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 OF RICHARD D. FRIEDMAN,
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal academic holding the title of Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (3d ed. 2004).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. *Amicus* successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

As he has previously done in *Giles v. California*, 128 S.Ct. 2678 (2008), and *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), *amicus* submits this brief on behalf of himself only; he has not asked any

[1] The parties have consented to the filing of this brief. Written statements of their consent have been filed with the Clerk. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. In some cases, as in *Giles*, his views principally favor the prosecution; in others, as in *Melendez-Diaz* and this case, his views principally favor the defense. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Amicus believes that the confrontation right would be severely undercut if the statements at issue in this case were deemed not to be testimonial within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). He believes that decision of this case may require the Court to determine the proper perspective for determining whether a statement is testimonial. In his view, the proper perspective is that of a reasonable person in the position of the speaker; under that perspective the statements here are plainly testimonial. This result, he contends, is clearly in accordance with decisions from the Framing era and before. He recognizes that constitutionally mandated exclusion of the statements may seem intuitively unappealing. The reason, he believes, is that, if what he regards as the optimal doctrine were applied to this case, it is possible that a court would conclude that the accused forfeited the confrontation right. The doctrine of *Giles* appears to foreclose that conclusion (and in any event no question of forfeiture is presented here), but that fact should not cause the Court to constrict the category of testimonial statements.

SUMMARY OF ARGUMENT

For the doctrine governing the confrontation right to develop optimally, it is essential that this Court choose the proper perspective for determining whether a statement shall be deemed to be testimonial. In the view of *amicus*, the proper perspective is that of the speaker – that is, the person who assertedly acted as a witness. A statement should be deemed testimonial if a reasonable person in the position of the speaker would anticipate that it would likely be used for prosecutorial purposes. The apparent purpose of an official investigator – if there was one – in taking the statement may be a significant fact bearing on the speaker's understanding of the situation, but that purpose is not determinative of whether the statement is testimonial. A test based on the purpose of the questioner would be historically inaccurate, would not fit a coherent or complete theory of the confrontation right, and would be very easily subject to manipulation.

In this case, Covington's statements were clearly testimonial. A reasonable person in Covington's position must have understood that his statements would be used in an attempt to bring the assailant to justice. The fact that the assailant was still at large has no bearing on this. Neither does the fact that Covington was in dire physical condition.

To the extent formality is a requisite for a statement to be deemed testimonial, it is satisfied by demonstrating that a reasonable person in the position of the declarant would expect the statement to be used in investigation or prosecution of a crime. It would

make no sense to adopt a separate formality requirement. The purpose of the Confrontation Clause is to ensure that testimony is given under the proper conditions. To hold that a statement clearly made in anticipation of evidentiary use is not testimonial because it was given informally would stand logic on its head and invite witnesses and government authorities to evade the confrontation right by giving and taking such statements informally.

It may be that if optimal doctrine were applied Covington's statements would be admitted. But if so that would be because the trial court concluded that Bryant engaged in serious intentional misconduct that rendered it impractical for him to be confronted with Covington, and so he should be deemed to have forfeited the confrontation right. *Giles v. California*, 128 S.Ct. 2678 (2008), appears to foreclose this possibility. In the view of *amicus*, *Giles* is an unfortunate development that is inimical to sound development of the confrontation right. It is not compelled by history, logic, or equity. This case does not present the Court with a question of forfeiture, but the Court should, when opportunity arises, confine *Giles*. Until such time, it should not attempt to compensate for it by adopting an unduly constrained definition of the category of testimonial statements.

ARGUMENT

I. WHETHER A STATEMENT IS TESTIMONIAL SHOULD BE DETERMINED FROM THE PERSPECTIVE OF THE SPEAKER. COVINGTON'S STATEMENTS WERE CLEARLY TESTIMONIAL.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the critical consideration in determining whether the confrontation right applies to an out-of-court statement is whether the statement is deemed "testimonial" in nature. Petitioner's Brief is based on the perception that whether a statement of the sort involved here should be deemed testimonial should be determined from the perspective of the investigating officials.[2] This is mistaken. The Confrontation Clause is not a regulation of police conduct. Whether a statement is testimonial for purposes of the Clause should be determined from the perspective of the speaker, the person who is assertedly a witness. A statement should be deemed testimonial if a reasonable person in the speaker's position would understand that it would likely be used for prosecutorial purposes.[3]

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[2] This orientation, pervasive throughout the brief, is apparent from the very beginning; Petitioner states the Question Presented as: "Are preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting nontestimonial . . . ?" Pet. Br. at i.

