No. 05-5224

IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington Supreme Court

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BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus curiae Public Defender Service for the District of Columbia represents indigent criminal defendants. *Amicus curiae* National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 state and local affiliate organizations numbering 28,000 members in 50 states.[1] As criminal defense lawyers, *amici* advise clients of their confrontation rights at trial, conduct cross-examinations of prosecution witnesses, and bring appellate challenges to restrictions on their clients' ability to confront prosecution witnesses—tasks they cannot perform effectively without a clear understanding of when the Sixth Amendment requires the government to present the testimony of witnesses against the accused in court and subject to cross-examination.

In *amici's* view, this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), formulated a standard that, if properly applied, has the potential to substantially clarify this calculus. But as Petitioner has demonstrated, significant interim uncertainty remains about what constitutes a "testimonial" witness statement necessitating confrontation under *Crawford*—particularly where, in order to prove its case, the prosecution relies on "excited" criminal accusations made by an absentee witness in response to questioning by a 911 operator or a responding police officer.

Amici believe that the Court has two excellent vehicles to address the use of unconfronted criminal accusations that are the product of both these scenarios—Mr. Davis's case (accusatory statements to a 911 operator) and *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005), Docket No. 05-5705 (petition filed August 5, 2005) (accusatory statements to responding police officers). *Amici* encourage this Court to

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

grant certiorari in both cases, as it has done in other related cases addressing a complex issue with widespread impact,[2] in order to put an end to the substantial uncertainty that currently plagues this important area of the law. To delay comprehensive guidance will perpetuate confusion in literally hundreds of criminal cases throughout the nation.

STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case, *see* Petition for Writ of Certiorari ("Pet.") at 1-6, with the additional observation that Mr. Davis's case shares three important similarities with those cases *amici* litigate daily in courts throughout the country.

1. Mr. Davis' case is representative of a group of post-*Crawford* cases that treat as unremarkable the absence at trial of the percipient witness to the alleged crime. Here, for example, the Washington Supreme Court determined that statements by an absentee accuser to a 911 operator were not "testimonial" despite the fact that it contained the "only evidence" linking Mr. Davis to the crime, Petitioner's Appendix ("Pet. App.") at 3, and despite the fact that the prosecutor could not even describe Ms. McCottry's statements to a lay jury without using the word "testimony." *Id.* at 6.

2. The Washington Supreme Court's focus on whether the absentee witness was subjectively motivated solely by a desire to "bear witness" at the time she made her statements is also typical of a subset of courts interpreting *Crawford*. Pet.

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[2] *See, e.g., Van Orden v. Perry*, 125 S. Ct. 346 (2004), and *McCreary County, Ky. v. ACLU*, 125 S. Ct. 310 (2004) (whether ten commandments displays violate the Establishment Clause); *Ewing v. California*, 535 U.S. 969 (2002), and *Lockyer v. Andrade*, 535 U.S. 969 (2002) (whether applications of California's Three Strikes Law violated the Cruel and Unusual Punishment Clause); *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (whether "correctable" disabilities are covered by Americans with Disabilities Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (whether employers are vicariously liable for sexual harassment under Title VII).

App. 5-6. In determining that Ms. McCottry was not so motivated, the Washington Supreme Court surmised that her statements were merely "a call for help," and the court appeared to look to Petitioner for contrary "evidence" concerning the absentee witness's subjective motivation for speaking. *Id.* The court also suggested that the "excited" accusations of an absentee witness to investigating police officers cannot serve as "testimonial" statements within the meaning of *Crawford* because they are never motivated solely by a desire to provide incriminating evidence. Pet. App. 5-6 (quoting *People v. Corella*, 18 Cal. Rptr. 3d 770 (2004)). The Washington court ignored this Court's observation in *Crawford* that an after-the-fact narrative of an event to government officials in response to questioning is testimonial, 541 U.S. at 58 n.8 (discussing *White v. Illinois*, 502 U.S. 346 (1992)), and that the admission of such a statement in *White* as a spontaneous declaration was "arguably in tension" with the Court's historical interpretation of the Confrontation Clause because such out-of-court statements would not have been admitted in criminal trials at common law. *Id.*

3. Instead of attempting to reconcile its analysis with either the common-law right to confrontation or the Framers' clear preference for in-court adversary testing described by this Court in *Crawford*, the Washington Supreme Court, like many courts nationwide, stressed that Ms. McCottry's statements to the 911 operator were not, in its view, the "functional equivalent" of the civil-law abuses that motivated the Framers to include the Clause in the Bill of Rights. Pet. App. 5-6. But, as is also typical of courts interpreting *Crawford* in this way, the Washington Supreme Court did not explain why, in resolving whether a statement necessitates confrontation under the *Crawford* analysis, tangential aspects of the historic abuses (such as the formality of *ex parte* affidavits) should play a decisive role in the "testimonial" analysis, while other seemingly more significant aspects of those abuses (namely, the fact that *ex parte* affidavits generally

involved criminal accusations made to known government agents by absentee witnesses) should be disregarded.

