Nos. 05-5224 and 05-5705

In the Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writs of Certiorari to the Supreme Court of Washington and the Indiana Supreme Court

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BRIEF OF AMICUS CURIAE COOK COUNTY, ILLINOIS IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant—admitted as "excited utterances" under a jurisdiction's hearsay law—constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois, within which the Criminal Division of the Cook County Circuit Court constitutes one of the most active criminal court systems in the country. The Cook County State's Attorney is the chief legal officer of Cook County and is constitutionally and statutorily charged with the duty to prosecute all criminal actions in the circuit court for his county. The outcome of the litigation in the two cases before this Court will have a direct impact on the prosecutions in Cook County and will significantly affect the execution of the Cook County State's Attorney's duties. As the legal representative of a unit of state government, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Therefore, Cook County, Illinois respectfully submits this brief as *Amicus Curiae* in support of Respondents.

STATEMENT OF THE CASE

Amicus adopts the Statements of the Cases presented by Respondent State of Washington in *Davis*, No. 05-5224 and Respondent State of Indiana in *Hammon*, No. 05-5705 in their respective merits briefs.

SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court redefined the "spatial reach" of the Confrontation Clause as it relates to out-of-court statements. The pre-*Crawford* paradigm, represented by *Ohio v. Roberts*, 448 U.S. 56 (1980), presupposed that the Clause reached *all* witness statements—both in-court and out-of-court. Therefore, the Clause's purpose was defined singularly in terms of a "'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). In the context of out-of-court statements, the question became whether the "truth-finding functions of a criminal trial," which devolved into a synonym for cross-examination, were "functionally-served" by something inherent in the class of hearsay evidence under consideration. If so, "cross-examination by substitution" had been effected and the Clause was not offended.

Crawford leaves intact the body of jurisprudence emanating from the "truth-finding functions of a criminal trial" in the context of in-court testimony and those out-of-court statements that are "testimonial" and, therefore, subject to the "spatial reach" of the Clause. *Crawford*, however, greatly constricted the "spatial reach" of the Clause with respect to out-of-court statements. No longer were the "truth-finding functional rights" operative at trial the lodestar. Rather, through the interpretive methodology of original meaning construction, this Court determined that the Framers *enlisted the aid* of these "truth-finding functions" to effectuate a very different purpose in the realm of out-of-court statements—to guard against *the government* creating "out-of-court testimony" against the accused *ex parte* and then introducing it at trial in lieu of live testimony. *Crawford*, 541 U.S. at 50. Based on experience, the Framers knew that this abuse could be unchecked by a less than impartial judicial gatekeeper.

The Confrontation Clause envisioned by the Framers, therefore, closed the door to this particular brand of governmental abuse by demanding that one who utters this "specific type of out-of-court statement" (*Id.* at 51) be seen for what he is—a "witness against" the "accused." The out-of-court statement, *judged from the moment of its creation*, is then and there the "functional equivalent" of in-court testimony and is, therefore, deemed "testimonial." It is the category of "testimonial" statements that defines the "spatial reach" of the Clause with respect to out-of-court statements. Once identified as "testimonial," the Clause demands that the out-of-court statement be subject to the same "truth-finding functional rights" operative at trial. Unless the government either brings the witness in or the accused had a prior opportunity to cross-examine the witness, the Clause operates as a categorical bar.

Thus, while the Confrontation Clause does enshrine "the truth-finding functional rights" that are fundamental to our adversarial system, the Clause has a decidedly different purpose in the realm of out-of-court statements. Here, the Clause was designed to act as a check on a very specific type of governmental abuse—conducting pre-trial *ex parte* examinations of witnesses and, thereby, creating evidence that would be used against the accused at trial. The foundational premises of both Petitioners' arguments, therefore, are in error. The definition of "testimonial" should not be defined in order to vindicate the "truth-finding, functional rights" of the Clause, as did the pre-*Crawford* paradigm and as Petitioners now advance. The definition of "testimonial" must logically be defined in terms of vindicating the purpose already identified by this Court in *Crawford* of acting as a check on governmental overreaching. Thus, the definition of "testimonial" cannot be unmoored from the very purpose of the Clause. It is within the confines of this purpose that this Court must assess whether the 911 call in *Davis* (No. 05-5224) and the crime disclosure statement in *Hammon* (No.

05-5705) are swept within the "spatial reach" of the Confrontation Clause as envisioned by our Framers.

This purpose of the Clause is reinforced by assessing its individual role in the overall purpose of the Sixth Amendment itself, the Bill of Rights as a whole and, indeed, the entire body of our Constitution. Employing the same original meaning interpretive methodology, in conjunction with constitutional construction principles, the Confrontation Clause's role within the larger constitutional body of guarding against governmental abuse emerges as the animating principle. The Framers envisioned a systemic response to governmental abuse—with each particular provision serving its designed purpose. To press the Clause into service to do the "heavy-lifting" in areas outside of its intendment would do damage to the overall balanced design. Therefore, when refining the definition of "testimonial," the Confrontation Clause simply cannot be unmoored from its overall purpose, particularly when there are other constitutional provisions better-suited and intended to accommodate the systemic concerns expressed by Petitioners.