[3] "Prosecutorial purposes" is a shorthand meant to indicate that the statement would be used for investigation or prosecution of a crime. Some other anticipated uses could occasionally render a statement testimonial – for example,

Davis v. Washington, 547 U.S. 813 (2006), includes language that, taken out of context, might suggest that, at least in some circumstances, the testimonial character of a statement is determined from the point of view of an official investigator. *Id.* at 822 (referring to "the primary purpose of the interrogation"). But *Davis* recognized that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n.1.

As this latter passage indicates, making the definition of "testimonial" depend on the purpose of an interrogator could not lead to coherent doctrine. For one thing, there is not always an interrogator. Indeed, historically, interrogation may have been more the exception than the rule, because the right to confront adverse witnesses predates the institutions of police forces and public prosecutors by more than two millennia.[4] Even at the time the Confrontation Clause

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if a reasonable person in the position of the speaker would anticipate that the statement would be used in civil litigation, the statement would arguably be testimonial. There is no need to resolve that question here; Covington's statements were clearly made in anticipation that they would be used to assist investigation and prosecution of a crime.

In *Grappling with the Meaning of "Testimonial"*, 71 BROOKLYN L. REV. 241 (2005) [hereinafter "*Grappling*"], at 255-59, *amicus* has argued at greater length that the question whether a statement is testimonial should be determined from the perspective of the speaker.

[4] *See, e.g.,* LAWRENCE H. SCHIFFMAN, SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY AND THE PENAL CODE 73 (1983) (quoting Dead Sea Scroll on procedure in case only one person witnesses a capital offense; witness

incorporated the right into the Constitution, there was nothing resembling the modern police force,[5] and both in England and in parts of America most crime was still privately prosecuted.[6] And, as *Davis* recognized, "volunteered testimony" is not "exempt from cross-examination." 547 U.S. at 822 n.1.[7] A theory that made determinative the purpose of the interrogator, when there was one, would therefore necessarily be incomplete; it would require one conceptual construct when there was an interrogator and an altogether different one when there was not, leaving unresolved what the underlying meaning of "testimonial" is.

Furthermore, even when there is an interrogator, it makes no sense for the interrogator's purpose to determine whether the statement is testimonial. It is the speaker who is deemed a witness if his statements are testimonial in nature, and therefore the speaker with whom the accused arguably has a right to be

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must report crime to examiner in presence of accused, and testimony is recorded, allowing for accumulation of testimony across episodes to satisfy three-witness requirement).

[5] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67 (1993) (describing the rise of the modern police force as one of the "major social inventions" of the nineteenth century).

[6] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986), *quoted in* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1248 n.295 (2002); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 518-19 (1994).

[7] Only in a very strained sense could the laboratory report in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), be considered a response to interrogation.

confronted. If the speaker anticipates that his statement will be used for prosecutorial purposes, the fact that he gives the statement in response to official questioning does not make the statement any less testimonial than it would be if he gave the statement spontaneously; even if at the moment the speaker utters the statement, the interrogator (presumably not knowing the situation as well as the speaker does) does not anticipate or intend the prosecutorial use, that does not deprive the statement of its testimonial character.

On the other side of the coin, if the speaker is not acting as a witness, his statement will not be rendered testimonial by the fact that an official interrogator hopes to use it for prosecutorial purposes. Police seek to draw evidence from many different types of sources – such as inanimate objects, plant material, animals, and fluid traces, in addition to human beings. That the investigator hopes to find or even create evidence for prosecutorial use does not render the source of the evidence a witness for purposes of the Confrontation Clause. It bears emphasis that the Confrontation Clause is not a regulation of police conduct, but rather a rule governing how testimony against an accused must be given. It is the self-conscious testimonial act of the speaker, the purported witness, that renders him subject to the Clause.[8]

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[8] In some circumstances, the prosecution may be equitably estopped from denying that the statement is testimonial because government agents used trickery to procure a statement from a person who would not have given it had he known that it would be used for prosecutorial purposes. But the equities would not call for such an estoppel if the speaker was engaged in misconduct – most notably, as a

