No. 05-5224

In the Supreme Court of the United States

ADRIAN MARTELL DAVIS, PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether an assault victim's identification of her assailant in response to emergency questioning by a 911 operator was "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004).

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INTEREST OF THE UNITED STATES

This case presents the question whether the rule against the admission of "testimonial" statements established in *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies to statements made in response to emergency questioning. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case.

STATEMENT

1. On February 1, 2001, Michelle McCottry dialed 911, but hung up before speaking to a 911 operator. J.A. 117. The operator called McCottry back immediately. *Ibid.* The conversation between McCottry and the operator proceeded as follows:

911 Operator: Hello

Complainant: Hello

911 Operator:	What's going on?
Complainant:	He's here jumpin' on me again.
911 Operator:	Okay. Listen to me carefully. Are you in a house or in an apartment?
Complainant:	I'm in a house.
911 Operator:	Are there any weapons?
Complainant:	No. He's usin' his fists.
911 Operator:	Okay. Has he been drinking?
Complainant:	No.
911 Operator:	Okay, sweetie. I've got help started. Stay on the line with me, okay?
Complainant:	I'm on the line.
911 Operator:	Listen to me carefully. Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, what's his first name?
Complainant:	Adran.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian?
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. He's runnin' now.

J.A. 8-9.

In response to further questioning, McCottry told the 911 operator that petitioner had run to his car, that the car was headed out of a dead end street, and that petitioner was not alone. J.A. 9-10. After informing the operator that she did not need an aid car, McCottry told her that she had to leave the phone to close her door. J.A. 11. When McCottry returned, she told the 911 operator, in response to additional questions, that petitioner was her former boyfriend, that she was moving that day, that petitioner had come over to "get his stuff," that someone else was present when petitioner arrived, that she told petitioner to go, and that petitioner then began beating her. J.A. 11-12.

At that point, the 911 operator obtained identifying information from McCottry. J.A. 12. After obtaining that information, the operator asked McCottry whether her door was locked, and McCottry replied that it was. J.A. 13. At the conclusion of the call, the operator told McCottry that the police would check the area for petitioner first and then come talk to her. *Ibid.*

Police officers arrived at McCottry's house within four minutes of the 911 call. J.A. 117. They observed that McCottry was "very upset" and that she had fresh injuries on her forearm and face. *Ibid.* While McCottry spoke with the officers, she made hurried efforts to gather her children and belongings so that they could leave the house. *Ibid.*

2. Petitioner was charged with one count of a felony violation of the provisions of a domestic no-contact order. J.A. 117. The State presented the two police officers who responded to the 911 call as witnesses, and they testified about McCottry's injuries. The prosecutor also introduced McCottry's 911 call under the State's excited utterance exception to the hearsay rule. J.A. 118. That exception permits the introduction of "[a] statement relating to a startling event or condition made while the declarant was under the stress of

excitement caused by the event or condition." Wash. Rev. Code Ann., R. Evid. 803(a)(2) (West 2005). The State was unable to locate McCottry, so she did not testify. J.A. 118. The jury found petitioner guilty. J.A. 119.

3. The Washington Court of Appeals affirmed. J.A. 96-111. As relevant here, the court rejected petitioner's contention that the admission of the 911 call deprived him of his Sixth Amendment right to confront the witnesses against him. J.A. 96. The court reasoned that, under *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), the admission of statements within a firmly rooted hearsay exception do not violate the Confrontation Clause, the excited utterance exception is firmly rooted, and McCottry's 911 statements were excited utterances. J.A. 98-99.

4. The Washington Supreme Court affirmed. J.A. 116-138. While the appeal was pending, this Court held in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the Confrontation Clause generally precludes the admission of "testimonial" statements unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. Applying *Crawford*, the Washington Supreme Court considered whether McCottry's 911 call was testimonial. J.A. 124.

In resolving that issue, the Washington Supreme Court first determined that the purpose of an emergency 911 call "is generally not to 'bear witness'" but rather to obtain "help to be rescued from peril." J.A. 124. The court rejected the argument that McCottry reasonably knew that her call would later be used to prosecute petitioner, finding "no evidence that McCottry had such knowledge or that it influenced her decision to call 911." J.A. 126.

The Washington Supreme Court further held that "[a]n emergency 911 call may contain both statements which are nontestimonial and statements which are testimonial." J.A. 127. The court also noted that harmless error analysis applies

to the admission of evidence in violation of the Confrontation Clause. J.A. 127-128. Applying those principles, the court held that McCottry's initial identification of petitioner as her assailant was non-testimonial because it was part of an effort to seek assistance and protection from peril. J.A. 128. The court concluded that, to the extent other statements in the 911 call might be testimonial, their admission was harmless beyond a reasonable doubt. J.A. 128-129

Judge Sanders dissented. J.A. 131-138. Applying a standard based on whether a reasonable person would anticipate that a statement would be used in investigating or prosecuting a crime, he concluded that McCottry's 911 call was testimonial. J.A. 133-134.

SUMMARY OF ARGUMENT

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court made clear that the Confrontation Clause's core textual and historical concern is eliminating the civil law method of proof, which permitted the use of *ex parte* examinations as evidence against the accused. The Court's approach to determining whether an out-of-court statement infringes that core concern—and thus is "testimonial"—requires assessing whether a modern-day hearsay statement presents the type of acute dangers raised by the historical abuses that the Framers targeted.