This same interpretive methodology must also be employed to ascertain the "temporal reach" of the Confrontation Clause. Just as the Framers defined the "spatial reach" of the Clause, as it relates to out-of-court statements, by use of the phrase "witnesses against," the Framers also tied the "temporal reach" of the Clause to the term "accused" and the phrase "criminal prosecution." This text was deliberately employed by the Framers to extend the "temporal reach" of the Clause to effectuate its purpose. Neither the status of "accused," nor the "criminal prosecution" itself extends infinitely backwards. The history out of which the Clause was borne was the "pre-trial, *ex parte*" abuses of the government in creating and using out-of-court statements. Therefore, a "testimonial" statement must be "created" at some point on the investigatory/prosecutorial timeline when the

machinery of the State was focusing upon the "accused" as an "accused."

Through the same interpretive methodology employed to ascertain the "spatial reach" of the Clause, this Court can now flesh-out its "temporal reach." Moreover, this Court can and should synthesize its interpretation with its already-existing Sixth Amendment jurisprudence, which teaches that the purpose served by the individual right identifies the place on the timeline when the right is triggered. However, these Sixth Amendment rights all share the common principle that they are somehow tied to the "accused" as an "accused" within the machinery of a "criminal prosecution." Based on this interpretive methodology, both the 911 call *(Davis,* No. 05-5224) and the crime disclosure statement *(Hammon,* No. 05-5705) fall outside of the outer-limits of the "temporal reach" of the Confrontation Clause.

ARGUMENT

I. THE CONFRONTATION CLAUSE WAS DESIGNED TO GUARD AGAINST GOVERNMENTAL OPPRESSION; THEREFORE, ANY DEFINITION OF THE TERM "TESTIMONIAL" MUST INCLUDE THE GOVERNMENT PRODUCTION OF *EX PARTE* OUT-OF-COURT TESTIMONY.

The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), after over a quarter century of jurisprudence, this Court did an "about face" and reunited the Clause with its historical roots. Based upon an interpretive methodology of original meaning construction, through history, historical inference and adherence to the text itself, this Court concluded that its

previous presuppositions about the Clause, represented by *Ohio v. Roberts*, 448 U.S. 56 (1980), were unsupportable. The *Crawford* Court, therefore, threw out the entire pre-*Crawford* paradigm and instituted an entirely new framework that represented the true design of the Framers.

The pre-*Crawford* paradigm was premised upon the notion that the Clause was all-encompassing, reaching *all* witness statements—both in-court and out-of-court. Driven by Wigmore's postulate (*Coy v. Iowa*, 487 U.S. 1012, 1028-1029 (1988) (Blackmun, J., dissenting)), the Court reasoned that cross-examination was the "primary interest secured by [the Confrontation Clause]" because it is "critical for ensuring the integrity of the factfinding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). Cross-examination and the other "implications of the Confrontation Clause" (*Maryland v. Craig*, 497 U.S. 836, 863 (1990) (Scalia, J., dissenting))—placing the witness under oath and permitting the jury to look upon the witness' demeanor as he testifies (*California v. Green*, 399 U.S. 149, 158 (1970))—combined to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-124 (1999). Under this framework, the Confrontation Clause served to "protect[] * * * essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Stincer*, 482 U.S. at 737. The right of confrontation was found to be "an essential and fundamental requirement for the kind of trial which is this country's goal." *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

Ironically, these purposes of the Clause, clearly effectual only if the witness actually took the witness stand at trial, were offered as the rationale for permitting and assessing out-of-court statements under the aegis of the Clause. The reasoning went—if cross-examination is the purpose, and

reliability is the goal, then an out-of-court statement can be sufficiently reliable to pass muster under the Clause if it "possess[es] indicia of reliability by virtue of its inherent trustworthiness" (*Idaho v. Wright*, 497 U.S. 805, 822 (1990)) such that "adversarial testing can be expected to add little to its reliability" (*White v. Illinois*, 502 U.S. 346, 357 (1992)). However, "[t]his reasoning abstracts from the right to its purposes, and then eliminates the right." *Craig*, 497 U.S. at 863 (Scalia, J., dissenting).

Pre-*Crawford* jurisprudence deliberately persevered in this fiction for more than a quarter century, finding it increasingly more and more difficult to develop a body of cohesive precedent. Moreover, the Court persisted in this paradigm, complete with multiple occasions of outright refusal to pay heed to the historical forces which drove the Framers to enshrine the Clause in the Bill of Rights in the first instance and/or the text of the Clause itself. See, *e.g.*, *Green*, 399 U.S. at 156-158; *Roberts*, 448 U.S. at 62-64; *Bourjaily v. United States*, 483 U.S. 171, 181-182 (1987); *Stincer*, 482 U.S. at 739-740; *White*, 502 U.S. at 352-353; *Lilly*, 527 U.S. 116. In its zeal to arrogate onto the Confrontation Clause the ability to monitor *all* hearsay, the Court in *White* went so far as to actually reject the Framers' own words in the text of the Clause because "[s]uch a narrow reading of the Confrontation Clause, [] would virtually eliminate its role in restricting the admission of hearsay testimony." *White*, 502 U.S. at 352.

In short, the pre-*Crawford* paradigm suffered from multiple logical systemic errors—all directly due to the preconceived desire to monitor all hearsay under the rubric of the Confrontation Clause. This framework simply refused to account for history, text, or purpose in construing the Clause. This Court, by employing an original meaning interpretive methodology, rectified the logical errors upon which the pre-*Crawford* framework was premised and realigned the Clause with the Framers' intendment.