An interrogator perspective would yield some bizarre results, in both directions. On the one hand, suppose an undercover police officer speaks to a conspirator of the ultimate accused, surreptitiously recording the conversation in hopes the speaker will make statements that could be used for prosecution. Under an interrogator perspective, that statement would be deemed testimonial, at least unless the Court adopted a strong formality requirement that, as discussed below, would be utterly inappropriate. On the other hand, suppose a police officer comes to a scene with no understanding that a crime has been committed and asks, "What's going on?" The victim, knowing full well that a crime has been committed, makes a statement describing it, with the knowledge, and indeed the purpose, that the statement will be used for prosecution. But given an interrogator perspective, it appears that statement would be non-testimonial, because the police officer was not attempting to gather evidence for use in prosecution.

For this reason, a test based on an interrogator perspective is particularly subject to manipulation. Virtually always (as in this case), when police begin an interrogation they are less knowledgeable about the situation than is the person being interrogated. Therefore, the officer could nearly always testify, "My primary purpose was not to gather evidence for use in interrogation, because I did not even know a crime had been committed, " or ". . . because until the witness informed me otherwise I thought the situation might be an ongoing emergency." And this means that the confrontation right would be dealt a grievous blow, rendered virtually of no consequence in many

conspirator of the eventual accused person.

situations. Indeed, Petitioner appears to contend that any statement made in response to police interrogation before the police have ascertained the identity and location of the perpetrator is non-testimonial. In practical terms, Petitioner's view amounts essentially to the rule flatly rejected by the Court in *Hammon* (the companion to *Davis*), 547 U.S. at 832 – that statements to responding police officers are *per se* non-testimonial.

For much the same reason, an interrogator perspective would distort police incentives, to the detriment of good police work. Emergency dispatchers would know that a statement to a responding police officer would have a greater chance of admission if the officer knew nothing about the situation beforehand; accordingly, the emergency response system would have an incentive to give responding officers as little information as possible before they arrive at the scene. Similarly, a responding officer would know that a statement would be more likely to be admissible at an ultimate trial if at the time of the statement she was not sure she had control of the situation. Confrontation Clause doctrine would therefore give the officer an incentive to try to gain as full statements as possible *before* ensuring that she had such control; she would then have a plausible basis for contending that her primary purpose in seeking the statement was to resolve an ongoing emergency.

In sum, it is important for numerous reasons, both theoretical and practical, that the question whether a statement is testimonial be viewed from the perspective of the purported witness rather than from that of an interrogator. *Amicus* believes that the question should not be one of purpose, primary or otherwise, but rather one of anticipated use; just like

an interrogator, a speaker may have multiple purposes in making a statement, but if it is clear that the statement will be put to prosecutorial use then she is testifying, even if that is not her primary purpose and even if that is not a result she desires at all.[9] *Amicus* also believes it is most appropriate to view the question objectively rather than subjectively – that is, to ask what a reasonable person in the position of the speaker would anticipate, rather than to ask what the speaker actually anticipated.[10] (The apparent purpose of official interrogators, if there are any, may be taken into account in determining what such a person would

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[9] *See, e.g.*, *Davis v. Washington*, 547 U.S. 813, 839 (Thomas, J., concurring in the judgment in part and dissenting in part). *Amicus* has commented further on this matter in *Crawford, Davis, and Way Beyond*, 15 J. LAW & POL. 553 (2007) [hereinafter "*Way Beyond*"], at 559-60.

[10] The Court has chosen an objective standard in numerous other areas of constitutional criminal procedure. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 112 (1996) (governing "in custody" determination for *Miranda* purposes: "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"); *Segura v. United States*, 468 U.S. 796, 820 (1984) ("A 'search' for purposes of the Fourth Amendment occurs when a reasonable expectation of privacy is infringed."); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (governing seizure under Fourth Amendment: whether "a reasonable person would have believed that he was not free to leave"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("holding that "it is imperative that the facts be judged against an objective standard" in determining reasonableness of stop under Fourth Amendment). Further discussion of the subjective-objective issue in this context is in *Grappling*, *supra*, at 253-54.

anticipate the likely use of the statements to be.[11])

In this case there is no need to resolve these additional issues. It is clear not only that a reasonable person in Covington's position would have anticipated

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[11] Note that use of an objective standard virtually requires that the question be phrased in terms of anticipation rather than of purpose. It makes little sense to ask, "What would the principal purpose of a reasonable person have been in these circumstances?" Purpose is a matter of desired end, and to say that a person is reasonable does not tell us whether his greater purpose might have been to achieve one end or another. It makes much more sense to ask, "Would a reasonable person in the circumstances have anticipated that the statement would be used prosecutorially?"

