No. 05-5224

IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether statements to a 911 operator reporting an emergent situation are "testimonial" statements under *Crawford v. Washington*, 541 U.S. 36 (2004).

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STATEMENT OF THE CASE

1. On February 6, 2001, at 11:54 a.m., a telephone call arrived at the Valley Communications Center in Kent, Washington.[1] The operator answering the call was greeted with a dial tone; she immediately reversed the call, and the telephone rang at the apartment of Michelle McCottry. Tr. 4:76-77; J.A. 8-13 (911 transcript).

Ms. McCottry answered, but before speaking into the receiver, she shouted to someone in the apartment. It is not possible to discern from the tape what she said. Her breathing was audible and heavy as the operator asked her what was going on. Over a period of about four minutes, including an interruption when Ms. McCottry left the telephone to close and lock her door, the operator determined the basic events leading up to Ms. McCottry's panicked call.

Ms. McCottry said that her boyfriend, Adrian Davis, had come to her house and was "jumping" on her again—"using his fists." J.A. 8. She told the 911 operator that after Davis hit her, he ran out the door, got into a car, and drove away. J.A. 9-10. Ms. McCottry had earlier obtained a court order prohibiting Adrian Davis from contacting her. Tr. 4:78.

In a highly agitated state during the 911 call, Ms. McCottry told the operator that Davis had come over to her residence when another man was present.[2] J.A. 12. Davis began arguing with her about the other man, and when Ms. McCottry told Davis to leave, he jumped up and started beating her in front of the other man. J.A. 12. Ms. McCottry told the 911 operator that she had repeatedly told Davis not to

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[1] The 911 tape is part of the appellate record, and a digital copy has also been provided to the Court.

[2] The other man, known only as "Mike," was never further identified by Ms. McCottry or the police. Tr. 4:11. This individual apparently left Ms. McCottry's house before the police arrived.

come over to her residence.[3] J.A. 12. At one point during the 911 call, Ms. McCottry left the telephone and closed her front door to try to keep Davis from returning. J.A. 11. The 911 operator told Ms. McCottry that the police would come and check the area to try to find Davis, and then would come and talk with her. J.A. 11.

Within four minutes of the 911 call, Kent Police Officers Mark Jones and Steve Tamanaha arrived at Ms. McCottry's residence. Tr. 4:74, 76. Ms. McCottry and her three children were present, and the officers observed that the house was in disarray, with clothes strewn all over. Tr. 4:75. There was damage to a wall adjacent to a rocking chair. Tr. 4:75. Ms. McCottry was very upset, and it appeared that she had been crying for some time. Tr. 4:76. Her eyes were swollen and red, she had tears on her face, and her hair was a mess. Tr. 4:76. She was frantically running around the house packing, throwing clothes into bags and trying to manage her children at the same time. Tr. 4:76. In her panicked state, she told the officers that she had to get out of the house. Tr. 4:76, 96.

Officer Jones, who was serving as a trainee officer, was also a long-time firefighter and medic. Tr. 4:9-10. He observed several injuries to Ms. McCottry, including red abrasions to her left forearm, which were starting to bruise, and another red mark on her right forearm close to her elbow. Tr. 4:80-81. She also had a red mark on the left side of her face near her eye, which was beginning to swell. Tr. 4:80. All of her injuries appeared to be recent. Tr. 4:84-85, 98, 100. The onset of bruising indicated to Officer Jones that the injuries were fresh. Tr. 4:85. The officers photographed Ms. McCottry's injuries. Tr. 4:81-83.

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[3] A portion of the 911 tape where Ms. McCottry told the 911 operator that Davis and the police had been there two days earlier was edited from the tape played to the jury. Tr. 2:51.

While Ms. McCottry was running around the house getting ready to leave, she described to the officers how Davis had hit her in the face and how she had tried to block as many blows as she could. Tr. 4:11-15. The trial judge, exercising his discretion, concluded in a pretrial ruling that Ms. McCottry's statements to the officers did not qualify as excited utterances. Tr. 4:46-51. The judge ruled that the 911 tape, after redaction of Ms. McCottry's statement that the police had been called to her home two days earlier, was admissible as an excited utterance. Tr. 4:46.

Although under subpoena, Michelle McCottry failed to appear for trial and could not be located. Tr. 5:5-6. The State's case consisted of the redacted 911 tape and the testimony of the arriving police officers regarding their observations of Ms. McCottry's behavior and demeanor, including proof of her injuries. Tr. 4:73-96; 911 tape. The State also introduced a copy of the court order that had been served on Adrian Davis prohibiting him from having any contact with Michelle McCottry. Tr. 4:78. Davis did not testify at trial, nor call any witnesses on his own behalf.

A jury found Davis guilty of the crime of Domestic Violence Felony Violation of a Court Order for the willful violation of the protection order and intentional assault of Michelle McCottry, and he was sentenced to 15 months confinement. J.A. 83-95.

2. Davis appealed his conviction to the Washington Court of Appeals. On March 10, 2003, that court upheld the introduction of Michelle McCottry's statements on the 911 tape as excited utterances. J.A. 96-101.

The Washington Supreme Court granted review and heard argument on two issues. Subsequently, this Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36 (2004), and the Washington Supreme Court ordered supplemental briefing and argument. On May 31, 2005, the Washington Supreme Court issued its final opinion. J.A. 116-38 (*State*

v. Davis, 111 P.3d 844 (Wash. 2005)). In an 8-1 decision, the Washington Supreme Court held that Ms. McCottry's excited utterance statements on the 911 tape identifying Davis as her assailant were not testimonial in nature because there was no evidence that Ms. McCottry sought to "bear witness" in contemplation of legal proceedings. J.A. 128-29. The Washington Supreme Court also found that, to the extent certain statements in the 911 call could be deemed testimonial because they were not concerned with seeking assistance and protection from peril, any error was harmless beyond a reasonable doubt; Ms. McCottry's identification of Davis as her assailant was non-testimonial and properly admitted, and the officers arrived within four minutes of the 911 call and observed and documented her fresh injuries with photographs. J.A. 128-29.

3. The role of 911 operators is important to deciding whether Ms. McCottry's statements were testimonial for purposes of the Confrontation Clause.

Petitioner correctly notes that "operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses." Petitioner's Brief at 3. Petitioner then outlines very generally the role of the operator but focuses on a passage indicating that, because an arrest may occur based on their dispatches, operators should "[q]uestion aggressively" and "[b]e tenacious in obtaining information from reporting parties." *Id*. (citing the Standard Operating Procedures, Section 4, at 29). This is true, but irrelevant to the question presented. As the rest of the manual shows, operators do not "question aggressively" in the manner of police interrogation.

The role of the operators is more fully described in materials from the Valley Communications Center submitted to the Washington State Supreme Court. *See* Answer to Brief of Amicus WACDL, Appendix B. (*hereinafter* Answer to WACDL). The operator's basic job description is as follows:

> This is responsible, time sensitive work involved in the transmission of radio and telephone messages and requests for police and fire services. ... The employee is involved in dispatching police and fire response units in accordance with the location and nature of the call for assistance. [The employee must] [q]uickly and accurately answer[] urgent radio transmissions from field units. . . .

Answer to WACDL at B-1. The operator's job is to "interview[] callers requesting police assistance." J.A. 112 (1.0 Purpose/References). She is to follow a procedure to "*quickly* classify the reporting party's situation and create a CAD incident." J.A. 112 (3.0 Procedure) (italics added). She asks rudimentary information that will be required to coordinate a response such as, "Where . . . What . . .When . . . Weapons . . . Who . . . Why . . ." and basic information about the reporting person. *See* J.A. 113-14. These "six w's" capture "the information that is *necessary to process an incident*." Answer to WACDL at B-16 (italics added).

The manual warns operators not to spend precious time on information that is not central to resolving the situation.