SUMMARY OF ARGUMENT

This Court should grant Mr. Davis's Petition, as well as the pending petition in *Hammon v. Indiana*, Docket No. 05-5705, in order to secure the uniform, analytically cohesive enforcement of the Sixth Amendment's confrontation guarantee. As demonstrated by Petitioner, the striking division among appellate courts regarding the "testimonial" nature of "excited utterances" made to 911 operators and responding police officers has matured and solidified. The lower courts cannot resolve this division because their dispute is not simply a matter of choosing among "formulations." *See Crawford*, 541 U.S. at 51-52. It stems from a basic disagreement about the purpose and scope of the Confrontation Clause now that the Court has reconnected it with its common-law origins.

On one side of this dispute are the courts that read *Crawford* as requiring a construction of the Sixth Amendment confrontation guarantee at least as broad as the common-law confrontation right. These courts are guided by this Court's repeated references to the functional common-law right and the Framers' belief that adversarial testing was an indispensable protection for a person accused of a crime. On the other side of this split are courts, like the Washington Supreme Court, that treat the confrontation guarantee as one that can be routinely denied based on the presence or absence of a variety of inconsistently applied arbitrary and subjective factors—much as was done under *Ohio v. Roberts*, 448 U.S. 56 (1980). To the extent these courts refer to the common-law origins of the right to confrontation at all, they limit their focus to tangential aspects of the *ex parte* affidavit practice that prompted the Framers to include the Confrontation Clause in the Bill of Rights, without explaining why the Framers would have accepted a definition of "testimonial" statements that leaves the government free to evade the common-law right to confrontation in new and different ways.

Mr. Davis's and Mr. Hammon's cases provide excellent vehicles for resolving this dispute. Both were witnessless criminal prosecutions that would have been forbidden at common law because they rose or fell on unconfronted criminal accusations made by an absentee witness to known government agents. Accordingly, in *amici*'s view (and the view of many appellate courts), such a prosecution should have been forbidden under *Crawford*. Because the Washington Supreme Court and the Indiana Supreme Court (among others) have held otherwise—applying an analysis representative of those courts that construe the confrontation right as far more narrow and pliable than it was at common law—granting review in Mr. Davis's case and Mr. Hammon's case will give this Court the means to resolve this fundamental dispute about the nature and purpose of the Sixth Amendment confrontation guarantee.[3]

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD CLARIFY THE GOAL OF *CRAWFORD'S* "TESTIMONIAL" INQUIRY.

The confusion about how to identify a "testimonial" statement, documented by Petitioner, *see* Pet. 8-18, is the product of a fundamental dispute about the purpose and scope of the Sixth Amendment right to confrontation now that the Court has reconnected it to its common-law origins.

A. The Common Law As Baseline.

Some courts read *Crawford* as reinforcing a "categorical constitutional guarantee[]," 541 U.S. at 68, founded on the common-law requirement that people functioning as witnesses against the accused provide "live testimony in court subject to adversarial testing," *id.* at 43, and born of the desire of the Framers to confer on defendants adequate means at a

[3] *Amici* fear that granting certiorari in *either* a 911 case *or* a responding officer case will be insufficient because courts will continue to narrowly limit their definition of "testimonial" statements only to those expressly declared "testimonial" by this Court.

criminal trial to probe the government's evidence against them—especially where that evidence consists of accusatory statements to known government agents.[4] This understanding of the Sixth Amendment right, where confrontation of percipient witnesses is the norm, is grounded in the detailed discourse in *Crawford* of the common-law origins of the Confrontation Clause and the value accorded to the practice of adversarial testing.

