sixth Amendment sense of the term, the statement must nonetheless

have some indicia of formality and "solemnity" to bring it within the rubric of "testimonial," consistent with the definition of "witness against" set forth in Crawford.

The facts and circumstances of the interrogations in Davis and Hammon are consistent with this distinction between "formal" and "informal" statements. Michelle McCottry's statements to a 911 operator were to a "government official" in Davis, but the remarks were in no way "formal." In calling 911 for assistance, McCottry plainly did not intend her statements as "a weaker substitute for trial testimony[,]" 547 U.S. at 828, quoting United States v. Inadi, 475 U.S. 387, 394 (1986). The Court noted that while Sylvia Crawford's questioning and resulting statement had, like that of Lord Cobham in Sir Walter Raleigh's trial, "aligned perfectly with their courtroom analogues," 547 U.S. at 828, McCottry's did not. "No 'witness' goes into a courtroom to proclaim an emergency and seek help." Id. Under the circumstances – the remarks were made during and immediately after a domestic assault by Davis, McCottry's former boyfriend – there was no indication of "formality" or "solemnity" such that the questions of the 911 operator and the responses of the witness could be deemed to be intended substitutions for "testimony" to be used in a formal legal proceeding. A formal legal proceeding was the last thing in McCottry's mind; Davis, who was the subject of a domestic violence protective order, had assaulted her, and she was seeking help. Gathering evidence for use at trial was not the objective of the 911 operator; she was responding to an ongoing emergency. A statement made during an ongoing emergency such as the one in

Davis lacks any indicia of formality, and is not testimonial; thus the statement was properly admitted.

The facts of Hammon provided a contrast and a means of illustrating the distinction between the "nontestimonial" statements of McCottry and the "testimonial" statements collected by the police in their capacity as investigators. When the police initially arrived on the scene, Amy Hammon "appear[ed] somewhat frightened," but told police that "nothing was the matter." 547 U.S. at 819. This Court noted that there was "no emergency in progress." Id. at 830. Ms. Hammon made a statement inculpating her husband in acts of violence against her only after police had arrived on the scene, removed Hershel Hammon from the room, and engaged in a formal interrogation of her concerning her husband's behavior. Id. at 819. After eliciting a statement from her, the police officer – who testified that he separated the Hammons and questioned Amy Hammon so he could "investigate what had happened" – had Ms. Hammon complete a "battery affidavit." Id. at 820.

Acknowledging that "the Crawford interrogation was more formal," id., this Court nonetheless found that under the facts and circumstances of Hammon, the oral statement and affidavit were "testimonial" and could not be admitted unless Amy Hammon were present for cross-examination. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." Id. Indeed, the majority, while finding sufficient "formality" in Hammon to render the statement "testimonial," nonetheless recognized that the formal nature of the statement was a critical

element in determining whether a statement was "testimonial." See id. at 827 (noting the "striking" difference in "the level of formality" between Sylvia Crawford's recorded statement and Michelle McCottry's 911 call); id. at 830 (acknowledging that Crawford's statement was "more formal" than Hammon's).

The specific circumstances of the statements in Davis required this Court to examine McCottry's and Hammon's "interrogations," but it was the degree of "formality" that helped determine whether the remarks were intended as a "substitute for trial testimony." Formal interrogation is, indeed, a strong indicator that a statement is an intended substitute for live testimony.[2] In the differing results of Hammon and Davis, this Court established two points on a spectrum which would seem to bracket the dividing line between a formal, Marian-style interrogation and an informal statement not intended as "testimony" and therefore not barred by the Confrontation Clause.[3]

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[2] There may be a small number of "formal" statements which are nonetheless admissible. In Davis, 547 U.S. at 825 n.3, and again in Melendez-Diaz, 129 S.Ct. at 2539 n.8 (2009), this Court approved of the result of Dowdell v. United States, 221 U.S. 325 (1911), which denied a Sixth Amendment challenge to the introduction of affidavits from court officials concerning the conduct of the trial below. There, the Court held that the affidavits dealt with "collateral matters . . . not concerning [the defendants'] guilt or innocence," and so did not violate the Confrontation Clause. 221 U.S. at 330.