> Often determining why a situation has occurred will help complete the "picture." Are drugs and alcohol involved? Is the fight really a shoplift where the security officer has confronted a suspect? Is the neighbor threatening the [reporting party] over a property dispute? Be careful, however, not to get caught up in the history leading to an event. This can be time consuming and not relevant to the immediate situation.

Answer to WACDL at B-19.

Regarding weapons, operators are trained that "[f]ield unit and citizen safety must be of primary concern," and that obtaining information about weapons "is part of painting the mental image for responders." *Id*. at B-18. The manual notes

that domestic violence calls "are one of the most dangerous calls that the field units respond to. . ." *Id.* at B-26.

Regarding names and dates of birth, the manual instructs that "the call receiver must ascertain who has reported the incident by name, phone number, relationship, and if necessary, address. Always obtain [reporting party] information. . . . On some types of calls, the date of birth should be obtained. For example, violation of restraining orders, domestics, warrant suspects. The dispatcher can then run the name in the [criminal records computer database] to ascertain valuable information regarding the individual(s) the Officers will be contacting." *Id.* at B-19.

911 calls are recorded for a number of reasons. First, they are recorded because defendants demanded recording, claiming that a failure to record violated, inter alia, their rights under the Confrontation Clause. *See e.g. State v. Cain*, 613 A.2d 804 (Conn. 1992) (defense claim that 911 tapes must be preserved to protect a defendant's rights; description of the history of the 911 system). Second, the recordings assist investigation by confirming details that an unavailable caller might not be able to provide to detectives after the fact. The recordings capture the declarant's tone of voice, inflection of voice, and manner of speaking, as well as background noises like shrieks, shouts, exclamations, gunshots, a slamming door, or the wail of approaching police sirens. These sounds can be instrumental in investigation. Third, the recording can be relevant in civil litigation concerning whether police responded appropriately to the call for assistance. *See, e.g,. Cummins v. Lewis County*, 98 P.3d 822 (Wash. App. 2004) (civil suit alleging failure to properly respond to medical emergency). Finally, the recordings frequently will have an independent evidentiary value at trial. *See United States v. Inadi*, 475 U.S. 387, 395 (1986) (recorded co-conspirator statements "provide evidence of the conspiracy's context that

cannot be replicated, even if the declarant testifies to the same matters in court").

SUMMARY OF THE ARGUMENT

This Court should hold that an emergency call to a 911 call center is not a testimonial statement under the Confrontation Clause because such calls—received to facilitate an immediate response by emergency personnel—resemble neither the investigative affidavits gathered by justices of the peace historically, nor statements taken during a formal, structured police interrogation. Testimonial statements are those produced by investigators with an eye toward trial, where the prospect of litigation can have a distorting influence on the production of the statement. Recorded 911 calls like the one at issue in this case have no relevant historical analogue, and do not present the same dangers of prosecutorial manipulation that tainted the statements used in the civil-law mode of criminal procedure of the 16th and 17th centuries.

1. The Confrontation Clause regulates only a narrow subset of out-of-court statements, and is thus distinct from the general rules against hearsay. The text of the Confrontation Clause suggests no intent to regulate hearsay in general, and the common law confrontation right that gave rise to the Clause illustrates an acute concern with a specific type of out-of-court statement commonly used as a substitute for live testimony in the 16th and 17th centuries—formal examinations prepared by justices of the peace performing an essentially investigative and prosecutorial function. The Framers were keenly aware that statements produced *ex parte* by governmental investigators with an eye toward trial posed a unique potential for prosecutorial abuse, and the Confrontation Clause was the tool the Framers employed to prevent reintroduction of such abuse. The more flexible hearsay

rules, on the other hand, were intended to regulate general use of out-of-court statements. Efforts to conflate the constitutional and hearsay doctrines, whether done in the manner of *Ohio v. Roberts*, 448 U.S. 56 (1980), or in the manner now suggested by the Petitioner, should be rejected.

The Confrontation Clause creates an immutable barrier to the use of testimonial statements, whereas the general prohibition against hearsay is more flexible, allowing states to legislate exceptions. An absolute constitutional prohibition is appropriate to curtail abuses whereby governmental agents create or produce testimony in secret. But constitutional scrutiny of routine out-of-court statements that fall solely within the traditional hearsay realm is unnecessary, as the government does not "produce" such evidence through structured police interrogation. Greater flexibility in the hearsay realm is needed so that hearsay rules can evolve in light of changing social attitudes and priorities. That flexibility is provided by leaving the states to control admissibility of non-testimonial hearsay by legislation and rules.

2. A statement is testimonial hearsay under the Confrontation Clause only if it was produced in a manner that resembles the historical abuses of the Sir Walter Raleigh era, when investigators had free rein to produce evidence through interrogation of suspects and witnesses in a manner that shaped such evidence to suit the needs of the prosecution. Examples of such evidence include affidavits, depositions, prior testimony from grand jury hearings or preliminary proceedings, and coroner reports. Statements gathered by police detectives pursuant to tactically structured, targeted police interrogation, like the interrogation of Sylvia Crawford, are testimonial as well, because they bear a striking resemblance to the interrogations of suspects and witnesses performed by justices of the peace.

But structured police interrogation, in its colloquial sense, does not include *all* questioning by *anyone* associated with

police. Rather, police interrogation resembles the historical abuses regulated by the Confrontation Clause only when police ask formal, tactically structured questions, pursuant to a criminal investigation, aimed at producing evidence for use at trial. Such questioning occurs only where the police practice is one that may reasonably be interpreted as an effort to build a case against an identified defendant, and where the circumstances lend themselves to such manipulation.

Efforts by police to assess and respond to a dynamic, potentially dangerous public safety threat will not meet this definition. Police responding under such circumstances are performing a community caretaking function that simply does not resemble the historical abuses, and is thus beyond the scope of the Confrontation Clause.

Whether a statement was made under conditions that resemble the historical abuses, and is therefore testimonial, thus turns on an objective assessment of the totality of the circumstances, including the identity of the governmental actor and whether there was a formal interrogation involving structured questioning. Determining whether a testimonial statement was produced does not depend on assessing the mental state of the declarant or the questioner.

This approach to the Confrontation Clause places the constitutional analysis on a firm conceptual foundation without changing the result of past Confrontation Clause decisions by this Court. Prior testimony, depositions, affidavits, accomplice confessions and the like will readily be excluded. On the other hand, statements made to governmental authorities responding to an emergency will be non-testimonial, as will statements made to private parties. Such ordinary hearsay will be governed by legislation and rules in the individual states.

3. Under this test, statements typically made in an emergency 911 call are not testimonial. 911 calls are initiated and

produced by the declarant. Operators who field 911 calls primarily initiate and coordinate an immediate response to an emergent situation; they are not investigative governmental agents bent on shaping testimony for use at trial. Nor are they investigators gathering information after the filing of a formal charge; there has been no formal or informal determination as to whether a crime has been committed. The questions asked in this case illustrate that the focus is on coordinating a response rather than on building a case for trial.

4. Petitioner argues that statements made during 911 calls should not be admitted at trial absent the live testimony of the declarant because such statements would not have been recognized as an exception to the rules against hearsay at the Founding. In so doing, he attempts to resuscitate an approach rejected by this Court in *Crawford*—the intermixing of constitutional analysis and hearsay rules. Merely alleging the absence of an "excited utterance" exception at the Founding does little to answer the question of whether 911 statements are "testimonial." Petitioner's approach offers a hearsay-based rationale for excluding these statements under the Confrontation Clause, which begs the question whether the statements are governed by the Clause in the first place.