Throughout its opinion in *Crawford*, the Court repeatedly reaffirmed the common-law roots of the confrontation guarantee, noting that the Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the found-

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[4] *See, e.g., United States v. Summers*, 2005 WL 1694031 (10th Cir. (N.M.) Jul. 21, 2005) (statement by defendant's companion made to police testimonial); *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005) (accusations to police testimonial); *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (accusations to "forensic interviewer" testimonial); *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) (statement by defendant's companion made to police testimonial); *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004) (accusations to police testimonial); *People v. Adams*, 16 Cal Rptr. 3d 237, 244 (Cal. App.) (accusations to responding police officers testimonial), *review granted*, (Cal. 2004); *Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004) (same); *Miller v. State*, 2005 WL 1423393 (Ga. App. June 20, 2005) (same); *State v. Grace*, 111 P.3d 28 (Haw. App. 2005) (same); *In re E.H.*, 823 N.E.2d 1029, 1036 (Ill. App. 2005) (absentee complainant "bore accusatory testimony" because out-of-court accusations were repeated in court); *State v. Snowden*, 867 A.2d 314 (Md. 2005) (accusations to sexual abuse investigator testimonial); *State v. Clark*, 598 S.E.2d 213 (N.C. App.) (statements to police testimonial), *review denied*, 601 S.E.2d 866 (N.C. 2004); *State v. Lewis*, 603 S.E.2d 559 (N.C. App.) (same), *review allowed and appeal dismissed*, 608 S.E.2d 60 (N.C. 2004); *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (911 call testimonial); *State v. Hill*, 827 N.E.2d 351 (Ohio App. 2005) (accusation to responding police officer testimonial); *Mason v. State*, 2005 WL 1531286 (Tex. App. June 30, 2005) (same); *cf. State v. Branch*, 865 A.2d 673, 692 (N.J. 2005) (in order to "pay proper respect to the principles animating our Confrontation Clause jurisprudence," excited utterances to police inadmissible).

ing." 541 U.S. at 54; *see also id.* at 54 n.5 ("the Sixth Amendment incorporated the *common-law* right of confrontation"); *id.* at 68 ("the Sixth Amendment demands what the common law required"). In 1791, these exceptions were limited. *See id.* at 54 n.5 ("Marian examinations were admissible . . . only because the statutes *derogated* from the common law" but that by 1791 "even the statutory-derogation view had been rejected"); *id.* at 56 n.6 & 58 n.8 (delineating established exceptions to common-law confrontation right as of 1791; spontaneous declarations not part of the *res gestae* were not then established).

Although the Court in *Crawford* noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure," 541 U.S. at 50, it gave no indication that the constitutional right to confrontation was meant solely to prevent the replication of these historic abuses of the common-law right, while leaving functionally equivalent encroachments unregulated. Rather, the Court endorsed as a whole the common-law understanding that defendants should be permitted to confront their accusers—the "witnesses against" them—before the trier of fact in order to elicit additional information, probe inconsistencies or untruths, and thereby demonstrate reason to doubt the government's charges. *Id.* at 43-56, 61-62, 66-68. The Court also indicated that, where there was no "direct evidence" of the Framers' reaction to modern-day limitations on confrontation, courts should employ a "reasonable inference" analysis to preserve confrontation rights. *Id.* at 52 n.3.

The reliance on the common-law confrontation right as the baseline organizing principle for identifying "testimonial" statements comports with the Court's discussion of adversarial testing as *the* fundamental procedural guarantor of reliability:

> [The Confrontation Clause] commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination . . . . [and] thus reflects a judgment, not

> only about the desirability of reliable evidence . . . , but about how reliability can best be determined. *Cf.* 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

541 U.S. at 61-62; *see also id.* at 62 (condemning *Roberts* because "it allows a jury to hear evidence untested by the adversary process, based on a mere judicial determination of reliability").

Despite these many indications in *Crawford* that the object of the testimonial inquiry is to promote the practice of bringing live witnesses into court and to ensure today at least as broad an opportunity for cross-examination as existed in 1791, some appellate courts have taken a quite different approach. These courts accord little or no import to whether a person is, within a common-law or common-sense understanding, functioning as a "witness against" the defendant at trial, and they minimize, if not entirely disregard, the utility of adversarial testing. Much as they did under *Ohio v. Roberts*, these courts continue to act as gatekeepers and make subjective determinations about the need for confrontation based on ahistorical, arbitrary, and manipulable tests that reduce the confrontation right to a technicality. In order to find support for their varying pliable tests, these courts read isolated passages of *Crawford* out of context and ignore this Court's reliance on the common law and "the principles [it] sought to vindicate." *United States v. Booker*, 125 S. Ct. 738, 753 (2005).

B. *Roberts* Redux: Conditioning the Right to Confrontation On Speculation About the Absentee Witness's Subjective Motivation.