[3] This Court was not unanimous on the question of whether the interview in Hammon fell on the "inadmissible" side of that dividing line. In an opinion concurring with the judgment in Davis but dissenting from the judgment in

In Giles v. California, ___ U.S. ___, 128 S.Ct. 2678 (2008), two separate concurrences addressed the requirement of formality when that issue was not even before the Court. In Giles, the remark was a tearful statement to a police officer responding to a report of an assault and death threat made by Giles against his former girlfriend, Brenda Avie. People v. Giles, 152 P.3d 433, 436-437 (Cal. 2007). The parties stipulated below that the statements in question were "testimonial." Justice Thomas nonetheless would have found that "the police questioning was not 'formalized dialogue'" and therefore the statements "do not implicate the Confrontation Clause." 128 S.Ct. at 2693 (Thomas, J., concurring). Justice Alito separately noted that "the Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements at trial made by 'witnesses.' It is not at all clear that Ms. Avie's

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Hammon, Justice Thomas agreed that under Crawford, "testimonial" statements "require some degree of solemnity[.]" 547 U.S. at 837 (Thomas, J., concurring).

> Interactions between the police and an accused (or witness) resemble Marian proceedings – and the[ ] early [American confrontation] cases – only when the interactions are somehow rendered "formal." In Crawford, for example, the interrogation was custodial, taken after warnings given pursuant to Miranda . . . This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.

Id. (citations omitted). The concurrence agreed, however, that the affidavit Amy Hammon later wrote at the request of the police was "inadmissible per se[.]" Id. at 840 n.5.

statement falls within that category." Id. at 2694 (Alito, J., concurring).

This Court also referred to both formality and substitution in its decision in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527 (2009). There, the statements at issue were affidavits prepared by police chemists. After repeating Crawford's application of the Confrontation Clause to "formalized testimonial materials," 129 S.Ct. at 2531, this Court noted that the affidavits were "functionally identical to live, in-court testimony," intended by all concerned to serve as direct evidence at trial. Id. The Melendez-Diaz Court distinguished the chemist affidavits at issue from admissible business records on the same "substitution" grounds – records which are "prepared specifically for use at petitioner's trial" are inadmissible under the Clause. Id. at 2540.

Reading Crawford, Davis, Giles, and Melendez-Diaz together, it is plain that the category of "testimonial" hearsay is meant to be narrow, and generally applies only to statements that are (a) formal, mirroring the sort of statements that would be given in a courtroom setting; and (b) given to a government official acting in an investigatory capacity. These requirements provide a means of determining whether a statement was intended to be a "substitute for trial testimony." The setting, purpose, and form of an official interrogation which elicited the statement are useful, and perhaps in some cases dispositive, means of determining whether a statement has "sufficient indicia of formality" and similarity to courtroom testimony to constitute the sort of unconfronted "testimony" allowed by the Marian statutes and barred by the Sixth Amendment. But the

requirements behind the test are critical for determining if the Confrontation Clause applies. A mechanical assessment of the grammar of a police officer's questions will not necessarily yield the correct result.

2. The decision of the Michigan Supreme Court in the instant case essentially ignores the "formality"and "substitution" requirements. While observing that this Court had ruled that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," (Pet. App. at 12a, quoting Crawford, 541 U.S. at 51), the court thereafter focused exclusively on the "interrogation" by the police without examining the principles underlying this Court's decisions on the issue. Asking a shooting victim "what happened?" is an ambiguous, informal interrogation, and assessing it as though it were identical to the interrogations of Crawford, Davis, and Hammon without applying the underlying principles leads to a decision that is inconsistent with the purpose of the Sixth Amendment.

The Michigan court's blinkered approach to the facts here was in error, since it is "the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate[,]" Davis, 547 U.S. at 822 n.1; see also Melendez-Diaz, 129 S.Ct. at 2535 ("a person who volunteers his testimony" without any police interrogation is still "a witness against the defendant" under the Confrontation Clause).

It is not dispositive that the statement in question was heard by a government official, or was rendered in

the past tense, or was preceded by a police officer asking "what happened." The fundamental question is whether the statement itself is "testimony" – a statement made to a government official acting in anticipation of future prosecution, with such indicia of formality that one can infer an intent to create a "substitute for trial testimony." This determination is based upon the totality of the facts and circumstances surrounding the interrogation and statement.[4] The Michigan Supreme Court's refusal to consider the extremely informal nature of Covington's statement, and the concomitant lack of any indication that his statement was meant to be a "substitute" for trial testimony, paved the way for its erroneous conclusion that the statement was barred by the Confrontation Clause.