After an extensive review of the history of both England and the colonial periods leading up to the passage of the Bill of Rights, the Court determined that the "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. That is not to deny the laudable trial purposes of the Clause upon which the pre-*Crawford* body of jurisprudence rested. Certainly, these purposes are entirely accurate with respect to in-court testimony and those out-of-court statements that are found to come within the protective reaches of the Clause. This Court simply rejected these trial-related goals outright as somehow justifying if or how a particular out-of-court statement came within the rubric of Confrontation Clause scrutiny. What is clear is that the Framers did not erect the Confrontation Clause as a "reliability-gauge" for all out-of-court hearsay, as the pre-*Crawford* paradigm presupposed. Rather, through resort to the very history which forged the constitutional right and the Framers' expression of their intent through the text of the Clause itself, this Court concluded that the Confrontation Clause, with respect to out-of-court statements, was actually erected as a barrier against governmental abuse.

Certainly, post-*Crawford*, in the context of the trial itself, the Clause still represents "an affirmative guarantee that testimony introduced against an accused must be given under a prescribed procedure," as Petitioner Hammon rightly points out. (*Hammon*, No. 05-5705, Br. at 7; See also *Davis*, No. 5-5224, Br. 17, 35) Indeed, cross-examination and the other "implications of the Confrontation Clause"—the premises upon which the pre-*Crawford* paradigm were based—still represent the implicit "affirmative guarantees of the procedure described" (*Hammon*, No. 05-5705, Br. at 9) within the Clause under the *Crawford* framework. This Court left the "truth-finding functions of a criminal trial"

purpose intact with respect to in-court testimony. Obviously, the Clause affords an "accused" during the very "criminal proceeding" at which the "witness against" him is testifying the full protection of the procedural guarantee.

Moreover, *Crawford* "once again reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony." *Id.* at 50. Thus, *when* an out-of-court statement (offered substantively) is deemed to come within the protective reaches of the Clause, these same "truth-finding functions of a criminal trial" are fully requisite, as well. Without either the witness on the stand or a prior opportunity for cross-examination and unavailability, the Clause erects a categorical barrier to the admission of that particular out-of-court statement.

However, the essential premise of both Petitioners and their *Amici*, that these "truth-finding functions" should be the benchmark for assessing *whether* an out-of-court statement should be swept within the "spatial reach" of the Clause, suffers from the same logical infirmity as the pre-*Crawford* paradigm. *Crawford* rejected this rationale outright because the history and text of the Clause demonstrated that *whether* an out-of-court statement came within the "spatial reach" of the Clause in the first instance was judged by a very different standard and was motivated by a very distinct purpose—to guard against the governmental abuse and overreaching that had periodically crept into their adversary system through the implementation of civil-law "controversial examination practices" actively employed by the government and unchecked by the judiciary. *Id.* at 47, 67.

To this end, the Framers enlisted the aid of the common law procedural trial right through the text of the Confrontation Clause to effectuate a very particular purpose with respect to out-of-court statements—to guard against *the government* creating "out-of-court testimony" against the

accused *ex parte*. The abuse began when the government created the "*ex parte* examination" of the witness and was completed when it was introduced "as evidence against the accused" at his trial in lieu of live testimony. In this manner, the government subverted the accused's right to employ, at trial, the arsenal of "truth-finding functions" on a live body on the witness stand. It is this governmental creation of out-of-court testimony in order to end-run the procedural guarantees of the Confrontation Clause at trial that constituted the abuse.

Moreover, the Framers were none too comforted by the fact that the out-of-court, government-created "testimony" would pass through a judicial gate-keeper, given their equal distrust of a judiciary beholden to the King. The reality of this fact played out before their very eyes in the "politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id.* at 67. In short, the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people" so "they were loathe to leave too much discretion in judicial hands." *Id.* at 67.

The Confrontation Clause envisioned by the Framers, therefore, closed the door to this particular brand of governmental abuse by demanding that one who utters this "specific type of out-of-court statement" (*Id.* at 51) be seen for what he is—a "witness against" the "accused." As such, when this particular type of out-of-court statement, termed "testimonial," is identified, it is subject to the same trial-type adversarial testing mandated by the Confrontation Clause for in-court testimony. If the witness is not put on the stand or the accused had not had a prior opportunity to subject the out-of-court statement to the rigors of adversarial testing, the statement is categorically barred by the Confrontation Clause.

Crawford, therefore, through its original meaning interpretive methodology, attempted to lay out the "common

nucleus" and "various levels of abstraction around it" (*Id.* at 51-52) of the "spatial reach" of the Clause—those out-of-court "testimonial" statements that are generated by "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed" (*Id.* at 68). Petitioners have proposed the following tests to identify these "specific type[s] of out-of-court statements": "whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime" (*Hammon*, No. 05-5705, Br. at 7) and "whether a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes" (Emphasis in original) (*Davis*, No. 05-5224, Br. at 41). While *Amicus* has grave concerns about these tests for multiple reasons[1], *Amicus*