Instead of asking whether confrontation would have been required at common law as it existed in 1791, the Washington

Supreme Court, like many others,[5] held that assessing whether a statement made in a 911 call is testimonial involves "scrutiniz[ing] [the call] . . . to determine whether it is a call for help to be rescued or whether it is generated by a desire to bear witness." Pet. App. at 5. The court noted that Ms. McCottry had made her accusations to the 911 operator "as part of an ongoing emergency situation" while she was "crying and hysterical," *id.* at 6, and found that she was subjectively motivated to "call[] 911 because she was in immediate danger." *Id.* at 7. Based on its supposition that the absent Ms. McCottry's single subjective motive to speak to the 911 operator was to "call for help," the court held that her accusatory statements were nontestimonial and were admissible without confrontation. *Id.* at 6-7.

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[5] *See, e.g., United States v. Brun*, 2005 WL 1797451 at *3 (8th Cir. (Minn.) Aug. 1, 2005) ("emotional and spontaneous" 911 call nontestimonial); *Massey v. Lamarque*, 2005 WL 1140025 (9th Cir. May 9, 2005) ("spontaneous" accusation by "upset" witness on 911 tape nontestimonial); *Anderson v. State*, 111 P.3d 350, 354 (Alaska App. 2005) (accusatory "excited response" to responding police officer nontestimonial); *People v. Aubrey*, 2004 WL 2378400, at *7 (Cal. App.) (911 call nontestimonial because it was "a cry for help"), *review denied*, (Cal. Jan 12, 2005); *People v. Caudillo*, 19 Cal. Rptr. 3d 574, 590 (2004) (911 call nontestimonial where caller-witness reported crime to "protect the community"); *Hammon*, 829 N.E.2d at 458 (accusatory excited utterances to responding police officer nontestimonial where witness's motivation was simply "to convey basic facts"); *State v. Barnes*, 854 A.2d 208 (Me. 2004) (accusations made by "stressed" complainant who drove to police station on her own initiative nontestimonial); *People v. Walker*, 697 N.W.2d 159 (Mich. App. 2005) ("excited" accusations to neighbor and police nontestimonial); *State v. Wright*, 686 N.W.2d 295 (Minn. App.) (accusations in 911 call nontestimonial because complainant was seeking aid), *review granted*, (Minn. 2004); *People v. Coleman*, 791 N.Y.S.2d 112 (N.Y. App. Div. 2005) (same); *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) (same); *State v. Cannaday*, 2005 WL 736583 (Ohio App. Mar. 31, 2005) (accusations by "upset" complainant to police nontestimonial); *Commonwealth v. Gray*, 867 A.2d 560 (Pa. App. 2005) (excited utterances to responding police officers nontestimonial); *State v. Anderson*, 2005 WL 171441 (Tenn. App. Jan 27, 2005) (same); *Key v. State*, 2005 WL 467167 (Tex. App. Feb. 28, 2005) (same).

In *amici's* view, this focus on the subjective motivations of the speaker as the pivotal factor in the "testimonial" analysis cannot be reconciled with *Crawford*'s insistence on the common law as the touchstone for determining which statements require an opportunity for confrontation. Nothing in the common-law history suggests that the subjective motivations of the speaker should play any role in the analysis of which statements are "testimonial" and therefore necessitate confrontation. Thus, as the Court explained in *Crawford*, 541 U.S. at 62, the Framers' objection to Sir Walter Raleigh's trial, a quintessential common-law confrontation abuse, had nothing to do with Lord Cobham's subjective motivations for writing his accusatory letter or testifying before the Privy Council. Indeed, the whole point of confrontation would have been to allow Raleigh to explore Cobham's subjective motivations in making the accusations, by "confront[ing] Cobham in court, where he could cross-examine him and try to expose his accusation as a lie." *Id.*

A focus on the subjective motivations of the absentee witness not only has no foundation in the common law, but also runs afoul of this Court's efforts in *Crawford* to disentangle the confrontation guarantee from hearsay rules. Like a subjective test for "testimonial" statements, what constitutes admissible hearsay as an excited utterance or a spontaneous declaration also turns on the subjective motivation of the speaker. These statements are deemed to be motivated by the exciting event—not by any conscious design, much less the desire to bear witness. *See, e.g.*, Pet. App. at 15. In fact, the Washington Supreme Court favorably cited a California appellate court decision that observed that "it is difficult to perceive circumstances under which a statement qualifying as an excited utterance would be testimonial."[6] Pet. App. at 5; *but*

[6] Numerous courts have held that statements admissible under *Roberts* as "excited utterances" or "spontaneous declarations" by their very nature cannot be "testimonial" under *Crawford*. *See* Pet. at 10-11.

see Crawford, 541 U.S. at 58 n.8 (spontaneous declaration in *White* was "testimonial"). By focusing on precisely the same factors that a court would look to in determining whether to apply the "excited utterance" exception to the hearsay rule, the Washington Supreme Court's analysis improperly "leav[es] the Sixth Amendment's protection to the vagaries of the rules of evidence," *Crawford*, 541 U.S. at 61, and its analysis of the confrontation question is virtually indistinguishable from what it would have been under *Roberts*.