The aim of the Confrontation Clause is to prevent the creation of a system in which witnesses can testify under unacceptable conditions. Accordingly, a more theoretically precise way of asking the question may be, "*Assuming hypothetically that the statement would be admissible if it were offered at a trial*, would a reasonable person in the speaker's position anticipate that if in fact the matter came to trial her statement would be offered?" If the answer is affirmative, and the statement is nevertheless admitted, then we have created a system in which witnesses can testify out of court, knowing full well that their statements will likely be admitted at trial. One cannot simply ask the above question without the italicized portion, because a reasonable person understanding the confrontation right might realize that in fact her statement is not admissible. But the italicized portion adds an undesirable complexity to the inquiry; instead of including a possibly counter-factual hypothetical, it is probably better to ask what the reasonable person would anticipate in the real world, but to include other official uses besides admission at trial within the set of anticipations that can render a statement testimonial.

that his statements would be used for prosecutorial purposes, but that Covington himself did, and that his purpose in making the statements was to create evidence for prosecutorial use, by describing the crime and identifying the person who committed it. Covington knew that a serious crime – one unquestionably warranting prosecution – had been committed on him. He knew that the assailant was not at the scene (and indeed, according to his statement, never had been) and that there was no danger in the vicinity; he also presumably knew that the assault was directed at him personally and that there was no imminent danger to anyone else. He knew that the information he provided about the incident could assist in prosecuting the accused, and that it had no significant use in relieving his medical condition. His understanding on these points must have been fortified by the nature of the police officers' questioning, which was plainly directed to bringing the assailant to justice rather than to providing medical assistance.

The conclusion that Covington's statements were not testimonial is not affected by the fact that the person Covington accused was at large at the time. Unlike the declarant in *Davis*, Covington spoke in the presence of police officers, some time after the assault had been completed and with the assailant nowhere near the scene; accordingly, unlike her, he knew throughout the interrogation that he was not in any further immediate danger from the assailant.[12] The

[12] For an argument that "*Davis* is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant" – especially if that test is applied "from the vantage point that the declarant

fact that the assailant was at large did not alter the fact that he made his statement in anticipation of prosecutorial use. Moreover, a rule that a statement made while the accused assailant is still at large would not only conflict with the express declaration of *Davis*, *see* 547 U.S. at 828-29 (asserting that statements made after a given point in 911 call were testimonial), but would create a particularly perverse incentive, to avoid taking a suspect into custody until all accusers had made full statements.

Similarly, for at least two reasons, the conclusion that Covington's statements were testimonial is not affected by the fact that he was in dire physical condition when he made them. First, the statements did nothing to relieve that condition. The contrast with *Davis* is clear. There, the complainant's call and initial statements were necessary to ensure that the assault would not continue or recur in the immediate future. Here, by contrast, Covington was protected when he made the statement, he knew the assailant was not at the scene, and he was merely describing a closed incident; nothing he said would be of assistance to medical care-givers, who were not even present at the scene. Thus, even assuming that a serious medical problem can constitute an "ongoing emergency" within the meaning of *Davis* – a proposition the Court need not reach – that would be of no avail to the Petitioner in this case. Second, Covington's medical condition did not make it less likely that the statements would be used for prosecutorial purposes. (Indeed, it probably

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actually occupied, speaking in the heat of the moment" rather than "as if she considered the probable use of her statement after the fact, reflecting calmly while sitting in an armchair" – see *Way Beyond*, *supra*, at 561-63.

made prosecutorial use *more* likely, because the crime warranted prosecution.) Nor – again in contrast with *Davis* – did that condition interfere with his ability to focus on that expected use; the only plausible reason Covington could have made the statements was to lead to the prosecution of the person he identified as his assailant.