5. The "functional equivalent" test proposed by Petitioner would count as "testimonial," and thus exclude under the Confrontation Clause, any out-of-court statement where the reasonable declarant would have anticipated that her statement might be used for law enforcement purposes. This test has no roots in the text or history of the Confrontation Clause, and is virtually without limits. The elasticity of this test is demonstrated by the way it has already shifted shape over a relatively short period of time. Its expression at the time of the *Crawford* decision focused on statements that a declarant would reasonably *expect* to be used *prosecutorially*. The current formulation asks whether the declarant would anticipate that her statement *might* be used for *law enforcement*

purposes. Petitioner's test paints with too broad a brush, and cannot be justified under the Confrontation Clause.

6. Finally, the assumptions that underlie the proposition that an "objectively reasonable declarant" who calls 911 knows exactly how her statements ultimately will be used are flawed. It is unlikely that our diverse society is comprised of such like-minded individuals, sharing knowledge equally and understanding it as one. Moreover, it defies common sense to suppose that a person who calls 911 in the midst of, or in the immediate aftermath of, a harrowing experience has any "objectively reasonable" thoughts at all.

This test is already proving unworkable. Some courts, in attempting to discern how an "objectively reasonable" person calling 911 would expect her statements to be used, have concluded that statements made even in the midst of a distressing incident are "testimonial" by that measure. In finding such statements inadmissible under the Confrontation Clause, these courts have excluded from trial statements that bear little resemblance to those at which the Clause was targeted. Other courts, applying the selfsame test to statements made under virtually identical circumstances, have found the statements not to be "testimonial."

Placing the focus on the declarant's intent, either subjective or objective, does not resolve the question of what statements are "testimonial" for Confrontation Clause purposes. Placing the focus instead on the manner in which the statements were obtained, by examining the actions of the governmental actors, better targets the type of statements that are the core concern of the Confrontation Clause.

ARGUMENT

I. EMERGENCY 911 CALLS ARE NOT GOVERNED BY THE CONFRONTATION CLAUSE.

The confrontation clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The question in this case is whether a recorded telephone call to a 911 call center is a "testimonial" statement such that the caller is a "witness against" the accused. Because such calls do not resemble the *ex parte* examinations that the Confrontation Clause was meant to exclude, the State of Washington respectfully urges this Court to hold that the 911 calls are not testimonial.

A. *Crawford* Sharpened Confrontation Clause Analysis By Narrowing Its Scope And Making It More Absolute.

Over the last few decades, members of this Court and commentators have noted that Confrontation Clause jurisprudence had become both too narrow and too broad. The analysis was too narrow because it permitted admission of testimonial statements like accomplice confessions that would not have been tolerated by the Framers, yet it was too broad in that constitutional scrutiny was extended to non-testimonial hearsay. These difficulties stemmed from the fact that the Court's constitutional analysis had strayed from the text and history of the Clause, thus blurring the distinction between constitutional analysis and hearsay analysis. *See Crawford*, 541 U.S. at 60-61 (citing *Lilly v. Virginia* 527 U.S 116, 140-43 (1999) (Breyer, J., concurring)); *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 125-31 (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011

(1998). In *Crawford v. Washington*, a majority of the Court sharpened the focus of Confrontation Clause analysis by returning to its text and history.

The words of the Clause—"witness against him"—suggest that the Clause was intended to ensure confrontation as to actual trial testimony, and no more. *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result); *White v. Illinois*, 502 U.S. at 359-60 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment). Although the noun "witness" can include a person who simply sees an event, as well as a person who testifies about the event in court, the Clause uses the phrase "witness *against him*," indicating that it was intended to apply only "to those who give testimony against the defendant at trial." *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting) (italics in original).

This interpretation of the Confrontation Clause sees the Clause "as part of the mechanism for controlling the central government" and as part of "a package of rights" guaranteed by the Bill of Rights. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 563 (1992). It also ensures that the term "witness" will have a consistent meaning under both the Confrontation Clause and its "fraternal twin," the Compulsory Process Clause.[4] *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L. J. 641, 694-95 (1996).

Under this purely textual view, constitutional analysis and hearsay analysis are wholly distinct, such that the Constitution would never regulate hearsay. But this purely textual interpretation seemed in tension with the common law history

[4] "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const. amend VI.

of the confrontation right, and with this Court's early decisions. *White v. Illinois*, 502 U.S. at 360 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

In *Crawford*, this Court reexamined the common-law and statutory roots of the right to confront witnesses, and concluded that the Sixth Amendment must be interpreted in light of the fact that it was designed to prevent use of a very narrow class of "testimonial" out-of-court statements. Specifically, this Court concluded:

> [T]he 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. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried.

Crawford, 541 U.S. at 50.

With this historical framework in mind, the Court returned to the text of the Clause and concluded that the text "reflects an especially acute concern with a specific type of out-of-court statement," and not with all hearsay. *Id*. at 51. The Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id*. Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*. (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

This text and history illustrate that the scope of the Clause does not depend on the scope of hearsay law. Just as the Framers "would not have condoned" the use of testimonial *ex parte* examinations regardless of their admissibility under "modern hearsay rules," so, too, the Clause's narrow focus on the evils of the civil-law mode of procedure "also suggests

that not all hearsay implicates the Sixth Amendment's core concerns" because simple hearsay "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Crawford*, 541 U.S. at 51.[5] A person who makes an off-hand remark to an acquaintance is clearly not "testifying" in the constitutional sense, so the use of such statements at trial ought to be governed by the hearsay rules, not the Constitution. In short, this Court adopted the view that the Clause is "narrow but absolute." *See* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 Geo. L. J. 1045 (1998).

If the Confrontation Clause and the hearsay rules are independent, then it follows that the test for testimonial statements must be independent of the test—historical or modern—for hearsay. If a statement is testimonial, it should not be admitted even if it falls within a modern hearsay exception. Likewise, if the statement is *non*-testimonial under constitutional analysis, it does not *become* testimonial simply because it may have been inadmissible hearsay in 1791.

So, too, for the question in this case. Whether 911 calls are testimonial statements must be answered by defining the term "testimonial," not by proving that a 911 call falls either within or without a hearsay exception. Only if the test for testimonial statements is closely tied to the historical abuses the Confrontation Clause was designed to prevent, can it be sufficiently narrow to serve primarily as a check on truly "testimonial" statements, and not as a super-hearsay rule.

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[5] *See also Crawford*, 541 U.S. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of `reliability.'").

B. A Statement Is Testimonial Only If It Was Produced Using Investigative Practices That Closely Resemble The Historical Abuses Addressed By The Confrontation Clause.

1. In *Crawford*, this Court listed "various formulations of this core class of testimonial statements," but did not choose any one formulation as a definitive test. *Crawford*, 541 U.S. at 51-52, 68.[6] The formulation that hews closest to the text and the historical roots of the Clause was first suggested by Justice Thomas in a concurring opinion, and would limit testimonial statements to documents that resemble "extra-judicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Crawford*, 541 U.S. at 51-52 (quoting *White v. Illinois*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)). It is these materials that were "historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process." *White v. Illinois*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

This focus on *production* of evidence by government officials distinguishes "testimonial" statements from other out-of-court statements. It is the specter of litigation that can encourage slanting and distortion. It is in the *production* of evidence that "an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language." 3 William Blackstone, Commentaries on the Laws of England 373 (1768). As one commentator observed, "Allowing the government to use

[6] The "various formulations" included tests recommended by the petitioner in *Crawford*, by Justice Thomas in *White v. Illinois*, and by Amici National Association of Criminal Defense Lawyers. *Crawford*, 541 U.S. at 51-52. The respondent in *Crawford* did not propose a test for testimonial statements.

evidence obtained through private interviews markedly enhances the potential for abuse. The prosecution has the incentive and the power to shape the witness's answers in accordance with its theory of the case." Berger, *The Deconstitutionalization of the Confrontation Clause*, 76 Minn. L. Rev. at 561.