Statements made to officials who are faced with an apparent emergency, and who ask questions reasonably necessary to resolve that emergency, are not "testimonial" statements. Three central features characterized the civil law method of *ex parte* examinations: they clearly conveyed to the declarant that he was giving statements for use in a legal proceeding; the government could readily exploit the situation to shape the statements; and the statements were only a weaker form of live testimony, without independent probative

value. Statements given in response to emergency questioning have none of those features.

In an emergency, a declarant will likely understand that the objective purpose of official questioning is to assess and resolve an immediate or imminent threat to the safety of an individual or the public. The circumstances lack the formality or structuring of inquiries characteristic of modern-day interrogation, or, most importantly, of the historical instances that prompted the Confrontation Clause. Similarly, government manipulation of the responses for prosecutorial purposes is not a general risk when public officials are seeking to resolve an emergency. Responsible officials can be expected to be focused on averting harm as their prime goal, rather than generating evidence for a trial. Finally, the immediacy and authenticity of on-the-scene statements in the midst of an emergency gives those statements a probative force that is not replicated by in-court testimony when the emergency has long passed. Statements given in an emergency thus have none of the critical features of the classic testimonial statements identified in *Crawford*: testimony at preliminary hearings, grand jury proceedings, or a former trial, or of modern, tactically structured interrogation.

Petitioner seeks to expand *Crawford*'s reach, and extend the "testimonial" category to encompass emergency statements, by misreading history. He contends that all accusations to government agents that a person committed a crime should be regarded as "testimonial." History, however, indicates that the "accusers" that the Confrontation Clause contemplates were formal accusers (as in Raleigh's case); that the sparse English case law excluding evidence of crime reports to constables was likely unavailable to the Framers, may have rested on grounds other than the common law confrontation right, and did not involve emergencies; that res gestae case law was mixed and in many cases *did* admit state-

ments identifying criminals made immediately or very shortly after an emergency; and that other cases excluding a rape victim's identification of the assailant (when she did not testify) involved no on-going emergency. This history thus furnishes no basis for excluding probative evidence stemming from emergency questioning that differs critically from the "principal evil at which the Confrontation Clause was directed." 541 U.S. at 50.

Under the proper approach, the statements made during the 911 call in this case by the victim identifying her assailant were the product of emergency questioning. The 911 operator faced an apparent emergency; and the questions were reasonably necessary to protect the safety of the victim. The Confrontation Clause's bar on "testimonial" statements has no application to such statements.

ARGUMENT

STATEMENTS THAT ARE THE PRODUCT OF EMERGENCY QUESTIONING ARE NOT "TESTIMONIAL" UNDER THE CONFRONTATION CLAUSE

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. This Court in *Crawford* v. *Washington*, 541 U.S. 36 (2004), made clear that the "primary object" of concern under the Confrontation Clause is "testimonial hearsay." *Id.* at 53. The determination of whether a particular statement is testimonial requires a close comparison to the type of statement that formed the "principal evil" at which the Confrontation Clause was aimed. *Id.* at 50. While the formal acquisition of evidence by the government in the "civil-law mode of criminal procedure," *ibid.*, exemplifies that evil, statements taken by law enforcement officers in response to what they reasonably perceive to be an emergency do not. Responses to emergency questioning, *i.e.*,

questioning that is reasonably necessary to determine whether there is an emergency and how to respond, are therefore not testimonial, and thus not within *Crawford*'s rule against admitting such statements absent unavailability of the witness and a prior opportunity for cross-examination.

I. THE FRAMERS SOUGHT TO ABOLISH THE USE OF *EX PARTE* EXAMINATIONS AND COMPARABLE PRACTICES AS EVIDENCE AGAINST THE ACCUSED, AND EMERGENCY QUESTIONING IS NOT A COMPARABLE PRACTICE

1. In *Crawford*, the Court held that the Confrontation Clause generally bars the admission against a criminal defendant of "testimonial" out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. The Court overruled *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), to the extent it held that the admission of testimonial hearsay does not violate the Confrontation Clause as long as it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." See *Crawford*, 541 U.S. at 60-62 (quoting *Roberts*, 448 U.S. at 66).

The Court based its holding on the historical development of the right to confrontation that preceded the framing of the Confrontation Clause. That history demonstrated 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." *Crawford*, 541 U.S. at 50. That practice had developed in England under the Marian bail and committal statutes that required justices of the peace to examine witnesses in felony cases and certify the written results to the court where they "came to be used as evidence in some [criminal] cases." *Id.* at 44. One particularly egregious example of the

practice of using *ex parte* examinations as evidence against the accused occurred during the treason trial of Sir Walter Raleigh. At that trial, the statements made by Raleigh's accuser during an *ex parte* examination by the Privy Council were introduced as evidence against Raleigh over his objection that his accuser should be brought before him. *Ibid.* Because *ex parte* examinations like those in Raleigh's case were the target of the Confrontation Clause, the Court explained, "[t]he Sixth Amendment must be interpreted with this focus in mind." *Id.* at 50.