II. A STATEMENT THAT WOULD OTHERWISE BE DEEMED TESTIMONIAL SHOULD NOT BE CHARACTERIZED AS NON-TESTIMONIAL ON THE GROUND THAT IT WAS MADE INFORMALLY.

In *Davis,* the Court said that it did "not dispute that formality is indeed essential to testimonial utterance." 547 U.S. at 830 n.5. That, of course, is not a holding that formality *is* essential for a statement to be deemed testimonial. Moreover, this statement came during discussion of the *Hammon* case, and the Court's resolution of that case suggests that there is no independent significance to a formality requirement.[13] That is, if a statement was made in anticipation of prosecutorial use, it will not be deemed non-testimonial on the ground that it was made informally.

The Court said that in *Hammon* "[i]t was formal enough that [the complainant's] interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. These factors do not readily lend themselves to

[13] *Amicus* has made this point at greater length in *Way Beyond*, *supra*, at 566-71.

characterization as "formal" – but they clearly demonstrate that the shared understanding of the conversation was that the complainant was creating evidence that would likely be used in prosecution.[14]

Indeed, it would stand logic on its head to treat a statement as non-testimonial, even though it was made in anticipation of prosecutorial use, on the ground that it was made informally. The very point of he Confrontation Clause is to ensure that testimony is given under proper conditions – that is, under required formalities. If a statement made in anticipation of prosecutorial use was made informally, that does not mean that it was not testimonial – rather, it means that it was not made under conditions acceptable for use at trial against an accused.

Suppose, then, that after a suspected criminal

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[14] *See also* 547 U.S. at 826 (noting that early cases "did not limit the exclusionary rule to prior court testimony and formal depositions"; citing passage from *Crawford*, 541 U.S. at 52 n.3, that it is "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK"; and noting that it is not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition"), 830 (noting that the interrogation in *Crawford* was more formal than that in *Hammon*: "While these features certainly strengthened the statements' testimonial aspect – made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events – none was essential to the point."), & n.5 (characterizing the distinction between formal and informal as "vague" and implying that it does not yield a "workable" test).

incident a police officer says to the apparent victim:

> Please tell me what happened. You can do so very informally; I won't take notes or record the conversation. But you should know that if this matter comes to trial I will testify in court and relay your statement to the jury; you won't have to take an oath, confront the accused, or be subjected to cross-examination.

Plainly, if that statement were admissible, then we would have a system in which a witness to a crime can self-consciously create narrative evidence for use at trial without ever having to appear in court, take an oath, or confront the accused – so long as he makes his statement in a way that a court will later deem to be informal. A witness would testify subject to confrontation only if she so chose. If she preferred to avoid coming face to face with the accused, she could simply make an informal statement – perhaps to the police, perhaps to another intermediary, perhaps to no particular audience but in a way that leaves some record – and the relay of that statement to the trial court would suffice in lieu of in-court testimony. Such a system would nullify the confrontation right.

King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779), confirms that there is no separate formality requirement for a statement to be deemed testimonial for confrontation purposes. There, a young child, immediately upon coming home, told her mother and a lodger of an assault just committed on her. The Twelve Judges of Kings Bench held that the two women could not testify at trial to what the child had

said. The basis for the holding was that "no testimony whatever can be legally received except upon oath"; there was no *per se* rule against child witnesses, of any age, "but if they are found incompetent to take an oath their testimony cannot be received." Clearly, the child's statement, though given informally and shortly after the incident, was considered testimonial in nature – and it was not admissible unless given under proper conditions for testimony. *See Davis*, 547 U.S. at 813 (asserting that *Brasier* "would be helpful to Davis" if the child's statements, like those involved in *Davis*, had been made during an ongoing emergency rather than "an account of past events.").

Proper formalities are a requirement for acceptable testimony. If the absence of formality takes a statement out of the reach of the confrontation right, then the right has essentially been squeezed out of our system of criminal justice.