The historical abuses under the Marian statutes had this quality of governmentally-directed evidence production. Justices of the peace were appointed by the Crown, supervised the work of the local constable, and issued search and arrest warrants. David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1198 (1999). When a suspect was arrested, a justice of the peace questioned suspect, complainant, and witnesses. *Id*. The system "was designed to collect only prosecution evidence." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1059-60 (1994). The justice of the peace, who was customarily a local gentleman active in civic affairs, was required to interview witnesses and the suspect, transcribe anything that was "material to prove the felony," and transmit the documents to the trial court, where they could be used as evidence against the accused. *Id*. The justice of the peace was "a partisan rather than a truth-seeker," whose role ensured that the resulting proceedings had a "strong prosecutorial bias." John H. Langbein, The Origins of Adversary Criminal Trial 43 (2003).

Such *ex parte* examinations could be as detailed and comprehensive as an in-court examination, and could include trappings of testimony or depositions, like oaths, signatures, or a formal structure that suggested the solemnity and the accusatorial nature of testimony. It was this resemblance to historical abuses that this Court noted in *Crawford*—the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuses—a fact borne out time and again

throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56 n. 7.

The "resemblance" test for testimonial statements—asking whether the procurement and subsequent admission of the statement at issue resembles the historical procedures whose potential for abuse so troubled the Framers—gives effect to this Court's "narrow but absolute" interpretation of the Confrontation Clause. It preserves the emphasis on targeted interrogation designed with litigation in mind, and includes tactically-structured police questioning designed to elicit a statement that will satisfy the elements of a crime. It follows that "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations . . . are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68.

The in-custody, tape-recorded interrogation of Sylvia Crawford easily fits this definition. Sylvia had been arrested with her husband Michael after Michael stabbed a man, apparently in retaliation for an earlier assault against Sylvia. Sylvia witnessed the stabbing and investigators considered her a suspect. *Crawford*, 541 U.S. at 65. Her statement was extracted after a second round of nighttime, station-house interrogations, and after she had been warned that she had a right to counsel and that any statement she gave could be used against her in a court of law.[7] *Id*. at 38-39. The questioning was leading, targeted, occurred over a protracted period, and was recorded to preserve her statement for use at trial. The police interrogation of Sylvia Crawford, viewed objectively, bore a "striking resemblance to examinations by justices of the peace in England," and thus carried the very real danger that police investigators who created these

[7] *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966) ("anything [you] say [ ] can be used against [you] in a court of law").

circumstances, and who asked repeated, leading questions, would "produce" evidence that was favorable to a prosecution. The statement was imbued with testimonial qualities, and would clearly have been deemed testimonial by the Framers. *Id*. at 52.

2. The question remains whether other modern police practices are sufficiently similar to the historical abuses to fall within the Confrontation Clause. Some police interrogation is less vigorous than the repeated, intensive, suspect-oriented interrogation of Sylvia Crawford, but may still be "structured police interrogation" that resembles *ex parte* examinations. *Crawford*, 541 U.S. at 54 n.4. On the other hand, not every question or series of questions posed by a governmental actor will be "police interrogation."

A natural starting point in refining the definition of testimonial is to define the term "interrogation." In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), this Court held that interrogation under the Fifth Amendment included "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), this Court expanded that definition and concluded that under *Miranda*, "interrogation refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 298.

But in *Crawford*, this Court eschewed this more legalistic definition, and said that for Sixth Amendment Confrontation Clause purposes it "us[ed] the term `interrogation' in its colloquial, rather than any technical legal, sense. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)." *Crawford*, 541 U.S. at 53 n.4. Indeed, the technical legal analysis of interrogation is a tangled bramble of definitions, *see* Yale Kamisar, *Brewer v. Williams, Massiah* and *Miranda: What is*

"Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 41-55 (1978), and this Court properly recognized that it was unnecessary to enter that thicket. A colloquial definition of interrogation will prevent practices that resemble the historically forbidden inquisitorial practices, without turning every hearsay question into a constitutional question. Thus, the Confrontation Clause can be applied consistent with its intended scope.

Interrogation means "to question typically with formality, command, and thoroughness for full information and circumstantial detail." Webster's Third New International Dictionary of the English Language, Unabridged 1182 (1993). This definition overlaps the definition of "testimony" used by this Court in *Crawford*, 541 U.S. at 51 ("[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact"). The definition of interrogation includes the notion of formality. It includes the term "command," suggesting a directorial role on the part of the questioner. It also suggests the need or desire for a thorough, full examination, akin to what one would expect from testimony, or from a deposition. Thus, the colloquial use of the term interrogation properly focuses on aspects of a police-witness exchange that one would expect to find in the inquisitorial practices that "the founding-era rhetoric decried." *Crawford*, at 50.

3. The *Crawford* "resemblance" test thus contains a number of key, overarching concepts that distinguish routine cases like this one from cases like *Crawford*. Those concepts may be distilled into the following test.

A statement is testimonial only if it was produced in a manner that resembles the historical abuses of justices of the peace. This can only occur where the questioning is done by a governmental official with a primarily investigative function who, acting in his investigative capacity, conducts a structured interrogation, under circumstances where the in-

vestigator could manipulate or shape the witness's statement into something that resembles trial testimony.[8]

Under this test, 911 operators or police acting to defuse a public safety threat are not functioning as investigators such that they can, or will, shape a witness's statement. This public safety consideration logically distinguishes statements taken in many cases from the types of testimonial statements the Confrontation Clause was meant to exclude.

The test could be applied in a variety of circumstances. First, the identity of the questioner must be evaluated to determine whether the challenged statement was made to a governmental investigator who was acting in his role as investigator at the time he received the information, as opposed to a 911 operator or a police officer acting primarily in a community-caretaking role. The inquiry should focus on whether the person has "an essentially investigative and prosecutorial function." *Crawford*, 541 U.S. at 53.

Second, the nature of the investigator's inquiries must be probed to determine whether investigatory questions were posed in a structured, targeted and formal manner that is, objectively viewed, characteristic of an attempt to create a witness statement for later use at trial. In other words, the investigator must be conducting a structured police interrogation.

Third, the circumstances of the interrogation must be such that the interrogator had the opportunity and the ability, judged objectively based on the totality of the circumstances, to manipulate or shape the witness's statement into something that resembles trial testimony.

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[8] This test bears a close resemblance to one recently proposed in a learned treatise on evidence. *See* 30B Michael H. Graham, Federal Practice and Procedure § 7032, SPECIAL REPORT: *CRAWFORD v. WASHINGTON*, at 75-76 (Supp. 2005).

These factors will seldom be satisfied when governmental agents are in the initial stages of responding to a public safety threat, as those circumstances simply do not lend themselves to the production and manipulation of testimonial statements. Each of these characteristics can be evaluated objectively based on evidence presented to the court, and without regard to the state of mind of the interviewer or the declarant. An actual public safety threat or emergency would not be required by the rule, so long as the evidence would have caused a reasonable person to believe that a public safety threat existed.

The resemblance test is wholly consistent with this Court's prior cases. For example, prior trial testimony is clearly testimonial, but subject to the exception that a prior opportunity to cross-examine would satisfy the clause. *Mattox v. United* States, 156 U.S. 237 (1895). Likewise, prior testimony at a preliminary hearing would still be considered testimonial, but admissible if the defendant had an opportunity to cross-examine at that hearing. *Ohio v. Roberts,* 448 U.S. at 67-70. An accomplice confession to robbery and murder obtained after repeated, in-custody police interrogations would be subject to exclusion under the Clause. *Lilly v. Virginia*, 527 U.S. at 120-21. *See also Lee v. Illinois*, 476 U.S. 530, 531-36 (1986) (accomplice confession) *and Douglas v. Alabama*, 380 U.S. 415 (1965) (same). Statements volunteered by an accomplice to another inmate and then reported to authorities would *not* be testimonial because there is no governmental role in production of the testimony. *Dutton v. Evans,* 400 U.S. at 77-78.[9]

[9] As this Court noted in *Crawford*, there may be some tension between the resemblance test and the result in *White v. Illinois*, where the trial court permitted use of a child's statement to the police officer. *See Crawford*, 541 U.S. at 58 n. 8 (discussing *White v. Illinois*, 502 U.S. at 349-51). *White* does not resolve this tension because the Court did not assess the precise circumstances under which the statement was made. Child welfare

Similarly, statements made unwittingly to a Federal Bureau of Investigation informant would *not* be testimonial. *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987). Although police may record co-conspirator statements, such statements do not resemble testimonial statements because, by their very nature, they do not occur under structured police interrogation such that the declarant can be said to bear witness against the accused. The statements are a part of the crime itself, so it hardly can be said that the declarant is providing "[a] solemn declaration or affirmation . . . for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51.