The Court also concluded that "the text of the Confrontation Clause reflects this focus." *Crawford*, 541 U.S. at 51. The Court explained that at the time of the framing of the Confrontation Clause, the term "witnesses" meant "those who 'bear testimony,'" and "[t]estimony" meant "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* (citing Noah Webster, *An American Dictionary of the English Language* (1828) (*Webster's*)). To illustrate the focus indicated by the Constitution's text, the Court stated that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51.

The Court declined to provide a "comprehensive" definition of "testimonial." *Crawford*, 541 U.S. at 68. Instead, it held that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial, and to police interrogations," because "these are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Ibid.* The Court also concluded that the recorded statement at issue in *Crawford*—taken while the declarant was in custody and under investigation for a crime—was the product of police interrogation and

therefore testimonial, because it was "knowingly given in response to structured police questioning." *Id.* at 53 n.4.

2. This case involves statements that are the product of emergency questioning, *i.e.*, the response of law enforcement officers to what they reasonably perceive to be an emergency. Responses to emergency questioning, *i.e.*, questioning that is reasonably necessary to determine whether there is a present or imminent risk of harm to an individual or the public, and if so, how to resolve that emergency, are categorically different from the types of testimonial statements identified in *Crawford*. While *Crawford* did not address whether statements that are the product of such questioning are testimonial, it did provide guidance on how to approach that issue. Because the Court interpreted the Confrontation Clause as principally concerned with outlawing admission of the kind of *ex parte* examinations conducted under the authority of the Marion statutes, and in Raleigh's trial, 541 U.S. at 50, the appropriate inquiry is whether emergency questioning resembles those historical abuses.

As discussed, *infra*, the relevant characteristics of *ex parte* examinations that make them testimonial for purposes of the Confrontation Clause are that: (1) they have a degree of formality in that they impart a clear understanding to the declarant that his statement is being taken for use in a legal proceeding; (2) they can easily be exploited by the government to shape the declarant's statement; and (3) they produce a weak form of live testimony, lacking in independent probative value. See pp. 11-19, *infra*. Because emergency questioning does not possess those characteristics, statements that are the product of emergency questioning are not testimonial for purposes of the Confrontation Clause.

A. While *Ex Parte* Examinations Impart A Clear Understanding That A Statement Is Being Taken For Use In A Legal Proceeding, Emergency Questioning Does Not

1. The justices of the peace who conducted *ex parte* examinations pursuant to the Marian statutes used the statements of the witnesses who appeared before them to make bail and committal decisions. They also sent the recorded depositions to the court for use at trial. Those who were examined by the justices of the peace therefore had a clear understanding that their statements were being taken for use in legal proceedings. They understood that they were being called upon to make "[a] solemn declaration or affirmation * * * for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting *Webster's* definition of "testimony"). Persons who appear before grand juries, in pretrial proceedings, or trials share that understanding.

The same is true of persons subjected to police interrogations. Indeed, by definition, a police interrogation as that term is used in *Crawford* should be understood to refer to police questioning that is objectively structured to obtain evidence for use in a legal proceeding and that is taken under circumstances that impart that understanding to the declarant. See *Crawford*, 541 U.S. at 53 n.4. For example, when, as in *Crawford*, a police officer conducts questioning in a custodial setting, precedes the questioning with a warning that the declarant's statement may be used in court, and structures the questioning to produce evidence for trial, the circumstances impart to the declarant a clear understanding that the statement is being taken for use in a legal proceeding.

In contrast, *Crawford* identified several examples of nontestimonial statements, and in each case, the circumstances did not impart to the declarant an understanding that his statement would be used in a legal proceeding. For instance,

Crawford reaffirmed the holding in *Bourjaily* v. *United States*, 483 U.S. 171, 173-174 (1987), that the admission into evidence of a statement made by a defendant's co-conspirator to an undercover informant implicating the defendant in the conspiracy does not violate the Confrontation Clause. *Crawford*, 541 U.S. at 58. The Court explained that a co-conspirator's statement to an undercover informant is not testimonial because it is made "unwittingly" to a government agent. *Ibid.* Thus, even when the government deliberately uses an undercover informant to solicit evidence from a co-conspirator implicating the defendant in the conspiracy, the statement is not testimonial because the co-conspirator is not made aware that the statement is being sought for use at trial.

Similarly, *Crawford* reaffirmed the holding in *Dutton* v. *Evans*, 400 U.S. 74 (1970), that a co-conspirator's statement to a cellmate implicating the defendant in criminal activity may be admitted into evidence without violating the Confrontation Clause. *Crawford*, 541 U.S. at 57. The Court explained that, "by their nature," co-conspirator statements in furtherance of the conspiracy are not testimonial. *Id.* at 56. One of the reasons that is so is that such statements are not made with an understanding that they will be used in a legal proceeding. The same is true of a casual remark to an acquaintance. See *id.* at 51.

2. Statements made in response to emergency questioning fall into the same category. Emergency questioning takes place when the factual circumstances would lead a reasonable official to believe that there may be an emergency—a present or imminent risk of harm to an individual or the public—that requires official action. The ensuing questioning, viewed objectively, is aimed at determining whether there is in fact an emergency, and if so, how to resolve it. A person asked to respond to such questioning is highly likely to understand

that her statements are being sought for that emergency purpose. And given the exigencies in emergency questioning, it is not accompanied by formalities that might lead a declarant to believe that the statement is being taken for use in a legal proceeding.