The Michigan court noted that Covington "made these statements while he was surrounded by five police officers and knowing that emergency medical services was on the way." (Pet. App. at 16a). However, rather than recognizing that this rendered the statements far less formal than those in Davis and Hammon (to say nothing of the highly formal statements in Crawford) – thus removing them farther

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[4] The circumstances of the interrogation itself obviously would be among the "indicia of formality." If the questions were asked by police officers acting in their capacity as crime investigators, or by prosecutors in the course of their professional duties, it would weigh heavily toward finding a statement "testimonial." Hammon, supra. By contrast, a prosecutor who happened upon the scene of a recent shooting on her way home from work would not be presumed to be developing testimony for use at trial if she asked the victim "what happened?"

from being a "substitute for trial testimony" – the Michigan court focused almost exclusively on the grammatical tense of the statements to reach its conclusion that the statements were "testimonial" without ever considering if the remarks were the sort of "solemn" substitute for courtroom testimony that the Confrontation Clause prohibits. (Pet. App. at 16a).

The statement in this case is utterly lacking the indicia of formality that this Court has found to be a critical element in determining whether or not a statement is a modern analog of the examination of witnesses conducted by a Marian justice of the peace at a committal proceeding. There is nothing in the facts of this case which would indicate that Covington reasonably believed his response to the inquiry "what happened?" to be a substitute for trial testimony. The Michigan's court's fixation on grammatical tense and the subsequent actions of the police was misplaced.

B. An excited utterance was historically recognized as not falling within the right of confrontation, and is not "testimonial."

1. In Crawford and later cases, this Court has looked to Framing era practices to help determine when hearsay evidence may be admitted consistent with the Confrontation Clause. Thus, in Crawford the Court noted that dying declarations, although "testimonial," may well be admissible as an exception to the Confrontation Clause, as such statements were admissible at the time the Bill of Rights was adopted. Crawford, 541 U.S. at 56 n.6; Giles, 128 S.Ct. at 2682-2683. In Melendez-Diaz, the Court observed that what is now called the "business records" exception predated the Confrontation Clause and retains its vitality. 129

S.Ct. at 2538. And in Giles, the Court affirmed the existence, and delineated the contours, of the forfeiture-by-wrongdoing exception to the Clause based on Framing era practices. 128 S.Ct. at 2691. Like dying declarations, business records, and the testimony of witnesses whose absence the defendant procured, "spontaneous exclamations" – excited utterances – were also recognized hearsay exceptions at the end of the eighteenth century.

Each of these exceptions has its own historical justification. Dying declarations were testimonial, but admissible because they were functionally sworn. The forfeiture rule was based on principles of equity. Business records and excited utterances, by contrast, were admissible because they were considered nontestimonial. Business records were not created to substitute for trial testimony. Indeed, records that were prepared in anticipation of litigation do not fall within the exception. And excited utterances were considered part of the res gestae, i.e., part of the act itself, not a separate statement. Neither business records nor excited utterances was sworn, and therefore would have failed an 18th-century test for "reliability." But neither was "testimony," and therefore the common-law right of confrontation did not attach.

The distinction between "testimonial" dying declarations, on the one hand, and business records and res gestae statements, on the other, is based upon the original basis for excluding hearsay – its unsworn nature. Prior to the mid- to late-eighteenth century, the chief criticism of hearsay statements was that they were not under oath. Crawford, 541 U.S. at 70 (Rehnquist, C.J., concurring). As legal historian

Thomas Gallanis explained, "[f]or early [treatise] writers, such as Gilbert, Bathurst, and Buller, hearsay lacked credibility because the original statement was not made under oath." T.P. Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499, 533 (1999).

Therefore, under a Framing-era analysis, dying declarations, uttered by a witness "immediately going into the presence of his Maker," Wright, 497 U.S. at 820 (1990), were admissible because they were "functionally sworn." Thomas Y. Davies, Not "The Framer's Design": How the Framing-Era Ban Against Hearsay Evidence Refutes The Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause, 15 J. L. Policy 349, 354 (2007). They were not, of course, "functionally cross-examined," yet this lack of confrontation was not regarded as an obstacle to their admission.[5]

By contrast, a spontaneous exclamation (or business record entry) would not have been considered "functionally sworn." Prior to the development of modern "reliability" analysis, the admissibility of the unsworn and unconfronted excited utterance rested upon the fact that it was treated, as the term res

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[5] Compare Marian examinations, which also were sworn yet unconfronted.

gestae indicates, as a verbal "act."[6] "Res gestae" may be translated as "acts" – that is, not speech.