C. Statements Made During Emergency 911 Calls Are Not Testimonial Because They Are Not Investigative, Are Gathered In Responding To A Public Safety Threat, And Do Not Have the Same Potential For Manipulation As Existed With Inquisitorial Practices.

Applying these three criteria to 911 calls, and to this call in particular, it is clear that the recording of emergency 911 calls like the one at issue in this case is a modern practice with no kinship to the forbidden inquisitorial practices. In fact, such recorded calls differ from historical *ex parte* examinations under each criterion.

1. A 911 operator is not a governmental agent with an "essentially investigative and prosecutorial function." *Crawford*, 541 U.S. at 53. The operator is a facilitator—a conduit

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cases pose particularly difficult challenges for police officers, who must be alert to safety issues beyond those stemming directly from reported crime. For example, if the alleged assailant is a relative or family friend, the officer needs to assess the chances that the assailant will be permitted to return to the home after the officer leaves. A myriad of other considerations may be relevant in child abuse cases, and the holding urged in this case will not foreclose this Court's independent consideration of those issues in an appropriate case.

between the caller and the police—rather than an investigator. Neither legal training nor a police commission is required for the job, suggesting that operators do not have the specialized knowledge that would permit them to tailor or shape a declarant's statement to meet the elements of a crime. *See* Answer to WACDL at B-3, 7. In other contexts, courts have noted that 911 operators do not generally have training equivalent to that of police officers, and they do not assess evidence or make subjective or qualitative legal judgments about that evidence. *United States v. Colon*, 250 F.3d 130, 136-38 (2nd Cir. 2001) (knowledge of 911 operator cannot be imputed to officers under the collective knowledge doctrine). There is no reason to conclude that they are equivalent to police officers in this constitutional context. As is evident in the basic 911 protocol, an operator is to obtain the information necessary to coordinate a response to a perceived public safety threat. J.A. 112-15.

Questions from a non-investigative governmental contractor simply do not resemble the forbidden inquisitorial practices, nor do they resemble police interrogation in its colloquial sense.

2. 911 operators do not interrogate callers with an eye toward trial. In fact, the training manual recommends that operators not get bogged down in details about the event and its history that are extraneous to the immediate response. Answer to WACDL at B-19. They are reminded to treat the caller with courtesy and respect, *id.* at B-15, and that their attitude may determine how "responders" are treated at the scene. *Id.* at B-14. Nothing in the manual suggests that operators are to interrogate the caller.

Moreover, the entire interaction is initiated by the caller, not the 911 operator. This is not a governmentally driven effort to produce evidence pursuant to a criminal case, but rather an effort to respond to a public safety issue as expeditiously as possible.

The questions asked in this case are illustrative of the operator's role. They occurred in the following sequence and may be paraphrased as follows: 1) What's going on? 2) Are you in a house or apartment? 3) Are there any weapons? 4) Has he been drinking? 5) What is his name and date of birth? 6) How and in what direction is he fleeing? 7) Do you need an aid car? 8) Is this your ex-husband or boyfriend? 9) Did he force his way into the house—or . . . 10) What is your name and date of birth (because Ms. McCottry said she had a restraining order) 11) Is your door locked? J.A. 8-13.

These questions are reasonably directed at ensuring a safe, prompt response. A responding police officer must know what is alleged to have happened, whether weapons are involved, whether participants are under the influence of alcohol or drugs, and whether the suspect is alone or with others, in order to assess the likelihood of risk to the officer. The identity and description of the suspect, his means of travel, and the direction of travel are all relevant in order to intercept and question the suspect if it should be determined that he poses an immediate public safety threat. The relationship of the suspect to the complainant can also assist the officer in deciphering the situation once the officer is on-scene. Questions like "Did he force his way into the house?" inform the officer about the level of violence or volatility.

All these questions paint a picture for the responding officer that helps him assess the risk posed to himself and the public by this situation. Such questions do not transform the conversation into a police interrogation akin to that at issue in *Crawford*.

Nor is the analysis different in this case simply because Ms. McCottry was not on the line when the 911 operator answered the call.[10] 911 operators immediately attempt to

[10] The record does not establish whether the original call was terminated by Ms. McCottry or by the Petitioner.

reinstate contact following an aborted 911 call; simply because a call has been terminated does not mean there is no emergency. In fact, a hang-up call can suggest an escalating situation rather than one that is being peacefully resolved. An assailant may have forcibly terminated the call against the caller's will, or the caller may be ill or injured, causing her to inadvertently disconnect the call. In any event, a 911 operator is not transformed into an investigator seeking to produce evidence for an *ex parte* trial simply because she seeks to discover whether the caller is truly in need of assistance.

3. The third factor—that circumstances permit manipulation of the statement—is not met in this context. When an operator fields a 911 call she is in no position to determine whether a crime has occurred, much less which crime, and she is thus unable to shape the witness's testimony to meet the elements of a crime. The public safety issue may, or may not, ripen into a criminal investigation, but at the point at which 911 operators are involved, there is simply no way to know. Again, this contrasts with justices of the peace, coroners, police interrogators, or prosecutors, who gather statements pursuant to an investigation, where a suspect has been identified, and a charge has been leveled or is at least anticipated.

In reality, the brevity of many 911 calls places limits on what "investigation" could be accomplished, and also distinguishes these situations from true interrogations. Ms. McCottry's conversation with the Valley Communications operator in this case lasted a mere four minutes. There is not sufficient time to develop anything remotely resembling an "interrogation" in such a brief interaction.

Ms. McCottry's call is typical of many calls to 911. The caller is in peril, and needs police intervention.[11] Under these

[11] The Petitioner seems to suggest that there was no emergency in this case because Ms. McCottry declined an "aid" car. Petitioner's Brief at 42.

circumstances, the operator is not conducting a structured police interrogation that in any way resembles the inquisitorial practices that the Confrontation Clause was designed to prevent.

All these considerations illustrate that 911 tapes are fundamentally different in character from police interrogations or the historical abuses of the civil-law mode of criminal procedure that were sometimes employed in 16th and 17th century English trials. It cannot be said that the Framers would have understood the Confrontation Clause to prohibit use of evidence gathered in this manner. This area should be left to regulation by the rules of evidence rather than the Constitution.

II. PETITIONER'S PROPOSED APPROACH TO DEFINING TESTIMONIAL STATEMENTS IS FLAWED IN THEORY AND IN PRACTICE, AND SHOULD BE REJECTED.

Petitioner's approach is flawed at the outset. In arguing that Michelle McCottry's statements were "testimonial," and thus admitted in violation of the Confrontation Clause, he places great significance on his conclusion that spontaneous declarations were not excepted from the general prohibition on hearsay in 1791. This approach fails to recognize the

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This is incorrect. The term "aid car" in this context means an ambulance. *See* Answer to WACDL at B-15 (referring to "emergency calls . . . such as an aid or fire call"). Ms. McCottry declined because her injuries were not sufficient to warrant an ambulance. The tone of her voice, her heavy breathing, and the fact that she agreed to wait for police to arrive certainly suggest that she was afraid. She needed police to secure the scene long enough for her to flee with her children. After all, the Petitioner had been undeterred by a court order prohibiting contact, so it is natural that Ms. McCottry would need the police to cover her back as she escaped her own apartment. In any event, whether Ms. McCottry *subjectively* wanted help is irrelevant. The relevant question is whether the circumstances, objectively viewed, suggested that hers was a call for help. Clearly, they did.

separation between constitutional analysis and the rules of hearsay, a separation acknowledged by various justices of this Court over more than three decades, culminating in the *Crawford* decision.