At the same time, persons in the midst of an emergency are likely to focus primarily on the resolution of the emergency and not on other matters. It is a normal human reaction to prioritize the resolution of an emergency. Attending to something that requires urgent action leaves little room for the mind to focus on other matters. That is certainly true when a person is in the midst of a crisis or is a recent victim of a violent physical assault, as many persons who make 911 calls are. Indeed, the premise of the deeply rooted excited utterance exception to the hearsay rule is that emergencies and other exciting events "still[] the capacity of reflection." Fed. R. Evid. 803(1) and (2) advisory committee's note (1972); see 6 John H. Wigmore, *Evidence* § 1747, at 195 (Chadbourn rev. 1976) (rationale of the excited utterance exception is that an external shock "stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock"). Not every person questioned in a perceived emergency is in such an excited state. But even when an emergency does not overwhelm an individual's reflective powers, the pressure of the emergency is still likely to focus that person's mind on its resolution. In such persons, the pressing need to resolve the emergency is still likely to take precedence, temporarily rendering other concerns of secondary or no importance.[1]

[1] As the discussion above indicates, statements that are the product of emergency questioning need not qualify as excited utterances under state or federal law. The converse is also true: not all excited utterances are made in the heat of resolving an emergency. For example, while the state-

Petitioner contends (Br. 41) that a reasonable person who "stopped to consider the matter" would understand that her responses to emergency questioning could be used "prosecutorially." Indeed, petitioner contends that, to the extent a more general test than text and history should apply in classifying a statement as "testimonial," the Confrontation Clause should focus on whether a declarant would reasonably have anticipated that his statements *might* be used for law enforcement purposes. Br. 13, 41. But abstracting the emergency away from the situation, and watering down the relevant "anticipation" to what *might* occur, removes what is unique about emergencies and thus destroys the ability to ask whether emergency questioning is akin to the historical practices that animated the adoption of the Confrontation Clause. In the historical examples, the declarants actually understood that their statements were being taken for use in a legal proceeding and that they were making solemn declarations for the purpose of proving some fact. In emergency questioning, as a general matter they do not.

That does not mean that a court should attempt to divine the actual subjective understanding of the person responding to emergency questioning. Because a person's actual subjective understanding is both elusive and unverifiable, such an approach would "entangle the courts in a multitude of difficulties," *White* v. *Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in the judgment), and lead to inconsistent results on similar facts. For that reason, an objective approach is appropriate. But since the ultimate inquiry is whether admission of statements that are the product of emergency ques-

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ment made by the child to the police officer in *White* v. *Illinois*, 502 U.S. 346 (1992), and discussed in *Crawford*, 541 U.S. at 58 n.8, was admitted as an excited utterance, it was made in response to police questioning 45 minutes after the assailant left the child's house (see *White*, 502 U.S. at 349-350) (describing and quoting officer's questioning of victim in *White*), and therefore was not the product of emergency questioning.

tioning is the modern equivalent of the historical abuses, any objective inquiry into the likely understanding of a person responding to emergency questioning must be a reasonable proxy for the declarant's actual understanding. Petitioner's proposal to extract the emergency from his objective test, and to imagine instead a person who has stopped to consider all the possible ramifications of his actions, fails to serve as such a proxy. Indeed, extracting the emergency from the inquiry virtually guarantees that the thought process of petitioner's hypothetical reasonable person will fail to match the declarant's.[2]

At the same time, it would not make sense to attempt to determine in every case the understanding of a reasonable person in the declarant's *particular* emergency situation. That approach would also lead to unpredictable and inconsistent results. Instead, because in the general run of cases, a person responding to emergency questioning is likely to be primarily focused on providing information for use in resolving the emergency, and not on providing evidence for use in a legal proceeding, the relevant inquiry should simply be whether a person is responding to emergency questioning. That approach is both sound and administrable. Courts have the means to distinguish between on-the-spot questioning

[2] That is not to question that, in some cases, persons faced with emergency questioning may well recognize on some level that their statements "might" be used for a "law enforcement purpose[]." Pet. Br. 41. But in the historical examples the declarants *clearly* understood that their statements were being taken for use in a legal proceeding, not simply that they might conceivably be used for some law enforcement purpose. It is that more focused understanding that is a characteristic of testimony. Indeed, all hearsay declarants, particularly those discussing criminal activity, might well realize to a greater or lesser degree of awareness that their words may later be used in legal proceedings. Yet any approach that has the potential to sweep all hearsay into the category of "testimonial" statements cannot be correct.

that is reasonably necessary to determine whether a perceived emergency in fact exists, and if so, how to respond, and questioning that is objectively structured solely to produce evidence for use in a legal proceeding. Cf. *New York* v. *Quarles*, 467 U.S. 649, 658-659 (1984).

B. The Government Can Easily Exploit *Ex Parte* Examinations To Shape The Declarant's Statements, But Emergency Questioning Does Not Pose That Same Danger

One salient characteristic of the *ex parte* examinations to which the framers of the Confrontation Clause objected is the ease with which the government could shape the declarant's statements to incriminate the accused. As the Court explained in *Crawford*, "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. at 56 n.7.