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The question of whether Covington's statements were testimonial is unaffected by the fact that he died several hours after making them. Accordingly, if Covington's statements were non-testimonial in the actual case, they would also be non-testimonial if he had recovered fully and were living near the courthouse at the time of trial. This means that, if the views of Petitioner and its supporting *amici* were to be accepted, in such a case the Confrontation Clause would tolerate admission of his statements to the responding officers even though the state could easily have procured his live testimony, subject to confrontation, but decided not to. As the next section of

this brief indicates, *amicus* does believe that, if the trial court finds as a predicate matter that an accused murdered a witness, that could – under the forfeiture doctrine that *amicus* believes is optimal – provide a basis for admissibility of the witness's testimonial statements. Currently prevailing law precludes this solution. But the Court should not attempt to address the problem of this rather specific situation by adopting, as a general matter, an unduly narrow concept of the term "testimonial."

III. IF STATEMENTS IN SITUATIONS SIMILAR TO THIS ONE SHOULD BE ADMITTED, IT SHOULD BE ON THE BASIS OF FORFEITURE OF THE CONFRONTATION RIGHT.

Amicus believes that Covington's statements were clearly testimonial, and that is the only question before this Court. If, however, in a future case the Court were to adopt what *amicus* regards as the optimal doctrine governing forfeiture of the confrontation right, an accused in a case similar to this one might be held to have forfeited the right.

Giles v. California, 128 S.Ct. 2678 (2008), however, appears to preclude that result; even if the accused murders a witness, it held, that does not suffice to forfeit the confrontation right with respect to that witness unless the murder was *designed* to render the witness unavailable. In the view of *amicus*, *Giles* was an unfortunate decision, one that threatens sound development of the confrontation right – in part by tempting courts to apply too constrained a concept of

"testimonial" in cases such as this.[15] In time, the Court should revisit the issue raised by *Giles*. In the meantime, it should not attempt to compensate for an overly narrow doctrine of forfeiture by adopting an unduly narrow definition of "testimonial."

Amicus believes that the accused should be held to have forfeited the confrontation right with respect to a witness if his serious intentional misconduct – the most obvious example of which is murder – had the foreseeable consequence of rendering the witness unavailable to testify subject to confrontation. Forfeiture should result whether or not the accused engaged in that conduct *for the purpose* of rendering the witness unavailable. The prosecution should not be able to invoke forfeiture doctrine, however, if it failed to take reasonable measures that were available to it and that would have mitigated the problem; in some circumstances, taking the witness's deposition is such a measure.

The justices in the *Giles* majority based their decision to incorporate a purpose element into forfeiture doctrine on three grounds. One was the perceived "near circularity," 128 S. Ct. at 2694 (Souter, J., concurring in part), of holding that the accused forfeited the confrontation right on the basis of the same misconduct with which he is charged. But this coincidence of issues (which still occurs under *Giles*, if the purpose element is satisfied) should not be

[15] *Amicus* has offered a fuller critical analysis of the *Giles* decision in *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009), from which part of this section of the brief is adapted. He also analyzed the forfeiture issue at length in *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997).

regarded as a genuine problem. To secure a conviction, the prosecution must prove to the trier of fact (a jury if there is one) that the accused committed the crime. As a separate matter, to justify the admission of particular statements, the prosecution must prove to the judge that the accused committed misconduct rendering the witness unavailable. It so happens that the two acts are the same, but that does not affect either fact-finding process. The two processes are held for different purposes, presumably before different fact-finders, on different bodies of evidence, and subject to different standards of persuasion. If the judge decides that in fact the accused did commit the forfeiting misconduct, she may simply admit the evidence, but of course she need not announce her factual conclusion to the jury. The situation is exactly comparable to the one that has prevailed for many years with respect to conspiracy cases in which the prosecution seeks to admit evidence on the basis that it was made in furtherance of the very conspiracy being charged.

Second was considerations of equity. But by hypothesis, the accused murdered the witness. The seriousness and wrongfulness of the conduct are beyond question, and it also was readily foreseeable that the conduct would render the witness unavailable to testify at trial. *Amicus* believes that in this circumstance the equities weigh heavily *against* allowing the accused to preclude admission of the witness's statements on the ground that he was unable to be confronted with the witness – even though his wrongful purpose was something other than to create that unavailability. The accused ought not be able to complain about the clearly foreseeable consequences of

his own serious intentional wrongdoing.

Finally, the lead opinion in *Giles* emphasized history. It took as a premise that in the Framing era and earlier there were no cases in which forfeiture was applied absent a purpose to render the witness unavailable. Under this argument, the dying declaration exception would have been essentially superfluous if forfeiture doctrine could be applied absent such a purpose; without such a purpose requirement, forfeiture would apply to virtually all dying declaration cases and more,[16] because the dying declaration doctrine has an imminence requirement while forfeiture does not.