Moreover, a test that turns on speculative assumptions about an absent witness's subjective motivations is inconsistent both with this Court's admonition in *Crawford* that "only cross-examination could reveal" a witness's "perception of her situation," 541 U.S at 66, and with this Court's suggestion that testimonial statements may be identified by examining whether the circumstances surrounding the statement "would lead an *objective* witness *reasonably* to believe that the statement would be available for use at a later trial." *Id*. at 52 (emphasis added). An objective analysis under *Crawford* of what a witness anticipates (as opposed to what her motives are), would, as it did under the common law, focus on whether the statement is an accusation of a completed crime, whether it was made to a known government agent, and whether, given these factors, a reasonable person would know the statement is one that might be used in a criminal proceeding. In addition to their historical accuracy, reliance on these objective factors makes it easy to determine when confrontation will be required.

By contrast, reliance on the subjective motivation test espoused by the Washington Supreme Court and others makes it nearly impossible to predict whether a court will require confrontation for a particular statement. In Mr. Davis's case, the Washington Supreme Court focused on the emergency situation and Ms. McCottry's emotional upset as a basis for its supposition that her subjective motivation was to "call for help." But, as the dissent noted, there was contrary record evidence that

Ms. McCottry "never ask[ed] for help," Pet. App. 10, and, when asked if she needed an "aid car," told the 911 operator, "no I'm alright." *Id.* at 25. This, in conjunction with the accusatory nature of her statements and the fact that they were made to a government agent, could have supported a conclusion—under the same subjective test—that her subjective motivation was to bear witness because she must have known that her statements would be available for use in a later criminal proceeding. Moreover, it is entirely possible and reasonable to conclude on this record, as in many of these cases, that Ms. McCottry had *multiple* motivations for speaking to the 911 operator,[7] rendering the subjective motivation test all the more unpredictable and difficult to employ.

Finally, of particular concern to *amici*, adopting a subjective motivation test for "testimonial" statements where the right to confrontation under a given set of facts will "vary from place to place and from time to time"[8] presents a host of problems for practitioners. In addition to encountering grave difficulties in advising a client pre-trial about her Sixth Amendment rights, defense counsel would face obstacles in seeking to assert the client's confrontation rights at trial. In the regular course, defense counsel will not have had access to the absent percipient witnesses, thus making it difficult for counsel to challenge the prosecution's assertions about the percipient witnesses' subjective motivations. More troubling is the Washington Supreme Court's apparent suggestion that

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[7] Even if one of those motives were to seek aid, that should not obviate confrontation, because the desire to seek help does not preclude a witness from telling untruths. *See, e.g.*, *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004) (911 caller made false accusations in order to get the police to respond quickly to her home).

[8] *See Devenpeck v. Alford*, 125 S. Ct. 588, 594 (2004) (condemning standard of probable cause that turned on officer's subjective reason for making arrest, explaining that it is intolerable for the constitutional validity of the exact same arrest to turn on the officer's stated reasons for making the arrest).

a defendant has some unspecified burden to affirmatively present "evidence" about the witness's subjective motivations in speaking with police or he risks losing the right to confront the witness. Pet. App. at 6 (denial of confrontation affirmed in part because "no evidence that McCottry" subjectively possessed or was influenced by "common knowledge" that taped 911 calls could be used as evidence). Nothing in the common-law history of the Confrontation Clause or this Court's *Crawford* decision even hints that a defendant's confrontation rights turn on his ability to affirmatively prove the absent witness's subjective desire to bear witness. In addition to all the other problems with a subjective motivation test, the contrary suggestion by the Washington Supreme Court and other courts illustrates the urgent need for this Court to intervene and provide lower courts with further guidance on this issue.

C. Roberts Redux: Limiting Confrontation to Only Those Statements That Mirror Tangential Aspects of the Common-Law Abuses.

The Washington Supreme Court, like many others around the country, concluded without meaningful analysis that the Sixth Amendment right to confrontation also turns on whether an out-of-court witness statement sufficiently duplicates the formality or some other tangential aspect of the *ex parte* examination practice that was of immediate concern to the Framers.[9] Thus, the Court also affirmed the denial of con-

[9] *See, e.g., Anderson*, 111 P.3d at 357-58 (concurrence) (testimonial statements are the product of "the kind of formal, systematic questioning that was characteristic of the English inquisitorial practices that prompted the enactment of the Confrontation Clause"); *Aubrey*, 2004 WL 2378400, at *6 (accusations made to investigating police officer and 911 operator nontestimonial where court "could not believe that the framers would have seen a striking resemblance" between them and a justice of the peace's pre-trial examination"); *People v. Cage*, 15 Cal. Rptr. 3d 846, 854 (Cal. App. 2004) (accusations made to doctor nontestimonial because he "was not performing any function remotely resembling that of a Tudor, Stuart

frontation in Mr. Davis's case because "[Ms.] McCottry's 911 call cannot accurately be described as an ex parte examination or its functional equivalent." Pet. App. at 6.