[1] Petitioners' proposed tests are decidedly atextual and ahistorical. Given this Court's methodology of ascertaining the meaning of the phrase "witnesses against," Petitioners' contentions that this phrase seeks to ascertain whether the statement at issue would perform the *function* of testimony when it is introduced at trial (*Hammon*, Br. at 12-13; *Davis*, Br. at 41) misses the mark. The question is whether the out-of-court statement, at the moment of its utterance, *is* the functional equivalent of in-court testimony at the time the statement is made. Petitioners' focus upon content is, again, contrary to the history and text of the Clause. The term "accused" is a very different thing than an "accusation." If Petitioners are correct, then this Court's characterization of the out-of-court accusation in *Dutton v. Evans*, 400 U.S. 74 (1970) as "nontestimonial" (*Crawford*, 541 U.S. at 57) would be error. In addition to the requisite governmental abuse component, what makes the out-of-court statement "testimonial" is the simultaneous understanding of the declarant that he was "bearing witness against the accused" at that time, drawn from the circumstances under which the statement was created. If this were not correct, then this Court's characterization of the declarant's statement to the F.B.I informant in *Bourjaily v. United States*, 483 U.S. 171 (1987) as "nontestimonial" (*Crawford*, 541 U.S. at 58) would be equally called into question. Finally, both

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would like to focus particularly upon Petitioners' suggestion that the definition of "testimonial" can be completely unhinged from any manner of governmental involvement in the creation of the out-of-court statement. (*Hammon*, No. 05-5705, Br. at 10, 11, 17; *Davis*, No. 05-5224, Br. at 13)

As stated, this conclusion necessarily derives from Petitioners' view of the purpose of the Confrontation Clause, as it relates to out-of-court statements, as a free-roving guarantor of our adversarial principles upon out-of-court statements that might end up in-court as prosecution "testimony." If the out-of-court statement accuses the "accused,"[2] then it should be subject to the rigors of adversarial testing else our adjudicative system will come into disrepute. In other words, Petitioners' theories rest upon the commentary on our adjudicative system that would result should it not be deemed to interpret the term "witnesses against" utilized by the Framers in the manner proposed by Petitioners.

Amicus has already pointed out that this rationale shares much in common with the pre-*Crawford* framework already rejected by this Court in *Crawford*. While admittedly packaged somewhat differently, both share the overall premise that the advancement of the truth-determining process is the purpose of the Clause and, therefore, the end in and of itself in the realm of out-of-court statements. More importantly, however, Petitioners' ideological misgivings aside, this Court has already identified the Framers' intent with respect to the Clause's role in the regulation of out-of-court statements as one of guarding against "the civil-law

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proposed tests do not even attempt to account for the "temporal reach" of the Clause, which will be more fully addressed below.

[2] Upon careful scrutiny, the actual tests proposed by Petitioners are not even limited to out-of-court "accusations." For this reason alone, much of Petitioner's rationale surrounding the significance of accusations is not logically integral to their ultimate conclusions.

mode of criminal procedure and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. While Petitioner Hammon attempts to employ this conclusion to underscore his operating premise (See *Hammon*, No. 05-5705, Br. at 11, n. 7 ("the Court's statement in *Crawford* that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused' (citation) should be interpreted in this light")), his efforts are unavailing for the simple reason that he refuses to accept that this Court has already identified the Framers' purpose with respect to out-of-court statements—a purpose very different than the one upon which Petitioners' arguments are premised.

This Court found that the Clause, within the realm of out-of-court statements, was designed to effect a check against the government's employment and use of civil law, pre-trial examinations of witnesses to end-run the procedural guarantees of the Confrontation Clause. It was the Framers' fear of governmental abuse, both at the hands of the investigatorial/prosecutorial entities, during the pre-trial phase of the "criminal prosecution," and the judiciary, during the trial itself, out of which the Confrontation Clause was forged.[3] The purpose of the Clause, therefore, was not simply

[3] Petitioner Hammon asserts that "it is not the police or prosecutors or other questioners who violate the confrontation right." Rather, the abuse occurs "when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness." (*Hammon*, No. 05-5705, Br. at 17) In other words, the abuse occurs at trial alone. In reality, Professor Friedman's construct is an effort to account for Professor Amar's earlier observation that Friedman's theory "sidesteps a powerful counterargument rooted in a basic principle of constitutional structure: the Constitution is mainly addressed to state action." Akhil Reed Amar, *Confrontation First Prinicples:*

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to glorify the adversarial process in and of itself but, in the specific context of out-of-court statements, to guard against governmental abuse. As a result, the government evidence-producing component simply cannot be written out of the "testimonial" equation.

That guarding against governmental abuse is the animating purpose of the Confrontation Clause, as it relates to out-of-court statements, is clear from this Court's interpretive original meaning methodology employed in *Crawford*. The Confrontation Clause was designed to afford an "accused" a procedural mechanism to effect a balance of power between himself and the machinery of the State so as to "safeguard[] against the restoration of proceedings which were so oppressive and odious while they remained in force." *United States v. Reid*, 53 U.S. 361, 364-365 (1852).

As one commentator aptly explained this, "the procedural dimension," of confrontation doctrine is "based on an unstated assumption that the right of confrontation restricted the ability of the government to create and use hearsay as a substitute for live testimony." Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 Neb. L. Rev. 485, 487 (1987) (hereinafter, "Kirst, *The Procedural Dimension*"). "The use of hearsay most closely resembles trial by affidavit when the hearsay is created by the government in the investigation or prosecution of the crime." This "procedural dimension," moreover, "has always been an integral, but implicit, part of confrontation doctrine." Kirst, *The Procedural Dimension*, 66 Neb. L. Rev. at 487.