Petitioner's proposed test for determining whether a statement is "testimonial" for purposes of the Confrontation Clause is likewise flawed. He argues that courts need look only to whether the statement is the "functional equivalent" of testimony; i.e., whether a reasonable declarant would have anticipated that her statement might be used for law enforcement purposes. This approach finds no support in the text or history of the Confrontation Clause. Moreover, the proposed test is so broad as to lack any real limiting principle. Finally, the test rests on assumptions that may reasonably be questioned, and it has proved to be unworkable in practice.

A. Petitioner's Historical Approach Fails To Recognize That This Court Has Explicitly Separated Confrontation Clause Analysis From The Hearsay Rules.

The general right to confront an accuser or witness, along with the preference for live testimony, has certainly existed for a very long time. Yet the question presented in this case is the extent to which this right is protected by the Confrontation Clause, and the extent to which further regulation is left to the law of hearsay. Defining the right by exegesis of hearsay law as it existed in 1791, as Petitioner attempts to do, simply returns this Court to a constitutional analysis rooted in hearsay law. This analytical approach was rejected in *Crawford*.

This Court has long recognized a distinction between the right protected by the Confrontation Clause and the rules that generally govern the admissibility of hearsay evidence:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to pro-

> tect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

California v. Green, 399 U.S. 149, 155-56 (1970) (citations omitted). *See also Dutton v. Evans*, 400 U.S. at 86 ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."); *White v. Illinois*, 502 U.S. at 366 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) ("Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions."); *Lilly v. Virginia*, 527 U.S. at 141 (Breyer, J., concurring) (a hearsay-based Confrontation Clause test is both too narrow and too broad). This Court in *Crawford* separated the two once and for all.

In effect, Petitioner makes the inverse of the argument made by Chief Justice Rehnquist in his concurring opinion in *Crawford*, and rejected by a majority of this Court. The Chief Justice argued that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence, and that those exceptions should continue to serve as exceptions to the constitutional rule. *Crawford*, 541 U.S. at 73 (Rehnquist, C.J., concurring in judgment). But this Court, distinguishing between testimonial statements and general hearsay, noted

that "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony." *Crawford*, 541 U.S. at 56 (italics in original). In other words, the Chief Justice's argument was flawed because it made the scope of the constitutional provision dependent upon the scope of the hearsay rules.

Petitioner makes a similar error in trying to define the scope of the Confrontation Clause by reference to the *absence* of certain hearsay exceptions. His argument begs the constitutional question, is analytically flawed, and must be rejected.

B. Petitioner's Definition Of "Testimonial" Statements Lacks Textual Or Historical Roots, And Is Overly Broad As A Result.

1. *Petitioner's Test Is Not Derived From The Text Or History Of The Confrontation Clause.*

Petitioner proposes that this Court define a "testimonial" statement as an out-of-court statement used at trial that "would operate as the functional equivalent of *ex parte* prosecutorial testimony." Petitioner's Brief at 41. He argues that courts, in applying this test, should inquire whether "a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes." *Id.* (italics in original). This proposal should be rejected.

Not once in his brief does Petitioner identify the textual source of his proposed test in light of this Court's analysis in *Crawford*. *See Crawford*, 541 U.S. at 51-52; *White v. Illinois*, 502 U.S. at 359-60 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) (examining

the phrase "witness against him," and explaining that it suggests a focus on a very narrow class of out-of-court statements). Instead, he seems to argue that a declarant is a "witness against" a defendant if the declarant makes an accusation against the defendant. Under his argument, status as a "witness" turns on the content of the statement rather than on the manner in which the statement was produced. This mode of analyzing the Confrontation Clause is unprecedented, and cannot be squared with *Crawford*.

Nor does Petitioner tie his proposed test to the historical analysis set forth in *Crawford*—an analysis that led the Court to identify the principal evil at which the Confrontation Clause was aimed as the creation of evidence by *ex parte* examination. *Crawford*, 541 U.S. at 50. Instead, as discussed above, he examines the historical roots of hearsay exceptions and concludes that "the upshot of *this history* is that the Framers . . . understood the Confrontation Clause as making a 'procedural' choice about how the reliability of *evidence* 'can best be determined'—namely, by cross-examination." Petitioner's Brief at 21 (quoting *Crawford*, 541 U.S. at 61) (italics added). In *Crawford*, however, when this Court said that "[*t]his history* supports two inferences about the meaning of the Sixth Amendment[,]" *Crawford*, at 50 (italics added), it was referring to the history of inquisitorial abuses, not the history of hearsay in general.

In fact, the general right to confront witnesses was distinct in the common law from the nascent hearsay rules. "Concern to promote cross-examination became the central justification for the hearsay rule in later law." Langbein, The Origins of Adversary Criminal Trial 245. Throughout the 18th century, the lack of oath was seen as the primary justification for rejecting hearsay, and "concern about the want of cross-examination remained a muted theme in criminal practice." *Id*. Although the two doctrines overlapped to a degree in later years, the Framers would not have understood the history

(such as it was in 1791) of hearsay to be the same as the well-known and hated history of inquisitorial practices.

As indicated, this Court need not discern the state of hearsay law in 1791 in order to decide whether a statement is testimonial under the Confrontation Clause. Even if the Court were to undertake such an analysis, however, Petitioner's historical account of the law of hearsay is incorrect. *See* Brief of Amici Curiae Illinois et al. 05-5224. The spontaneous declaration exception to the developing hearsay rules was applied around the time of the founding. Although some courts refused spontaneous declarations, the rationale for refusal was often unclear, and there certainly was no generally recognized prohibition against the evidence. *Id*. at 4-15.

More particularly, Petitioner is mistaken to compare 911 calls to "hue and cry." Under "hue and cry," English citizens, prior to the advent of a professional police force, were *compelled* by the Crown to report crimes to the authorities and, in some cases, to actually effectuate the arrest of the suspect. This government-instituted compulsion was backed by the fact that, if they failed to fully comply with their reporting obligation, victims and witnesses could themselves be arrested, prosecuted, and imprisoned for the crime of misprision of a felony. *See* Christopher M. Curenton, *The Past, Present, And Future Of 18 U.S.C. § 4: An Exploration Of The Federal Misprision Of Felony Statute*, 55 Ala. L. Rev. 183, 183-85 (2003); *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972). Because of the specter of their own freedom being taken away by the Crown, witnesses had a powerful incentive to implicate other citizens in criminal activity, regardless of the accuracy of their observations, and regardless of any doubt that they may have harbored regarding the suspect's guilt. Simply stated, these government-compelled statements are dissimilar to statements given by victims and witnesses, acting of their own free will, to 911 dispatchers and first

responders. These dissimilarities become more stark when one considers that in many, if not all, jurisdictions, it is a crime for a victim or witness to falsely accuse someone of a crime. *See, e.g.,* Wash. Rev. Code § 9A.84.040.

Thus, in lieu of the *Crawford* Court's approach to the text and history of the Confrontation Clause, Petitioner has relied on general assertions about the right to confront, as delineated by the scope of hearsay rules in 1791. This approach leaves his proposal rootless and elastic, with no principled way to distinguish Confrontation Clause analysis from hearsay analysis, or to limit the scope of the test he proposes.