In holding that police interrogations are akin to the *ex parte* examinations conducted by justices of the peace, the *Crawford* Court relied heavily on that risk of abuse. 541 U.S. at 52-53. The Court emphasized that "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are the police or justices of the peace." *Id.* at 53.

Emergency questioning does not pose that same potential for abuse. Public employees who take 911 calls and police officers who help to resolve an emergency on the scene will characteristically focus their energies on that pressing task. See U.S. Amicus Br. at 10-12, *Hammon* v. *Indiana*, cert. granted, No. 05-5705 (Oct. 31, 2005). To officials intent on resolving an emergency, taking the time to shape questioning to produce evidence for trial could only serve as a distraction and impede the resolution of the emergency, possibly risking

harm to the victim or to public safety. There is therefore little risk that emergency questioning will be used to shape testimony for trial. Indeed, it would be an extreme dereliction of duty and contrary to every natural impulse for a government official to forsake the needs of a person imperilled by danger in order build a case for trial. Questioning in an emergency is therefore likely to be exploratory and focused on assessing the needs of the moment, not a means of building a possible future case.

The objective standard for determining whether a government official is engaged in emergency questioning further minimizes any risk of the kind of manipulation that attended traditional *ex parte* examinations. As noted above, to qualify as emergency questioning, the official must confront facts that would lead a reasonable official to believe that there may be an emergency, and the questions must be reasonably necessary to determine whether an emergency exists and, if so, how to resolve it. Questioning that strays from those objectives is not emergency questioning. Any effort to use the happenstance of an emergency to gather evidence for trial that would not be subject to cross-examination is therefore likely to be self-defeating. The very effort to collect such evidence is likely to reveal itself in the questioning, transforming emergency questioning into structured interrogation, and triggering *Crawford*'s restrictions on the admission of testimonial evidence.

C. *Ex Parte* Examinations Produce Weak Forms Of Live Testimony, While Emergency Questioning Often Results In Statements That Have Independent Probative Value

Another characteristic of the *ex parte* examinations conducted by justices of the peace is that they produced evidence that was nothing more than a weak version of live testimony.

The same is true of the modern-day counterparts: testimony before a grand jury, testimony at a preliminary hearing, former trial testimony, and the results of interrogations. The introduction of such testimony raises special Confrontation Clause concerns. The Court has made that point in connection with former testimony, explaining that "former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony." *United States* v. *Inadi*, 475 U.S. 387, 394 (1986). That same observation applies to the other categories of testimonial evidence *Crawford* identified.

Some out-of-court statements, however, have independent probative value and therefore differ from the historical abuses at which the Confrontation Clause was aimed. For example, statements made in furtherance of a conspiracy "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Inadi*, 475 U.S. at 395. And "given a declarant's likely change in status by the time the trial occurs, simply calling the declarant in the hope of having him repeat his prior out-of-court statements is a poor substitute for the full evidentiary significance that flows from statements made when the conspiracy is operating in full force." *White* v. *Illinois*, 502 U.S. 346, 354 (1992).

Statements made in response to emergency questioning can also have independent probative value, particularly when they take the form of excited utterances. As the Court explained in *White* v. *Illinois*, 502 U.S. at 356, a "statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's examination—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." That has been the judgment of courts beginning

more than two centuries ago; that view is reflected in the Federal Rules of Evidence; and that view is widely accepted in the States. *Id.* at 355 n.8. A victim's panic-stricken appeal for help on a 911 tape, for example, can have value that live testimony simply cannot replicate. Thus, the Framers of the Confrontation Clause would readily have perceived a distinction between the admission of the products of emergency questioning and the historical abuses in the use of *ex parte* testimony that they sought to abolish. There is no reason for this Court to extend the testimonial concept in *Crawford* well beyond its historical origins, with the effect of entirely precluding uniquely probative evidence.

II. HISTORY DOES NOT ESTABLISH THAT AN OUT-OF-COURT STATEMENT THAT IMPLICATES A PERSON IN A CRIMINAL ACT IS TESTIMONIAL WHEN THE STATEMENT IS MADE IN RESPONSE TO EMERGENCY QUESTIONING

Petitioner argues that any out-of-court statement to a government agent that implicates a person in criminal activity is testimonial, including statements made in response to emergency questioning. But as discussed, *infra,* petitioner makes no effort to show that statements made in response to emergency questioning bear a kinship to the ex parte examinations at which the Framers directed the Confrontation Clause, and the historical argument he does make is unsupported by the materials upon which he relies.

A. An Accusation Rule Sweeps Far More Broadly Than The Paradigmatic Examples That Prompted the Confrontation Right

Petitioner contends (Br. 15) that any statement made to a government agent that implicates a person in a criminal act is testimonial, including any statement made in response to

emergency questioning. For several reasons, that contention is incorrect.

First, while petitioner asserts (Br. 14-15) that his rule is derived from the approach followed in *Crawford*, in fact, petitioner strays from that approach. *Crawford* held that the Confrontation Clause was aimed at a particular practice that the Framers found objectionable—"the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50. And *Crawford* further held that the scope of the Confrontation Clause has to be interpreted "with this focus in mind." *Ibid.* Following that approach, the Court held that police interrogations are testimonial because "they bear a striking resemblance to examinations by justices of the peace in England." *Id.* at 52.