The argument does not recognize, however, that the dying declaration cases, including their imminence requirement, can themselves easily be explained as applications of sound forfeiture doctrine, bounded by a mitigation requirement, without a need for demonstrating purpose to render the witness unavailable. A mitigation requirement makes sense because it expresses the principle that, even if the accused's wrongdoing was the initial cause of the witness's unavailability, the prosecution cannot stand idly by and later invoke forfeiture doctrine if it has available to it but forgoes reasonable means to preserve the confrontation right in whole or part; the requirement is comparable to the idea of the last clear chance in tort.

Thus, suppose that in the Framing era a victim of

[16] This assumes (accurately, *amicus* believes) that in most cases in which the dying declaration doctrine is invoked, the court could make a (nearly circular?) predicate finding that the accused committed the killing charged.

a grievous assault lingered for a time and subsequently died. It was standard practice to take a formal, testimonial statement from her. If death appeared to be imminent at the time, then the statement could be admitted at the accused's murder trial, even though the accused never had an opportunity for confrontation.[17] But if death did not appear imminent at the time, then the statement was not admissible unless the authorities provided the accused with an opportunity for confrontation.[18]

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[17] *See, e.g.*, *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352, 354 (1789).

[18] *See King v. Forbes*, Holt 599, 171 Eng. Rep. 354 (1814); *King v. Smith*, Holt 614, 171 Eng. Rep. 357 (1817); *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791); *Thomas John's Case* (1790), reported in 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 357-58 (photo. reprint 2006) (1803); *Henry Welbourn's Case* (1792), reported in *id*. at 358-60. In *Forbes*, the accused was present for only part of the deposition – and only that part was held admissible. In *Smith*, also, the accused appeared when the proceeding was well under way – but the victim was re-sworn, the testimony already given was read back, the victim reaffirmed it, and all was held admissible.

THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (1801), presents a nice juxtaposition, summarizing the law and showing the relation of the deposition and dying declaration rules. On pages 40-41, Peake asserts that a deposition taken under the so-called Marian statutes may be admitted at trial if the witness has died and the accused was present, but that if the accused was not present the deposition may not be admitted. A listing of Errata, p. xii, qualifies this by noting that the statement may yet be admitted if the witness was "apprehensive of, or in imminent danger of death."

This set of holdings reflects very well a sound doctrine of forfeiture, limited by a mitigation requirement. That is, the results of the Framing-era cases are consistent with these propositions of law:

> (1) An accused forfeits the confrontation right with respect to statements by a witness if his inability to be confronted with the witness is attributable to the fact that he murdered the witness.
>
> (2) Proposition (1) does not apply if it was reasonably possible before the witness's death to take a deposition, but prosecuting officials did not do so.

These principles cannot be applied to the present case; *Giles* is the governing law, and in any event no question of forfeiture has been raised before this Court. But suppose that in the future the Court adopts these principles and then a case similar to this one arises. The trial court would first determine, as a predicate matter, whether the accused had murdered the victim. If it answered in the affirmative, it would then ask whether the state could, feasibly and humanely, have taken the victim's deposition. As the Framing-era cases indicate, the fact that the victim was severely wounded and died not long after does not in itself preclude the possibility that a deposition could be taken. But a court might well find – especially if the accused is still at large – that there was no feasible and humane way in which the victim's deposition could have been taken. If so, the court would then conclude

that the accused forfeited the confrontation right.

Amicus submits that the combination of doctrines advocated here would provide a sensible rubric under which the admissibility of statements like those of Covington should be determined: The statements are clearly testimonial, because made in anticipation of prosecutorial use, but if the trial court finds as a predicate matter that the accused murdered the victim and that a deposition was not practical, the accused forfeited the confrontation right. *Giles* appears to foreclose this result for now; in time, the Court may wish to revisit the holding of *Giles*. But for now, it is critical that the Court not attempt to compensate for *Giles* by adopting an unduly narrow, and generally applicable, concept of the key term "testimonial."

CONCLUSION

For the foregoing reasons, the judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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June 23, 2010