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A Reply to Professor Friedman, 86 Geo. L.J. 1045, 1048 (1998). To solve his "state action" problem, Friedman has created another problem—he has ignored the very purpose of the Clause in the realm of out-of-court statements. The abuse consists of *both* the creation of *ex parte* testimony during the pre-trial process *and* the introduction of it at trial.

Moreover, this purpose—to keep the power of the government in check—only becomes clearer when viewing this Clause as a component part of the Sixth Amendment itself. The purpose of the Confrontation Clause identified by this Court in *Crawford* fits seamlessly with fundamental principles of constitutional construction on a larger scale. The Clause cannot be interpreted in a vacuum, located as it is within the Sixth Amendment, as a whole, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have Assistance of Counsel for his defence." U.S. Const., amend. VI.

Petitioners are correct in the sense that the Sixth Amendment "includes a compact statement of the rights necessary to a full defense[,]" which rights "are basic to our adversary system of criminal justice." *Faretta v. California*, 422 U.S. 806 (1975). However, this Court's jurisprudence with respect to other individual rights within the Sixth Amendment indicates that these, too, were erected by the Framers as a systemic check on governmental abuse. For example, in *Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967), this Court found that the Framers viewed the right to speedy trial served to guard against governmental procedures that "indefinitely prolong[ed]" the "oppression" inherent in the "pendency of [an] indictment." The right to a public trial, emanating from the "Anglo-American distrust for secret trials has been ascribed to the notorious use of this practice * * * * [by] institutions [which] obviously symbolized a menace to liberty," was "recognized as a safeguard against any attempt to employ ours courts as instruments of persecu-

tion" because "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 268-269 (1948). Similarly, this Court, based upon an assessment of the history of jury trial at the time of our Founding Fathers, stated that "the guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). See also *Singer v. United States*, 380 U.S. 24, 31 (1965) (Art. III, § 2 jury trial clause "was clearly intended to protect the accused from oppression by the Government"); *Ring v. Arizona*, 536 U.S. 584, 611-612 (2002) (Scalia, J., concurring).[4]

The Framers deliberately elected to "bundle" these Sixth Amendment rights together as a package. This Court has employed the same interpretive methodology in discerning the Framers' intent with respect to these other Sixth Amendment rights and came to the same conclusion as it did in *Crawford* with respect to the Confrontation Clause: that these Sixth Amendment rights, the defining characteristics of our adversary system, were also enshrined by the Framers to act as checks on governmental overreaching in both the executive and judicial departments.

Moreover, grouped, as they are, within the Sixth Amendment as a package, "each Sixth Amendment guarantee should be interpreted in light of the rest of the Sixth Amend-

[4] The Compulsory Process Clause, too, was enshrined in the Bill of Rights to guard against governmental oppression. This Clause was included in the Sixth Amendment "in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

ment," the "package" of personal procedural guarantees "dovetail[s] to construct a forum that will not only find facts, but will also be a check on governmental overreaching." Randolph N. Jonakait, *Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713, 734-735 (1992). In short, the Confrontation Clause plays a "supporting role * * * in restraining the capricious use of government power." Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 560 (1992) (hereinafter, "Berger, *Prosecutorial Restraint*"); See also *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (Sixth Amendment rights, with the exception of compulsory process, "shield the defendant from potential prosecutorial abuses"); *Duncan*, 391 U.S. at 154 ("Those who emigrated to this country from England brought with them this great privilege [of jury trial] 'as part of their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'") (citations omitted).

This interpretation of the Clause is given further textual support by its location within the Bill of Rights. In the words of commentator Akhil Reed Amar, "much is lost by the clause-bound approach that now dominates constitutional discourse." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991). "Perhaps as a consequence of the parceling out of constitutional issues among several law school courses, the particular guarantees of the amendments have been studied in a fragmented manner that obscures the grand design of the Bill of Rights and its relationship to the Constitution, and is at odds with ordinary canons of statutory analysis." Berger, *Prosecutorial Restraint*, 76 Minn. L. Rev. at 560.

Thus, again in keeping with fundamental constitutional construction principles, the Confrontation Clause must also

be interpreted in conjunction with the Bill of Rights and, indeed, the Constitution as a whole. It has been said that "the Bill of Rights was never intended to serve as a source of government power. Rather, its *raison d'etre* is to function as a limitation on that power." Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of Hearsay Rules*, 76 Minn. L. Rev. 521, 538 (1992). "The Bill of Rights [is] a political document with a principal objective of restraining the power of the government *vis-a-vis* the individual." Berger, *Prosecutorial Restraint*, 76 Minn. L. Rev. at 561; See also *Benton v. Maryland*, 395 U.S. 784, 795-796 (1969) ("underlying notion" of the Double Jeopardy Clause, that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense" is one that "has from the very beginning been part of our constitutional tradition"); *Doe v. United States*, 487 U.S. 201, 212 (1988) (Fifth Amendment privilege against self incrimination, "[h]istorically, * * * was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him" and, therefore, "[t]he major thrust of the policies undergirding the privilege is to prevent such compulsion."); *Malloy v. Hogan*, 378 U.S. 1, 22 (1964) ("It follow[s] from the recognition that due process encompassed the fundamental safeguards of the individual against the abusive exercise of governmental power that some of the restraints on the Federal Government which were specifically enumerated in the Bill of Rights applied also against the States."); *Reid v. Covert*, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring) ("The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution.").