Telephones, 911 operators, and professional police forces did not exist in 1791. Thus it is hardly surprising that the Framers had no express views on the use of 911 calls at criminal trials. But this omission merely proves why limiting "testimonial" statements to those that mirror the specific abusive mechanisms of Tudor, Stuart, or Hanoverian England is a woefully insufficient means of safeguarding the constitutional confrontation guarantee. Any meaningful analysis must focus on the "functional" problem of gravest concern to the Framers—the existence of patently unfair trials like Sir Walter Raleigh's, in which people were deprived of liberty and life based on criminal accusations to government agents that were never subjected to adversarial testing. In that dispositive respect, Ms. McCottry's unconfronted accusations to a 911 operator *can* "accurately be described" as the "functional equivalent" of the abusive practices most familiar to the Framers, who were not so shortsighted as to fail to predict that, if one particular means of evading the common-law right to confrontation were closed off, the government would inevitably find others.

It turns history on its head to ignore the salient aspects of Ms. McCottry's statements for confrontation purposes—that they were accusatory and made to a known government official—and to limit testimonial statements to those that sufficiently duplicate the civil-law abuses of which the Framers disapproved. After all, the "abuses" described in *Crawford* were only abuses at all because they sought to encroach, through a veneer of formality, on the established, broad common-law right that entitled an accused to confront his

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or Hanoverian justice of the peace"); *State v. Hembertt*, 696 N.W.2d 473, 481 (Neb. 2005) ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England" but police interview of complainant eliciting accusations was not an interrogation).

accuser in open court. The sixteenth and seventeenth century mechanisms used to evade the common-law right cannot now be used to define the whole of that right as it is preserved in the Confrontation Clause. Moreover, there is every reason to believe that at common law the informality of 911 calls would have *heightened,* not lessened, concerns about the use of such statements in criminal prosecutions. Indeed, *State v. Campbell*, 30 S.C.L. 124, 1844 WL 2558 at * 3 (App. L. 1844)—a nineteenth century decision relied on by this Court in *Craw-ford*, 541 U.S. at 49—made clear that the "emergency" and "excited" nature of common-law coroner's inquests made them even *less* amenable "to dispens[ing] with any of the common law guards."

The abuses-only construct of the right to confrontation not only misconstrues the parameters of the common-law right, but also, as with the subjective motivation test for "testimonial" statements, permits courts to make entirely subjective and unpredictable determinations as to when confrontation is warranted. In their efforts to determine when a modern-day police practice sufficiently resembles the civil-law abuses, some appellate courts have articulated a mishmash of possible characteristics of a testimonial statement (its formality,[10] its timing in relation to the alleged incident, [11] its timing in relation to the filing of criminal charges,[12] the pres-

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[10] *See, e.g., State v. Maclin*, 2005 WL 313977 (Tenn. App. Feb. 9, 2005) (nontestimonial: "informal" accusation to police responding to 911 call); *Lee v. State*, 143 S.W.3d 565, 570 (Tex. App. 2004) (testimonial: recording statement made after roadside traffic stop rendered it sufficiently formal); *but see People v. Kilday*, 20 Cal. Rptr. 3d 161, 173 (Cal. App. 2004) ("presence or absence of indicia of formality" not "determinative"), *review granted*, 23 Cal Rptr. 3d 693 (Cal. 2005).

[11] *See, e.g., Wright*, 686 N.W.2d at 302 (nontestimonial: statement made to police minutes after alleged incident); *but see People v. King*, 2005 WL 170727 (Colo. App. Jan. 27, 2005) (nontestimonial: time between injury and elicitation of statements by police unknown).

[12] *See, e.g., Aubrey*, 2004 WL 2378400, *8 (nontestimonial: "no suspect was under arrest, no trial was contemplated"); *Lee*, 143 S.W.3d at

ence or absence of structured police questioning,[13] the location in which it was made,[14] the identity of the witness,[15] the identity of the auditor,[16] the state of mind of the auditor,[17] the state of mind of the witness[18]). But these factors (none of which captures the most important features of the civil-law

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570 (testimonial: statement made after defendant's arrest); *but see Stancil v. United States*, 866 A.2d 799 (testimonial: made to police after scene was secured but before arrest), *reh'g en banc granted*, 2005 WL 1653880 (D.C. June 29, 2005).