Petitioner fails to follow that method of analysis. In particular, he does not attempt to show that emergency questioning is a modern-day counterpart to the civil law mode of criminal procedure that the Framers rejected. Nor is such a showing possible. For the reasons previously discussed, emergency questioning does not have the characteristics of the civil law mode of procedure.

Petitioner's rule would also set aside the well-established practice of state and federal courts of admitting as significant evidence of guilt a statement implicating a person in criminal conduct made in the immediate wake of an attack. See *White*, 502 U.S. at 355 n.8. It is one thing to invalidate state and federal practice when, as in *Crawford*, courts had unpredictably and inconsistently applied a list of factors and had regularly admitted accomplice confessions that were the product of police interrogation, despite the Court's repeated holdings that the Confrontation Clause creates a strong presumption against their admissibility. *Crawford*, 541 U.S. at 63-64. It is another thing, however, to entirely sweep aside a practice

that has not been shown to have been plagued by unpredictability, where the evidence does not share the characteristics of the abuses that animated the Confrontation Clause.

B. History Furnishes No Sound Basis For Treating The Products Of Emergency Questioning As "Testimonial"

Petitioner's case for his proposed rule rests on his assertion (Br. 10-11, 14-34) that the historical evidence shows that the Confrontation Clause was intended to bar the admission of any out-of-court statement to a government agent implicating a person in criminal activity, including a statement in response to emergency questioning. Petitioner has failed to make that historical case.

1. In support of his per se rule, petitioner relies (Br. 16) on the demand of defendants, such as Raleigh, to meet their accusers face-to-face. But Raleigh's accuser was someone who had made a formal accusation against him to the Privy Counsel. As the Court explained in *Crawford*, that is the kind of accuser the Framers had in mind when they established that criminal defendants would have the right to confront the witnesses against them. 541 U.S. at 50 (Confrontation Clause was directed at the abuse in Raleigh's case); see *Webster's*, *supra* (defining "accuse" as "to charge with an offense against the laws, judicially or by a public process"). Petitioner does not cite any historical reference that suggests that the Framers understood an "accuser" to be someone who identified the person responsible for harming him in the immediate aftermath of an attack, in response to emergency questioning.

2. Petitioner also relies (Pet. 19-20) on two English cases that excluded from evidence a constable's testimony about what the victim told him after the crime. But those cases cannot carry the weight petitioner places on them.

First, there is no evidence that those case's rulings on the admissibility of the statements made to the constable affected

the Framers' understanding of the Confrontation Clause. One of the cases—*Rex* v. *Wink*, 6 Car. & P. 398, 172 Eng. Rep. 1293 (1834) —was decided 43 years after Congress approved the Confrontation Clause for submission to the States in 1789, and 41 years after the States ratified it in 1791.

The other case petitioner relies on is *King* v. *Radbourne*, 1 Leach 456, 168 Eng. Rep. 330 (1787). Even if the Framers were familiar with Leache's published account of the significant legal rulings from that case, they would not have learned about the ruling relating to the constable's testimony because that ruling was not included in Leache's account. Rather, that ruling appears in The Proceedings of the Old Bailey, See Pet. Br. 19, a publication that was intended to provide a full account of the testimony in local criminal trials, not to extract from those trials its significant legal rulings. Petitioner provides no evidence that the Framers would have been familiar with the Old Bailey account, much less with the very brief reference in that publication that petitioner cites. It is highly unlikely that the snippet cited by petitioner was "burned into the general consciousness." *Crawford*, 541 U.S. at 46 (citation omitted).

Second, the accounts of the cases do not support petitioner's contention that the admissibility rulings were based on the common law right of confrontation. In *Wink*, the report does not supply an explanation for the ruling. But since the statement was hearsay not subject to any apparent exception, it might well have been excluded on hearsay grounds.[3]

[3] Wigmore believed that the "appreciation of the impropriety of using hearsay statements" took increasing hold during England during the 17th century, and, by the early 18th century, the general prohibition against hearsay declarations "receive[d] a fairly constant enforcement." 5 John H. Wigmore, *supra*, § 1364, at 18. "Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions," *Crawford*, 541 U.S. at 69 n.1 (Rehnquist, C.J., concurring in the judgment), but there is

The Confrontation Clause was not intended to preclude the admission of all hearsay, see *Crawford*, 541 U.S. at 51 (historically significant practices that prompted the Confrontation Clause "suggest[] that not all hearsay implicates the Sixth Amendment's core concerns"), but instead was targeted at testimonial hearsay, *ibid.*; see also *id.* at 60-61 (noting proposals to exclude non-testimonial hearsay from Confrontation Clause scrutiny). Thus, a decision on hearsay grounds without more would not have implications for deciding what is testimonial under the Confrontation Clause. For example, a casual remark to a neighbor, offered to prove the truth of the assertion, presumably would have been excludable as hearsay at the time of the framing of the Confrontation Clause. But, as *Crawford* establishes, because that statement is not testimonial, its introduction does not implicate the core concerns of the Confrontation Clause. See *Crawford*, 541 U.S. at 51.