Again, this Court's jurisprudence bears this out. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955), this

Court explained that "[t]he Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, even though wholly independent [by virtue of Article III]. * * * * Other safeguards designed to protect defendants against oppressive governmental practices were included." Similarly, in *Hurtado v. California*, 110 U.S. 516, 531-532 (1884), this Court early on recognized that:

> "[t]he concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. * * * * In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

Perhaps *Amicus*' point could not be better encapsulized by the following statement by this Court: "The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution," which this Court described as "the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." *Reid v. Covert*, 354 U.S. at 6-7, 9.

Therefore, fundamental principles of constitutional construction lend further support to the fact that the *Crawford* Court correctly viewed the Confrontation Clause as a check on governmental oppression in the realm of out-of-court statements. The Clause, like the remainder of the Sixth Amendment, the Bill of Rights and the Constitution itself, was designed to guard against the government abuse while acting within its awesome powers against the individ-

ual. In perfect harmony with this design, this Court in *Crawford* identified the historical force which drove the Clause: the "involvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse—a fact borne out time and time again throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56, n. 7. It was not abuse by the executive body alone, however, that the Framers employed the Confrontation Clause to check. The Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people" and they were, therefore, "loathe to leave too much discretion in judicial hands." *Id.* at 67-68. The Confrontation Clause, therefore, erects a categorical barrier against the creation of *ex parte* testimony by the executive body against the accused because the Framers also "had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id.* at 68.

Thus, to suggest, as Petitioners do, that the definition of "testimonial" statements need not include any government-production-of-evidence component is simply error of the highest degree. Their premise, that our system of adversarial adjudication might be compromised if this Court were to faithfully interpret the purpose of the Confrontation Clause as a check on governmental oppression in the realm of out-of-court statements simply misses the mark.

Whether or not Petitioners like it, this is the adversarial system that our Framers set up—one that was forged from a distinct historical focus and purpose and defined specifically by the actual words of the text of the Clause itself and its role within the larger constitutional scheme. To interpret the Clause in the manner Petitioners advocate would drag it out of its natural role within the system set up by the Framers and require it to do all the "heavy lifting" outside of its natural intendment. Petitioners neglect to account for the fact that

other constitutional provisions were designed to and are better-suited to accommodate Petitioners' concerns. As discussed above, the Constitution itself was designed by the Framers to *systemically* guard against governmental oppression—a system that operates most effectively when each provision operates within its own sphere and according to its own purpose and design.

This Court has already identified the purpose of the Confrontation Clause within this system: to guard against "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. As this Court recognized long ago,

> "Legal doctrines are not self-generated abstract categories. * * * They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots." *Reid v. Covert*, 354 U.S. at 50 (Frankfurter, J., concurring).

Amicus, therefore, urges this Court not to unmoor the definition of "testimonial" from the purpose and intendment of our Framers, as Petitioners would have this Court do.

II. THE "TEMPORAL REACH" BACKWARDS OF THE CONFRONTATION CLAUSE WITHIN THE PRE-TRIAL PROCESS SHOULD BE SYNTHESIZED WITH THIS COURT'S ALREADY-DEVELOPED SIXTH AMENDMENT JURISPRUDENCE.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court employed an original meaning interpretive methodology to ascertain the "spatial reach" of the Confrontation Clause as it relates to out-of-court statements, by focusing upon the purpose of the Clause and the text itself with respect to the phrase "witnesses against." *Amicus* now urges this Court to address itself to the "temporal reach" of the Clause by employing this same methodology to ascertain the meaning of the term "accused" and the phrase "criminal prosecution." Fortunately, this Court has already built up a large body of jurisprudence in this regard with respect to several other constitutional rights contained also in the Sixth Amendment. In keeping with the principles of constitutional construction, *Amicus* urges this Court to synthesize the meaning of these phrases within the Confrontation Clause with the already-developed principles of Sixth Amendment jurisprudence, generally.

The Framers employed the phrase "witnesses against" within the text of the Clause to delimit what type of out-of-court statements come within its reach. *Crawford*, in essence, was a roadmap for identifying "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68. Because *Crawford* focused on the crucial phrase "witnesses against," it sought to identify the *qualities* that a particular out-of-court statement must possess in order to come within the "spatial reach" of the Clause.

The text of the Clause, however, also contains terminology identifying the "temporal reach" of the Clause. An *ex parte* statement and "controversial examination practices" (*Id.* at 47)—necessarily presuppose "parties," in the first instance, and

"involvement of government officers in the production of testimony with an eye toward trial" (*Id.* at 56, n. 7), in the second instance. These phrases, of necessity, carry with them temporal qualities, identifying the relative place on the investigatory/prosecutorial timeline during which an out-of-court statement must be produced in order to qualify as "testimonial." The two "reaches" of the Clause—both spatial and temporal—in fact, dovetail to identify a relative point on the investigatory/prosecutorial timeline that a statement must be uttered in order to qualify as "testimonial."