[13] *See e.g.*, *Aubrey*, 2004 WL 2378400, at *8 (nontestimonial: no "structured [police] questioning, just an open-ended invitation for . . . [the witnesses] to tell their story"); *Barnes*, 854 A.2d 208 (nontestimonial: voluntary accusation); *Davis v. State*, 2005 WL 183141, *4 (Tex. App. Jan. 27, 2005) (same); *but see Talley v. Commonwealth*, 2005 WL 387443, at *3 (Ky. Feb. 17, 2005) (nontestimonial: government officers involvement in statement's production irrelevant).

[14] *See, e.g.*, *King*, 2005 WL 170727, at *5 (nontestimonial: statement made to police officer in noncustodial setting and without indicia of formality); *but see Barnes*, 854 A.2d at 211 (*non*testimonial: statement made at police station).

[15] *See, e.g.*, *Davis*, 2005 WL 183141, at *4 (nontestimonial: police did not consider who made accusatory statement to be "a suspect, an accomplice, or a co-conspirator"); *but see Wright*, 686 N.W.2d at 302 (nontestimonial: 911 caller expects to maintain "cloak of anonymity").

[16] *See, e.g.*, *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. 2005) (*Crawford* "applies only to statements to government officials"); *Heard v. Kentucky*, 2004 WL 1367163, at *5 (Ky. App.) (accusatory statement to grandmother and doctor nontestimonial, but accusatory statement to police testimonial), *review granted*, (Ky. 2005); *but see Barnes*, 854 A.2d at 211 (*non*testimonial: statement made to police at police station).

[17] *See, e.g.*, *People v. Bradley*, 2005 WL 1774080 at *7 (N.Y. App. Div. July 28, 2005) (what is testimonial turns on "the objective of the person posing the question"); *Corella*, 18 Cal. Rptr. 3d at 776 (nontestimonial: 911 call; 911 operator was "not conducting a police interrogation in contemplation of a future prosecution"); *Stancil*, 866 A.2d at 812-13 (nontestimonial: made to police officers who were "securing scene"); *Hembertt*, 696 N.W.2d at 483 (same); *but see Hammon*, 829 N.E.2d at 456 (what is testimonial turns on motive of questioner *and* responder).

[18] *See* Pet. at 10-11 (cases holding excited utterances are nontestimonial); *see also Brun*, 2005 WL 1797451 (same); *Key*, 2005 WL 467167 (same); *but see Stancil*, 866 A.2d at 809 (some excited utterances are testimonial); *Hembertt*, 696 N.W.2d at 482 (same); *Hammon*, 829 N.E.2d at 456 (motives of questioner *and* responder are dispositive).

abuses, *see* Point II *infra*) vary, and it is unclear which factors (or combination thereof) are dispositive. *See* 541 U.S. at 63 (unpredictability of multi-faceted *Roberts* test "fail[ed] to provide meaningful protection from even core confrontation violations"). This test is a return to the *Ohio v. Roberts* regime so pointedly rejected in *Crawford.*

* * * *

Like *Crawford* before it, Mr. Davis's case is a "self-contained demonstration" of the "unpredictable and inconsistent application" of the right to confrontation, 541 U.S. 66, which this Court should use to clarify which of the lower court analyses more accurately reflects its vision of the confrontation right. But *Davis* alone cannot capture the depth and breadth of the post-*Crawford* confusion, and there is every reason to believe that, even if this Court clarifies the application of *Crawford* to 911 calls, further clarification will nonetheless be required in the responding officer context. *See* nn. 9-18 *supra* (documenting the varied and conflicting factors upon which courts are relying to deny the right to confrontation). Accordingly, this Court should also consider granting review in *Hammon v. Indiana*, Docket No. 05-5705. This Court has frequently used the practice of granting review in two cases involving different permutations of the same issue in order to provide more comprehensive guidance to lower courts, *see* note 2 *supra*, and such a procedure would be especially appropriate here, where the legal confusion stemming from this Court's *Crawford* decision is widespread.

II. THIS COURT SHOULD CLARIFY THAT ACCUSATORY STATEMENTS ABOUT COMPLETED CRIMES TO KNOWN GOVERNMENT OFFICIALS ARE "TESTIMONIAL."