This Court has previously recognized that excited utterances have been deemed admissible for at least two hundred years. White, 502 U.S. at 355 n.8. Historic examples of the admission of res gestae remarks, including what would now be known as excited utterances, include Thompson v. Trevanion, 90 Eng. Rep. 179 (1694) (allowing a remark made immediately after being assaulted); Aveson v. Kiniard, 102 Eng. Rep. 1258 (1805) (allowing a statement about the declarant's then-present good health); and Rex v. Foster, 172 Eng. Rep. 1261 (1834) (allowing the statement of a pedestrian who was killed by a passing coach, made immediately after being struck). But see Reg. v. Megson, et al., 173 Eng. Rep. 894 (1840) (disallowing a report of a rape made upon the victim's return home). An early American example is Massachusetts v. M'Pike, 57 Mass. 181 (1849), which began with the statement: "The admission in evidence of the statement of the party injured, as to the cause and manner of the injury which terminated in her death, may be sustained upon the ground, that the testimony was of the nature of the res gestae." Id. at 184.

2. The admissibility of res gestae statements at common law had little to do with their "reliability" as testimony, and thus did not constitute the merger of

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[6] The other res gestae exceptions were similarly admitted as acts, not testimony, such as a statement of a co-conspirator in the furtherance of the conspiracy, defamatory remarks, or the making of a contract. 6 John Henry Wigmore Evidence §1768 (Chadbourne rev. 1974).

hearsay reliability analysis and confrontation rights implied in Ohio v. Roberts, 448 U.S. 56 (1980), and repudiated in Crawford. Indeed, just the opposite. In the eighteenth and early nineteenth centuries, "reliability" required an oath or its functional equivalent. Res gestae statements were admitted because the statements were deemed a part of the "thing done" – not a formal statement at all. Theories for the reliability of hearsay came along later.

The development of modern hearsay rules occurred around the same time as the drafting of the Sixth Amendment; "[b]y the close of the eighteenth century, the contours of the modern rule against hearsay were largely in place." Gallanis, 84 Iowa L. Rev. at 535. This included what would later become known as the "res gestae" exceptions. Id. at 537. See also Ben Trachtenberg, Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule, 61 Hastings L.J. 581, 591 (1996) (noting that "an enforceable Hearsay Rule akin to its modern incarnation" developed late in the seventeenth century); Tom Harbison, Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause, 58 Mercer L.Rev. 569,600 (2010) (observing that the holding in Davis is consistent with a Framing-era res gestae or spontaneous declaration analysis).

Wigmore discussed the "spontaneous exclamation" res gestae exception at length, 6 John Henry Wigmore Evidence §1745 et seq. (1974 Chadbourne Rev.). He considered the "spontaneous declaration" (and its related extensions) to be essentially the only genuine

hearsay contained under the term "res gestae." Id. at §1746. Most of the traditional res gestae exceptions, he noted, were not hearsay at all in the modern sense – the statements were not presented for the truth of the matter asserted, but as verbal acts. Id. at §1766 et seq.[7]

When the res gestae exceptions – like business records, not uttered for use at trial – are considered in their historic role (and separated from the modern "reliability" analysis), it is evident that their admissibility was rooted in their "nontestimonial" nature. A statement that is a part of the "thing done" is not testimonial. It is not uttered for use in litigation. It is comparable to a verbal act. Thus, the statement of a co-conspirator in furtherance of a conspiracy is admissible without prior cross-examination, not because it is reliable, but because the act of the statement itself is evidence of a crime. See Crawford, 541 U.S. at 59 n.9 (noting that statements introduced "for purposes other than establishing the truth of the matter asserted" are admissible under the Clause). The same holds true of a spontaneous declaration made while still affected by "the pain or hurt received" by the criminal act. Harbinson, id. at 602.

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[7] Wigmore also considered the "present sense impression" to be one of the "res gestae" exceptions. While not before the Court in this case, a statement made evincing the declarant's then-existing state of being ordinarily would not seem to be "testimonial" in the Crawford/Davis sense – it would rarely be "formal," and unlikely to be meant as a "substitute for trial testimony." Thus, whether one applied Framing-era res gestae analysis or Crawford's "testimonial/non-testimonial" analysis, the outcome would ordinarily be the same.