Thus, any test for the definition of "testimonial" must also account for the "temporal reach" of the Clause intended by the Framers. Surely, the history and historical inferences of the Clause identified in *Crawford* indicate that the statements must come into existence during the *pre-trial* process—at some point in time when the government, police or prosecutor— is actually preparing its case against the accused. If Petitioners are correct in their proposed tests for the definition of a "testimonial" statement, then the absence of any governmental involvement whatsoever would permit the category of out-of-court statements to extend backwards in time to a point outside of the temporal limits of the *pre-trial* process.[5] Petitioner Hammon refers to a scenario where a private party relays information about an offense to another private party before the authorities are even aware of the offense, much less in the *pre-trial* stage of the prosecution. (*Hammon*, No. 05-5705, Br. at 11) Petitioner Davis defines his test in terms of "whether declarants reasonably would have anticipated that their statements might be used for law enforcement purposes." (*Davis*, No. 05-5224, Br. at 13) A statement might be made

[5] In fact, Petitioner Hammon describes a determination that an out-of-court statement was "nontestimonial" as "quite startling" (*Hammon*, No. 05-5705, Br. at 20)—where the statement was made nearly two years *prior* to the offense. See, *Hammon*, No. 05-5705, Br. at 20, n. 20, citing *State v. Barnes*, 854 A.2d 208, 210-12 (Me. 2004).

well in advance of a *pre-trial* stage and still be used, at some point further along the timeline, "for law enforcement purposes." Quite simply, Petitioners advocate definitions of "testimonial" that are well beyond the reaches of the Clause "spatially," as discussed above, *and* "temporally," as well.[6]

Moreover, the relative point on the investigatory/prosecutorial timeline for an out-of-court statement to come within the "temporal reach" of the Clause is also indicated by an examination of the text of the Clause, as this Court undertook in *Crawford*. In addition to the phrase "witnesses against," which this Court explained in *Crawford*, the Clause also speaks to an "accused" during a "criminal prosecution." This Court, however, has already developed a body of jurisprudence regarding the meaning of these words and their relationship in the context of other Sixth Amendment rights. Therefore, because the term "accused" and the phrase "criminal prosecution" speak commonly to all the Sixth Amendment rights, principles of constitutional construction dictate that the meaning ascribed to this text in the context of the Confrontation Clause must somehow be unified, in principle, with Sixth Amendment jurisprudence.

In *United States v. Wade*, 388 U.S. 218 (1967), this Court addressed itself to the application of the Sixth Amendment right to counsel in the context of a post-indictment lineup, concluding that "the Sixth Amendment guarantee [of counsel]

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[6] As discussed in footnote 3, Petitioner Hammon's position is that the abuse occurs at trial when the court admits the out-of-court statement. This may, superficially, counter Petitioner's "temporal reach" problem. However, Petitioner's entire theory rests upon an erroneous premise, refusing to take this Court's identification of the abuse at which the Clause was directed at face value. The abuse consists of *both* the creation of "*ex parte* examinations" during the pre-trial process *and* the introduction of that examination into evidence at trial. Petitioner cannot obviate his "temporality" problem by simply crafting another purported abuse which happens to occur only at the trial itself.

appl[ies] to 'critical' stages of the proceedings." *Id.* at 224. Finding that the right applied to this government procedure, this Court reasoned that, "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226. In refining this principle, however, this Court in *Kirby v. Illinois*, 406 U.S. 682 (1972), explained that the right to counsel is triggered "at or after the initiation of adversary judicial criminal proceedings" because this "is the starting point of our whole system of adversary criminal justice." The *Kirby* Court continued:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.* at 689; See *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel.").

Thus, the *Kirby* Court keyed upon the explicit term "criminal prosecutions" within the text of the Sixth Amendment and the purpose of the particular right at issue, in determining how far, temporally, the right to counsel contained in the Sixth Amendment reached backwards on the prosecutorial timeline.

In *United States v. Ash*, 413 U.S. 300 (1973), this Court made explicit what had been implicit in prior precedent. The *Ash* Court explained that, while the "historical background [of the right to counsel] suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, * * * [l]ater developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself." *Id.* at 309. Further, "[t]his extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself." *Id.* at 311. However, this Court in *Ash* refused to extend this right to a post-indictment photo display identification, even though it fell within the "temporal reach" of that constitutional provision, because the purpose the right to counsel was designed to serve in the pre-trial arena was not at issue in the procedure under scrutiny. *Id.* at 317-321; See also *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment [right to counsel] is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.").

Finally, in *United States v. Gouveia*, 467 U.S. 180 (1984), this Court tied the entire jurisprudential rationale for the attachment of the right to counsel to the purpose and text of the Amendment. In declining to find that the right to counsel attached while petitioners were in prison administrative detention but before the return of indictments against them, the Court held fast to its "initiation of adversary judicial proceedings" rule as the point on the prosecutorial timeline in which the right to counsel attaches. The *Gouveia* Court explained, "[t]hat interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecution' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves." *Id.* at 188;

See also *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) ("after a formal accusation has been made—and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.").

Perhaps to make matters clear, this Court subsequently, in *Moran v. Burbine*, 475 U.S. 412 (1986), refused to extend the right to counsel further back in time to a prearraignment confession, even when an attorney retained by the defendant's sister was misled while trying to get in contact with the defendant and in the face of argument that "police questioning often seals a suspect's fate" (*Id.* at 431-432). This Court explained:

> "[The] purpose [of the right to counsel] is to assure that in any 'criminal [prosecution]' (emphasis in original) U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society.' (citations omitted) By its very terms, it becomes applicable only when the government's role shifts from investigative to accusation. For it is only then that the assistance of one versed in the 'intricacies of the law' (citations omitted) is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.' (citation omitted)" *Id.* at 430.