Like the trial of Sir Walter Raleigh, Mr. Davis's trial was a "paradigmatic confrontation violation," *Crawford*, 541 U.S. at 52, when viewed through the lens of the common law. Raleigh's complaint and his contemporaries' shame was that

he had been prevented from confronting his accuser, Lord Cobham, in court and that Cobham's unconfronted statements to the Privy Council were used to convict him. *Id.* at 44, 62. Like Raleigh, Mr. Davis was never permitted to confront Ms. McCottry, upon whose out-of-court accusations made to a known government agent—described by the prosecutor in closing as "testimony"—the government's entire case relied. But although the Washington court acknowledged that McCottry's identification of Davis as her assailant was "essential to the prosecution of this case," it deemed her statements "nontestimonial and properly admitted." Pet. App. 7. In so doing, it ignored their accusatory nature and deemed significant that they were the product of a 911 call, not "an in custody interrogation by police." *Id.* at 5.

The text and history of the Sixth Amendment preclude a definition of "testimonial" statements that authorizes the introduction at trial of facially accusatory out-of-court statements to known government agents without any opportunity for cross-examination. First, a person accusing someone of a past crime—an accuser—is the quintessential "witness against" the "accused" in a "criminal prosecution" contemplated by the Sixth Amendment. U.S. Const. amend. VI; *see also Crawford*, 541 U.S. at 43 (the Confrontation Clause has its roots in the "right to confront one's accusers . . . [in] Roman times"); *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused"). Indeed, as in Mr. Davis's case, an accuser's statements typically serve as the foundation, if not the whole, of the prosecution's case. "[T]he legal community at the time of the framing understood that at least a witness who made an accusation against the defendant was the equivalent of a witness against him." Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sex Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 750 (discussing *King v. Brasier*, 168 Eng. Rep. 202

(1779) (complainant impermissibly acted as a witness against the defendant by virtue of the introduction of her unsworn accusations at trial)).

Second, government involvement in procuring a witness statement about a completed crime—regardless of its precise form—also should render a statement "testimonial." As the Framers were well aware, government involvement in securing witness statements always carries the potential for abuse because it places the government in the position of ensuring that the government's side of the story is the one the witness tells. *Crawford*, 541 U.S. at 53, 56 n.7. "Neutral" government officers, 541 U.S. at 66, are trained to elicit the precise information the government needs to sustain a prosecution. *See, e.g.*, Pet. App. 21-23.[19] There is only added danger when the statements are elicited in haste, shortly after an alleged incident, by government agents making an initial assessment of the situation based on incomplete information because the government may unwittingly pursue charges that only adversarial questioning could expose as exaggerated or unfounded.

For these reasons, the involvement of known government officials in securing witness statements also triggered (but was not the sole prerequisite for) the common-law confrontation right. A well-documented abuse of that right arose from the introduction of sworn statements to justices of the peace (the closest analog to our modern-day police) in lieu of live witness testimony. 541 U.S. at 43. Similarly, much of the evidence introduced against Sir Walter Raleigh "in derogation of the common law" was elicited from Lord Cobham by the

[19] In the instant case, the 911 operator tracked the questions scripted in the "Police Incident Interview Techniques" set forth in the city's standard operating procedures—questions that were drafted knowing that arrests could be made based on information gathered from 911 callers. Pet. App. 9 n.5 & 21-28; Pet. at 2 (quoting Standard Operating Procedures, Section 4, at 29).

Privy Council. *Id.* at 44, 46.[20] Thus, just as "[t]he Framers would be astounded to learn that *ex parte* testimony could be admitted . . . because it was elicited by 'neutral' government officers," *id.* at 66, the Framers would be appalled at the widespread practice of convicting defendants based in large part on "dial-in" 911 testimony or officers' hearsay accounts of complainants' on-the-scene accusations. Richard Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171 (2002).

There is no textual, historical, or common sense justification for a definition of "testimonial" that compels confrontation for statements derived from "in custody interrogation" and that shelters from adversarial testing accusations that have been made "informally" and in haste to government agents. 541 U.S. at 61 ("the Clause's ultimate goal is to ensure reliability of evidence" through cross-examination). That the Washington Supreme Court and many like it have determined that the latter statements are not "testimonial" under *Crawford* illustrates the critical need for this Court to provide further guidance on this issue.

CONCLUSION

For the reasons set forth above, the Petition should be granted.

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[20] The historical record does not reflect that the Framers were concerned exclusively, or even primarily, with ensuring confrontation only for those statements made in response to coercive or overly suggestive questioning by government officials. Indeed, many common-law abuses involved witnesses (apparently labeled "bringers") who made statements to the Justices of the Peace and who "were extremely willing witnesses"—thus rendering leading questions "unnecessary." Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 568 (2005).

Respectfully submitted,

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