2. *The "Functional Equivalent" Test Is Too Broad.*

Petitioner would deem a statement "testimonial" if it is "functionally equivalent" to testimony. The term "functional equivalent" is dangerously vague, as any out-of-court statement offered at trial to prove the truth of the matter asserted is functionally equivalent to testimony. And, although it can always be said that cross-examination would be *helpful* to the defendant, that fact does not transform a non-testimonial statement into a testimonial statement.[12]

That the "functionally equivalent" test provides no meaningful boundaries is illustrated by the recent expansion of the proposed test. For example, the petitioner in *Crawford* suggested that testimonial statements should include "*ex*

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[12] For example, a defendant on trial for conspiracy, who is facing a "confused tangle of [intercepted] conversations," may wish to cross-examine declarants in a conversation among co-conspirators, in order to clear up "the ambiguities that so often appear in all casual conversations," including "difficulties one has in making sense of slang and dialect [that] can be compounded where conspirators use private codes." *United States v. Inadi*, 475 U.S. 387, 405 (1986) (Marshall, J., joined by Brennan, J., dissenting). But the desirability of cross-examination does not render co-conspirator statements testimonial under the Confrontation Clause.

parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements *that declarants would reasonably expect to be used prosecutorially***.**" *Crawford*, 541 U.S. at 51 (citing Brief for Petitioner 23) (italics added). The petitioner in *Crawford* also indicated that "spontaneous declarations" or "excited utterances" would not be excluded by this test, and that they would pose ". . . purely a hearsay question. . .". Tr. of Oral Argument, Argument of Petitioner, 2003 WL 22705281, at 20-21.

Although purporting to define the same "functional equivalent" test, Petitioner Davis describes this test in much broader terms. Under the earlier proposal, a statement would be testimonial if it was "similar" to affidavits, custodial examinations, and the like. *See Crawford*, 541 U.S. at 51 (citing Brief for Petitioner 23). That limiting principle is missing from the current proposal. Also, the earlier proposal turned on whether declarants would reasonably expect a statement to be used *prosecutorially***.** Now the proposal is that a statement is testimonial if "a *reasonable declarant* would have *anticipated* that her statement might be used for *law enforcement purposes*." Petitioner's Brief at 41 (final italics added).[13] Clearly, "law enforcement purposes" is much broader than "prosecutorially." "Prosecution" is ordinarily understood to mean trial use, whereas "law enforcement purposes" is considerably more open-ended, and presumably

[13] Petitioner's proposal is likewise broader than the proposal made by the National Association of Criminal Defense Lawyers in *Crawford*, who argued that testimonial statements should include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use *at a later trial*[.]" *Crawford*, 541 U.S. at 52 (citing Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae 3*) (italics added).

encompasses investigation. Moreover, "*expect* to be used" has now been broadened to "*might* be used."

No explanation is offered for broadening this test, nor is any reason for its expansion immediately obvious. It is not clear why a declarant becomes a "witness" in the constitutional sense—and pursuant to a constitutional provision that secures trial rights—simply because he has given a statement to police, not knowing that it will be used at trial, but knowing that it will be used to advance an investigation.

Additionally, Petitioner's test is too broad insofar as it encompasses statements made to citizens, not just to police officers. Petitioner's Brief at 23 (noting that statements made to "private parties" were excluded historically) There is no constitutional justification for such a rule. The focus of Confrontation Clause analysis has always been on statements made to "authorities." Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003). "The Confrontation Clause is designed to limit state misconduct and manipulation, not private trickery." Amar, *Reply to Professor Friedman*, 86 Geo. L. J. at 1048.

Apart from its elasticity, the Petitioner's test is untethered to the constitutional text or history. If the Confrontation Clause guarantees the opportunity to confront a "witness against" the accused, and if "witness against" is understood to mean a person who will testify at trial, then there seems to be no constitutional justification for including investigative use as a part of the test. If any form of the "reasonable declarant" test is used, the reasonable expectations of the declarant should be tied to an expectation that her statement will be used at trial, as a substitute for live testimony.

C. The Definition Of "Testimonial" Should Not Turn On The Declarant's State Of Mind.

The centerpiece of Petitioner's definition of a testimonial statement is his focus on whether an objectively reasonable declarant would have known that her statement might be used in a police investigation, or at trial. This focus is a critical defect in his proposal and will prove unworkable.[14]

Moreover, the assumptions that underlie this test are flawed. The test appears to have its roots in a law review article wherein the authors argued that callers to 911 "know" that the information they provide, and even the statements they give, likely will be used in prosecution of a crime. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1181 (2002). The authors concluded that a statement should be considered "testimonial" for purposes of the confrontation right if "[a] reasonable person in the position of the declarant would realize that such information would likely be used in a criminal investigation or prosecution." *Id.* at 1242.

The authors supported their assumptions about what callers to 911 "know" with a lengthy account of public efforts in recent years to make victims of domestic violence aware that "their complaints will be taken seriously and that protective and punitive action to assist them will follow issuance of the complaint." *Id.* at 1195, 1193-1200. They concluded that "these 911 callers realize they are creating evidence for the prosecution as they call." *Id.* at 1199.

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[14] Respondent recommended a test to the Washington Supreme Court that attempted to decipher, by objective evidence, the subjective intent of the caller. *See* Answer to Brief of Amicus WACDL at 10-16. That recommendation was made a few months after *Crawford* was decided. Upon further research and reflection, Respondent believes that approach ill-advised, and instead recommends the test set forth in this brief.

There are several problems with these assumptions. First of all, it is illogical to attribute "objectively reasonable" thoughts or expectations to the typical 911 caller. Many, if not most, of these calls are made in the midst of, or in the immediate aftermath of, a highly distressing event. There is thus little time for calm reflection on what may happen over the ensuing months. [15]

Moreover, this picture of the all-knowing caller to 911 assumes that, in our diverse society, all share knowledge equally, and understand it uniformly. The authors of the article themselves hint at the fallacy in this construct when they report: "There is evidence, however, that not every segment of the population avails itself of the [911] service equally. In one New York study, African-American participants expressed the view that reporting batterers to the police was a breach of loyalty." *Id.* at 1196 n.89. This leads one to question, then, whether subsets of 911 callers might also have differing expectations of what will happen when they call 911. Might one's expectations of the police response be different depending on the type of neighborhood one lives in? Might various racial, ethnic and socioeconomic subgroups have varying expectations as to the likelihood of prosecution? Might recent immigrants have outright misconceptions about the likelihood of arrest or prosecution, based on experiences in their countries of origin? Must the courts then develop a different "objectively reasonable 911 caller" profile for each

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[15] *See United States v. Arnold*, 410 F.3d 895, 913 (Sutton, J., dissenting) ("[I]t does not seem unduly speculative to conclude that the state of mind of few 911 callers faced with an imminent threat of violence will bear the collected features that the Court has ascribed to 'testimonial' evidence—namely, a `solemn declaration or affirmation made for the purpose of establishing or proving some fact' in a court of law. *Crawford*, 541 U.S. at 51. One can only admire the presence of mind of a 911 caller who feels that way."), *vacated and superseded on other grounds*, ___ F.3d ___, 2005 WL 3315297 (6th Cir. 2005).

of these groups before they can determine what statements are truly "testimonial"?

And what happens to such profiles as legal standards evolve? For example, if this Court were to hold, as Petitioner urges, that statements made during the course of a 911 call can never be used at trial, the "objectively reasonable 911 caller" would presumably, over time, acquire this knowledge. Would these statements then become "non-testimonial"?

Another assumption inherent in the proposed test is that callers to 911 give their statements to police "knowing" that the statements can be used in lieu of their live testimony, and that they will thus never have to appear in court. *See People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. 2004) ("Indeed, callers knowing how the information will be used, often refuse to disclose their identity."). A perhaps more common, or at least equally likely, perception is that, if one gives a statement to police, one can expect a subpoena, and time lost from work to give testimony in court. At bottom, it is not realistic to assume that the typical caller to 911 has any idea of the limitations on the admissibility of hearsay at trial, the exceptions to the general prohibition on hearsay, or the reach of the Confrontation Clause.