The Old Bailey account of *Radbourne* indicates that the judge instructed the constable not to repeat the victim's statement to him because the defendant was not present at that time. Pet. Br. 21. But that does not mean that the ruling was based on a criminal defendant's common law confrontation right. Radbourne was tried for petty treason, and British law required all evidence in such cases to have been taken in the presence of the accused. See *Radbourne*, 168 Eng. Rep. at 332-333. The ruling may have been based on that statute, rather than a criminal defendant's common law confrontation right.

Finally, while petitioner characterizes the statements excluded in *Wink* and *Radbourne* as fresh reports, neither statement was made during an emergency. The statement in *Wink* was made between five and six hours after the declarant was robbed. 172 Eng. Rep. at 1293. And the state-

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little doubt that hearsay could form a basis for exclusion quite apart from confrontation concerns.

ment in *Radbourne* was made more than one and one-half hours after the crime occurred, following the constable's one-hour meticulous search for evidence. Accordingly, neither *Wink* nor *Radbourne* establishes that statements made in response to emergency questioning are testimonial.

Petitioner also relies (Br. 21-22) on an 1835 decision of the South Carolina Supreme Court. See *State* v. *Hill*, 20 S.C.L. (2 Hill) 607 (Ct. App.). That decision, however, was issued more than 40 years after the framing of the Confrontation Clause; it did not purport to rely on the Confrontation Clause in excluding the evidence at issue; and the evidence at issue was a statement made to a magistrate, not a statement made in response to emergency questioning. That decision therefore has no relevance here.

3. Petitioner next relies (Br. 22-34) on the development of the hearsay rule and its relationship to the doctrine that out-of-court statements were admissible if they formed part of the res gestae. According to petitioner (Br. 24-25), the rule that statements could be admitted as part of the res gestae was limited to statements before the relevant act occurred, such as "Prince Jones, don't shoot me," and did not extend to statements made just after the act, such as "Prince Jones just shot me." In fact, however, that has never been the settled understanding of the res gestae rule. While petitioner has cited nine state court cases decided between 1880 and 1887 that adhere to the res gestae line he identifies, there are other prominent decisions that viewed the res gestae to extend to statements made immediately or very shortly after the event described.

For example, in the only pre-Framing case cited by petitioner—*Thompson* v. *Trevanian*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694)—the court allowed a witness to testify to what the victim said "immediate[ly] upon the hurt received, and before she had time to devise or contrive any thing for her own ad-

vantage." It also appears that, before the framing of the Confrontation Clause, English courts allowed witnesses to testify about what the victim had told them some time after the crime had been committed.[4]

After the framing of the Confrontation Clause, some criminal courts in England and the United States continued to admit out-of-court statements implicating the defendant in the crime when the statements were made immediately or very shortly after the criminal conduct occurred. For example, in *Rex* v. *Foster*, 6 Car. & P. 325, 172 Eng. Rep. 1261 (1834), a person who witnessed a cab drive by, but did not see the cab run over the victim, was allowed to relate what the victim told him about the incident just after it occurred. Similarly, in *Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181, 184 (1849), a witness was allowed to testify that he heard the victim cry murder, went to find help, returned to the victim, and was then told by the victim that the defendant had stabbed her. Other cases reached the same result on similar facts.[5]

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[4] *Rex* v. *Salter*, Old Bailey Session Papers Nos. 330-332, at 280 (1755) (statements of victim after an assault identifying the defendant as the assailant) <http://www.oldbaileyonline.org/html_units/1750s/t17550910-29.html>; *Rex* v. *Matthews*, Old Bailey Session Papers No. 164, at 152-153 (1755) (statement of the victim to surgeon after the assault describing an altercation and where it occurred, but not identifying the assailant by name) <http://www.oldbaileyonline.org/html_units/1750s/t17750409_12.html>.

[5] *Commonwealth* v. *Hackett*, 84 Mass. (2 Allen) 136 (1861) (admitting testimony of witness that 20 seconds after he heard the victim cry out that he had been stabbed, the victim told him that the defendant had stabbed him); *People* v. *Vernon*, 35 Cal. 49, 51 (1868) (admitting witness's testimony that 30 to 45 seconds after he heard shots, the victim of the shooting told him that the defendant had shot him) ; *People* v. *Simpson*, 48 Mich. 474, 479 (1882) (admitting witness's testimony that he overheard the victim exclaim immediately after being shot, "My God, Simpson, you have shot me," and that she subsequently responded to the question "Who shot you, Madam?" with, "John Simpson"); *Reg.* v. *Lunny*, 6 Cox C.C. 477 (1854) (admitting witness's statement that victim told him that he was robbed by man who

Petitioner notes (Br. 30) that some scholars have not read *Trevanian* to support the admission of statements made after the relevant conduct has occurred to prove the matter asserted. And he further notes (Br. 26 & n.5) that some writers and courts have criticized *Foster* and *M'Pike*. But this Court examined those three decisions in *Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397 (1869), and it reached a contrary conclusion with respect to each case. In particular, it relied on *Trevanian* as authority for the proposition that statements made "almost contemporaneously" with an event are admissible as proof of the matter asserted, and it expressly endorsed the decisions in *Foster* and *M'Pike*. See *Mosely*, 75 U.S. (8 Wall.) at 405-409. Petitioner's view that there was a firm understanding that the res gestae rule did not allow statements describing a completed event to be admitted is therefore incorrect.[6]

There is, however, a more basic objection to petitioner's reliance on the development of the res gestae rule. That rule developed as an aspect of the hearsay rule, not as a method for determining limits imposed by the Confrontation Clause. As already discussed, a limitation that has its source in the general rules against the admissibility of hearsay does not have implications for defining the meaning of "testimonial" under the Confrontation Clause. See pp. 22-23, *supra*.