As this body of Sixth Amendment right to counsel jurisprudence reveals, this Court has taken great pains to temporally tie the text of the Sixth Amendment to the particular pre-trial governmental form of oppression against which the right was meant to guard. Because the Sixth Amendment right to counsel is one of "Assistance" at trial, it only reaches back into the pre-trial prosecutorial process to a point where the "government's role shifts from investigative to accusation" because, at this moment—the initiation of adversarial judicial proceed-

ings—counsel is needed to act as an "equalizer" between the machinery of the government and the accused. Without counsel at this point in the process, the "accused's" right to the "Assistance" of counsel at trial would be meaningless. However, and importantly, even if the pre-trial abuse occurs within the "temporal reach" of the right to counsel, the right is not automatically triggered. It is only triggered when the governmental abuse at issue has a nexus to the purpose for which the right was designed.

In the context of another Sixth Amendment right, the right to speedy trial, this Court's rationale remains the same. In *United States v. Marion*, 404 U.S. 307, 314 (1971), this Court stated that, "[o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." However, the *Marion* Court extended this right backward on the investigatory/prosecutorial timeline to "the actual restraints imposed by arrest and holding to answer a criminal charge." *Id.* at 320. In keeping with the methodology devised in the context of the Sixth Amendment right to counsel, because the right to speedy trial served to guard against governmental procedures that "indefinitely prolong[ed]" the "oppression" inherent in the "pendency of [an] indictment" (*Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967)), the Court determined that the "public act" on the part of the government in arresting someone would visit oppression upon an arrestee similar to that visited upon one who is charged and, therefore, an "accused." *Id.* at 320. The *Marion* Court, however, refused to extend this right further backwards to pre-indictment because "until [arrest], a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *Id.* at 321.

Thus, some clear principles emerge from examining this Court's jurisprudence in the context of the Sixth Amendment rights to counsel and speedy trial. In both cases, this Court

recognized the fact that the rights were organized around the "criminal proceeding" itself. The "accused" then is understood to be an "accused," at a point on the investigatory/prosecutorial timeline when the "machinery of the State" trains its sights upon the individual. However, as demonstrated above, this Court has been careful to tie the initiation of the particular right during the pre-trial phase to a point in time, specific to the right itself, when the governmental oppression against which the right serves to guard can jeopardize the trial interests served by the right. In the context of right to counsel, it was "to protect the accused during trial-type confrontations with the prosecutor" (*Gouveia*, 467 U.S. at 190) while, with the right to speedy trial, the purpose was to guard against the oppression inherent in the government's "public act" of arrest (*Marion*, 404 U.S. at 320). However, it is not enough that the purported "abuse" occur within the "temporal reach" of the constitutional provision at issue. The "abuse" must also be committed by the government and must share a nexus with the purpose and abuse against which the particular right was designed to guard.

So, too, should this Court employ this same method of analysis when ascertaining the "temporal reach" backward of the Confrontation Clause, given that it shares the same constitutional amendment as the rights to counsel and speedy trial. This Court should interpret the term "accused" and the phrase "criminal proceeding" in keeping with the history and the purpose the Confrontation Clause was designed by the Framers to serve in the context of out-of-court statements. As the Clause was "directed [at] the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," (*Crawford*, 541 U.S. at 50), this Court should fix the "temporal reach" of the Clause to a point during the *pre-trial* process when the investigatory/prosecutorial machinery of the State is in a position to produce this type of "examination." However, it is not enough to come within the "temporal reach" of the Clause, as this Court's Sixth Amendment jurisprudence teaches. The

statement must also be created by the government, *ex parte*, with an eye toward the "accused's" "criminal prosecution." In other words, the "spatial reach" of the Clause discussed in Section I of *Amicus*' argument, and the "temporal reach" of the Clause, discussed herein, will necessarily dovetail when an out-of-court statement is truly "testimonial."

Petitioners' position that a "testimonial" statement can be made even prior to the *pre-trial* phase—when the investigatory/prosecutorial machinery of the government has not yet even considered mobilizing against the "accused" to gear up for a "criminal proceeding"—should be rejected out of hand. Wherever this Court decides to fix the "temporal reaches" of the Clause on the investigatory/prosecutorial timeline, both the 911 call (*Davis*, No. 05-5224) and the disclosure of a crime to the first responding officer (*Hammon*, No. 05-5705) clearly fall outside of both the "spatial reach" *and* the "temporal reach" of the Confrontation Clause. In addition to not being government-produced whatsoever and, therefore, not qualitatively "testimonial," in both instances, the investigatory/prosecutorial machinery of the State could not have possibly been focusing upon the defendants as "accuseds" in "criminal prosecutions" within Sixth Amendment jurisprudence. Both the 911 call and the crime disclosure statement were the first revelations to the authorities that a potential crime had even been committed. The police were not even within the pre-trial process when these statements were made, much less focusing upon these men as "accuseds" in preparation for their "criminal prosecutions." The statements simply fall outside of the "temporal reach" of the Confrontation Clause, as defined by history, text, and this Court's own Sixth Amendment jurisprudence.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgments in *Davis* (05-5224) and *Hammon* (05-5705).

Respectfully submitted,

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