A test based on so many faulty assumptions will not aid the courts in determining what statements are truly "testimonial" when the right of confrontation is at issue. Indeed, Justice Thomas foresaw problems in applying such a test, and concluded that "[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties." *White v. Illinois*, 502 U.S. at 364 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

Examples of these difficulties already abound. Courts attempting to apply the "objectively reasonable declarant" test have reached inconsistent results. Moreover, some

courts, using this test, have excluded statements that bear no resemblance to those that concerned the Framers when drafting the Confrontation Clause.

In *Commonwealth v. Jackson*, No. 03-537, 2005 WL 2740579 (Mass. Super. Sept. 16, 2005) (order denying motion in limine), the trial court was faced with the Commonwealth's motion in limine to admit a tape recording of a call to 911 made by an elderly woman, Rita Lutz. *Id.* at *1. The trial court described the contents of the tape:

> The dispatcher answered, "911 line, what's your emergency?" Ms. Lutz responded, "I'm at 63 Silverbrook Road and someone just broke in my back door." The dispatcher asked a brief series of questions, eliciting that Ms. Lutz did not know the identity of the intruder, that Ms. Lutz was still in the house, and that the door was still open. The dispatcher spoke to police units; I infer that he dispatched them to the scene. He then asked further questions of Ms. Lutz, eliciting that the intruder had broken a door and entered the back porch, that she had seen a black leather jacket, and that the intruder had left through the same door and "gone into the back yard, I guess." The dispatcher again spoke to police units; I infer that he conveyed the information Ms. Lutz had provided. The dispatcher resumed questioning Ms. Lutz, eliciting that she had "a very dark back area," that the intruder had crouched down, and that she did not know whether he had seen her or not. The dispatcher informed Ms. Lutz that he wanted "to stay on the line in case someone's in the house." Ms. Lutz asked whether a particular police officer was on duty, noting that "he lives two doors down." The dispatcher informed her that the named officer was not on duty. The conversation ended when the dispatcher informed Ms. Lutz, after communication from the units dispatched, that police were "right around the corner." Ms. Lutz spoke in a tone of fearfulness, conveying concern for her safety.

Id.

Police located the defendant, wearing a black leather jacket, in the yard of a nearby house. They also located an unregistered vehicle with keys inside, containing identification belonging to the defendant as well as items later determined to have been stolen from other locations. *Id.* Ms. Lutz, who was 79 at the time of the court hearing, was unwilling to testify at trial. Without her taped statements to 911, the Commonwealth could not prove the charge of burglary. *Id.*

The trial court looked to the decision of the Supreme Judicial Court in *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005) *petition for cert. filed* (Dec. 21, 2005) (No. 05-8485), for the appropriate test to use in determining whether Ms. Lutz's statements to the 911 operator were "testimonial." *Jackson*, at *2. Interpreting the Confrontation Clause in light of *Crawford*, the *Gonsalves* court had set out a two-part test. *Gonsalves*, 833 N.E.2d at 555-60. Finding that Ms. Lutz's statements were not per se testimonial under the *Gonsalves* test, the court proceeded to examine whether the statements were testimonial in fact, i.e., whether "a reasonable person in Ms. Lutz's position would have anticipated their use for investigation or prosecution." *Jackson*, at *3. Applying this part of the test, the trial court found that Ms. Lutz "reported what a reasonable lay person would have recognized to be a crime, and gave the limited information she had to describe that person and his apparent location at the time of the call." *Id.* Finding that "[a] reasonable person would anticipate that such information would facilitate investigation, which might then lead to identification," the trial court concluded that Ms. Lutz's statements in the 911 call were "testimonial in fact," and thus inadmissible at trial. *Id.*

In *People v. Cortes*, the following call was made to 911:

> Operator: Police 1290. Is this emergency?
>
> Caller: I just saw a man running with a gun at 138th.

Operator: What borough?

Caller: 137 and Cypress. He had a red shirt on . . . bald head.

Operator: What borough, sir?

Caller: Pardon me?

Operator: What borough is this for?

Caller: Oh, the Bronx, sorry.

Operator: The Bronx.

Caller: Yeah, 137, 138 and Cypress. He's got a red shirt on, hispanic, bald-headed.

Operator: What direction?

Caller: Towards 138th Street and Cypress.

Operator: 138th Street and Cypress. What was he wearing?

Caller: A red shirt and he's bald-headed.

Operator: A red shirt and he's bald-headed.

Caller: Yeah.

Operator: What about the bottom?

Caller: Eh?

Operator: What about the bottom? What kind of pants? Jeans?

(Noise)

Caller: Oh, he's shooting at him, he's shooting at him.

Operator: OK.

Caller: He's shooting at him.

Operator: He's chasing the guy, right?

Caller: Yup. (Noise) You hear it?

Operator: I hear it. I hear it. OK.

Caller: He's killing him, he's killing him, he's shooting him again.

Operator: He's shooting at him or he shot him?

Caller: He shot him and now he's running. And he shot him two or three times. Yes.

Operator: Where's he running to?

Caller: He's running toward 138th Street.

Operator: Hold on, let me get a ambulance on line. Hmmm?

(Ring)

Male voice: 0709

Operator: OK. What was that?

Male: 0709.

Caller: I gotta hang up because people, people are gonna think I'm out calling the cops. And they'll think it's me.

Operator: OK. All right sir, no problem. OK. Thank you. I think I got it to relay.

781 N.Y.S.2d at 403-04.

In determining whether the statements made during this call to 911 were admissible at trial despite the fact that the caller could not be located, the court in *Cortes* canvassed various internet sites throughout the country, and concluded that callers to 911 reporting crimes are likely to know the use to which the information will be put. *Id.* at 405-06, 407. Citing an objective test, the court found that the call was testimonial because the purpose for which the information was given was investigation, prosecution, and potential use at a judicial proceeding. *Id.* at 414-15.

Other courts have grappled with the idea of an "objectively reasonable 911 caller" and come to the opposite conclusion,

finding the statements not to be testimonial. *See, e.g., People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004) (while 911 caller's statements were ultimately used in prosecution, statements made "without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial"); *People v. Caudillo*, 19 Cal. Rptr. 3d 574, 590 (Cal. App. 2004) ("This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial.") *rev. granted and opinion superseded*, 104 P.3d 97 (Cal. 2005).

As these examples illustrate, this Court should look with great caution on adopting an overly broad formulation of the definition of "testimonial," based on an "objectively reasonable declarant." It is easy to posit that *any* reasonable citizen speaking to a police officer would likely realize that her statements might ultimately be used in investigation of a crime or at trial. Defining "testimonial" in this way leads to the classification of virtually *every* out-of-court statement made to a police officer as "testimonial," even those which (as in the above examples) bear little resemblance to the statement at issue in *Crawford*, or to the statements that were the primary concern of the authors of the Confrontation Clause.

The primary problem with the declarant-centered approach is that the *subjective* intent of the declarant in making her statement may be difficult to discern, and the Petitioner's *objective* test for determining such intent leads to results that cannot be justified under the Confrontation Clause. Focusing instead on the *manner* in which the statement was obtained (i.e., structured questioning in preparing a case for trial, or ad hoc questioning in resolving an emergent situation), obviates the need for either a searching inquiry into a declarant's individual motives, or a "one size fits all" test for a de-

clarant's "objectively reasonable" expectations. Where a statement is given in response to structured, targeted police questioning, whether in a formal or an informal setting, the declarant will likely understand that her statements may be used in some way at trial. Nevertheless, putting the focus on the actions of the police (or other governmental actors), rather than on the motives of the declarant, will better target the type of statements that so concerned the Framers when they set out to protect the right to confrontation in our Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Washington State Supreme Court should be affirmed.

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