It is important to note that while a modern gloss on the "excited utterance" is that it must be made while the declarant is too emotionally upset to formulate a conscious falsehood, this approach to the statement seems to be drawn from the "reliability" analysis used to justify various modern hearsay exceptions. Under this theory, statements which are not part of "the thing done" could be admitted provided that the declarant was shown to be upset at the time of the statement. See United States v. Napier, 518 F.2d 316 (9th Cir. 1975) (allowing admission of a statement made by a witness seven weeks after she was assaulted by the defendant, triggered by her "great distress" upon seeing the defendant's picture in a newspaper). A Framing-era analysis of an excited utterance as part of the res gestae would necessarily focus much more upon the proximity in time between the act and the statement; while a victim may become too upset to formulate a falsehood seven weeks after the fact, her statement would nonetheless not be a part of the "thing done."[8]

3. Although "res gestae" properly has been repudiated as an analytical approach to hearsay,[9] see

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[8] At least one other eighteenth century hearsay exception is consistent with the notion that the statement must be made while in distress from the act itself. The "hue and cry" of a crime victim, substantively admissible until the early 19th century, must have been raised immediately after the assault. See State v. Hill, 578 A.2d 370, 375 (N.J. 1990).

[9] Over sixty years ago this Court considered the use of the term res gestae "a veil for obscurity of thought." Griffin v. U.S., 336 U.S. 704, 709 n.2 (1949), quoting 1 Wigmore, Evidence, §111 (3d Ed., 1940).

Kenneth S. Broun, 2 McCormick on Evidence §268 (6th Ed. 2006), it serves as a useful, historically sound basis for harmonizing the Crawford testimonial/nontestimonial approach with the understanding of the right to confrontation that existed around the time the Sixth Amendment was adopted. The parallel between a Framing-era res gestae analysis and a Crawford "testimonial" analysis is borne out by the Court's decisions which involved a determination of the testimonial nature of an out-of-court statement. In Crawford and Hammon this Court found that the various out-of-court statements in question were "testimonial." None of these statements would qualify as "excited utterances." In Crawford, the witness was taken to a police station, Mirandized, and interrogated twice, several hours apart. State v. Crawford, 54 P.3d 656, 658 (2002). (It was the second recorded statement to which Crawford primarily objected.) This Court found the statement to be "testimonial under any definition," Crawford, 541 U.S. at 61, and held it was barred by the Confrontation Clause. Sylvia Crawford's statement plainly was not an "excited utterance" made in such close connection with the act itself as to constitute an admissible res gestae statement under a Framing-era analysis.

Amy Hammon's statement to the police was similarly made at a point removed in time from the act itself, and although she appeared "somewhat frightened," she assured police that "nothing was the matter" before making the testimonial statement to them. Davis, 547 U.S. at 819. This Court found the statement to be nontestimonial, and from the record presented, there is nothing to indicate that this

statement would have been a res gestae "excited utterance."

In contrast, the statements of Michelle McCottry in Davis were found to be nontestimonial and admissible; they were also clearly "excited utterances" made in close relation to the events themselves. Id. at 817-818. They only ceased to be spontaneous declarations when the 911 operator interrupted McCottry's narrative discourse and directed McCottry to "stop talking and answer my questions." Id. at 818.[10]

It should be noted that in Giles, as discussed supra, it is at least arguable that the statement Avie made would have qualified as an "excited utterance" if it was made close on the heels of the assault while still suffering from its effects. In Giles the State had conceded that the statements were "testimonial," 128 S.Ct. at 2682, but the concurring opinions of Justice Thomas, id. at 2693, and Justice Alito, id. at 2694, both questioned whether the statement was "testimonial."

The trial judge in this case found Covington's statement to be admissible as an "excited utterance." The statement was made by Covington as he lay dying in the parking lot of a gas station, bleeding from a gunshot wound to his torso, minutes after the shooting. Under even the most conservative definition of an excited utterance, this would qualify as part of the res gestae of the shooting itself. To the Framers, this

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[10] The Court specifically declined to address the admissibility of these later remarks; the Washington Supreme Court had found any error in their admission to be harmless. Davis, 547 U.S. at 829.

finding would have meant that the statement was an "act" so closely tied to the events in question as to form a part of the events. It would have been, in a word, "nontestimonial."

The Crawford/Davis "testimonial" analysis and an historical "spontaneous declaration"/res gestae analysis reach the same result because they are, fundamentally, describing the same phenomenon: a statement that is not meant to serve as a "substitute for trial testimony," but is rather a part of the act. Whether one applies the Crawford analysis to determine whether this statement fit within the narrow category of "testimonial" statements, or whether one applies a Framing-era analysis to determine if the statement was a part of the "thing done," the result is the same. The Michigan court's focus was too narrow and its concept of "testimonial" statements too broad. Its decision should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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May 7, 2010