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walked with him to the crossroads); *Aveson* v. *Kinnaird*, 6 East. 189, 193, 102 Eng. Rep. 1258, 1261 (1805) (Chief Justice Lord Ellenborough stating in dicta that, "[i]f [a wife] declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence.").

[6] Cases such as *Trevanian*, *Foster*, *M'Pike*, and *Mosely* are now understood as examples of excited utterances admitted as an exception to the general rule against the admission of hearsay, rather than as applications of the res gestae rule. *E.g.*, *White*, 502 U.S. at 355 n.8 (citing *Trevanian*). Regardless of how they are characterized, however, they show that statements made immediately or very soon after an occurrence have long been admissible in civil and criminal trials.

Indeed, if the res gestae rule reflected an effort to implement the limits established by the Confrontation Clause, and not simply general hearsay standards, one would expect to see evidence that courts applied the rule differently in criminal and civil cases. But petitioner cites no such evidence. And the Court's reliance in *Mosely*—a civil case—on criminal case res gestae precedents suggests the opposite. Nor does he offer any other evidence that would contradict the conclusion of a leading commentator writing in 1880 that there has never been a distinction between the application of the res gestae rule in criminal and civil cases. James B. Thayer, *Bedingfield's Case*, 14 Am. L. Rev. 817, 829 (1880).

4. Petitioner also errs in relying (Br. 27-28) on cases holding that a rape victim's identification of a perpetrator soon after the incident could only be introduced when the victim testified. The only case decided before the framing of the Confrontation Clause cited by petitioner is *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), and that case did not address a situation in which a statement was made during an ongoing emergency. Instead, the report of the case indicates that the rape victim's statement was made immediately after she arrived home. Nor does the report of the case indicate that the decision to exclude the victim's statement was based on grounds that would be relevant to an interpretation of the Confrontation Clause. The stated ground of the decision was that "no testimony whatever can be legally received except upon oath," and that if infants "are found incompetent to take an oath, their testimony cannot be received." 168 Eng. Rep. at 202-203.

The later English and state court cases cited by petitioner likewise do not have a bearing on whether emergency statements are testimonial for Confrontation Clause purposes. While petitioner refers to the cases as involving fresh complaints, he does not identify any case that involved an ongoing

emergency. Indeed, in one of the cases petitioner cites, the statement at issue was made the day after the incident. See *Regina* v. *Guttridges*, 9 Car. & P. 471, 173 Eng. Rep. 916 (1840). In any event, state court and English cases decided long after the framing of the Confrontation Clause have little bearing on the meaning of that Clause.

III. MCCOTTRY'S STATEMENT IDENTIFYING PETITIONER AS HER ASSAILANT WAS A RESPONSE TO EMERGENCY QUESTIONING AND THEREFORE NOT TESTIMONIAL

In this case, petitioner's claim of constitutional error relates solely to the admission of McCottry's statement identifying petitioner as her assailant. The Washington Supreme Court ruled that, to the extent any other evidence admitted from the 911 tape was error, that error was harmless, J.A. 128-129, and petitioner has not challenged that harmless error determination in this Court.

Under a correct understanding of the Confrontation Clause, McCottry's statement identifying petitioner as her assailant was permissible. As a review of the transcript of the 911 tape demonstrates, that identification was a response to emergency questioning and therefore was not testimonial.

At the outset of the 911 call, McCottry informed the 911 operator that "[h]e's here jumpin' on me again" and "[h]e's usin' his fists." J.A. 8. McCottry's use of the present tense and the distress in McCottry's voice would have alerted a reasonable 911 operator to the existence of an apparent imminent danger to McCottry's safety. The operator then began asking questions that were reasonably necessary to determine how to resolve that emergency, such as whether the attacker had any weapons and whether he had been drinking. Those questions sought information that was important in assessing the nature of the danger to McCottry and others in

the house, as well as to the police who would be coming to assist her.

The 911 operator's next question—"do you know his last name"— was of the same character. J.A. 9. The identity of a person who may pose a current danger is an important fact to know in determining how to address that possible danger. Officers going to the scene of an apparent emergency "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." See *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). For example, obtaining a suspect's name "may inform an officer that a suspect * * * has a record of violence or mental disorder." *Ibid.* Accordingly, when McCottry named petitioner as the person responsible for hitting her, she was answering a question that was reasonably necessary in determining how to respond to the emergency she had identified. She was not testifying.[7]

[7] Although there is no need to decide whether the 911 operator's additional questions involved emergency questioning, as the Washington Supreme Court concluded, even after McCottry reported that petitioner was running out of the house and was driving away in his car, there was still an apparent emergency. At that point, there remained an imminent danger that petitioner would return immediately and assault McCottry again. Questions that were reasonably necessary to address that possibility constituted emergency questioning.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted.

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FEBRUARY 2006