**Nos. 05-5224 and 05-5705**

**IN THE**
# Supreme Court of the United States

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**HERSHEL HAMMON,**
*Petitioner,*

*- v. -*

**INDIANA,**
*Respondent.*

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**ADRIAN MARTELL DAVIS,**
*Petitioner,*

*- v. -*

**WASHINGTON,**
*Respondent.*

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ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF INDIANA AND WASHINGTON

## BRIEF OF *AMICUS CURIAE* THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS


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**On Writs of Certiorari to the Supreme Courts of Indiana and Washington**

# BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

## INTEREST OF THE *AMICUS CURIAE*

The National District Attorneys Association ("NDAA")[1] is a nonprofit corporation and the sole national

[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 amicus, has made a monetary contribution to the preparation or submission of this brief.

membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and *amicus curiae* activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People."

The NDAA and its members have a compelling interest in the outcome of these appeals because of the severe damage a reversal in either case could do daily in innumerable prosecutions in courthouses across this nation. Put simply, the positions advanced by petitioners would have an enormous and negative impact on the ability of prosecutors to do their jobs, and of the courts to do justice. As the facts in Hammon and Davis show, great harm would be done in domestic violence prosecutions, in which victims frequently will not appear in court. Should informal statements taken in the immediate wake of attacks on domestic violence victims be excluded, as petitioners ask, juries would never hear the reports which, very often, are the most trustworthy proof of serious crimes.

And the damage would by no means be limited to domestic violence cases. Elderly victims, children, and the socially powerless frequently are unable or unwilling to appear in court. A rule disallowing statements that traditionally have been admissible under hearsay exceptions such as the one for excited utterances would offer a free pass to many of those who prey on such victims. Nor are cases involving vulnerable victims the only ones at stake. For centuries the courts have admitted hearsay in all kinds of criminal cases, on behalf of the prosecution and the defense, because the wisdom of the

common law has demonstrated that hearsay exceptions promote just results.

Critically, there is no constitutional justification for the harmful results that petitioners seek. The Confrontation Clause was designed to preclude "trial by affidavit." A trial by affidavit is one in which the prosecution makes its case with a declaration (1) created in a formal out-of-court examination, by a government agent, (2) of a declarant aware that the statement was intended for use at a trial. NDAA asks this Court to return to this understanding of the Confrontation Clause and make clear that, subject to due process limitations, states are free to regulate the admissibility of non-testimonial hearsay statements.

## SUMMARY OF ARGUMENT

The present cases require this Court to determine whether the statements at issue are "testimonial" hearsay barred by the Confrontation Clause of the Sixth Amendment. The petitioners in Hammon v. Indiana and Davis v. Washington both take a wrong turn in analyzing the meaning of "testimonial." In that regard, petitioner Davis incorrectly posits that the Confrontation Clause forbids the admission of any hearsay that does not fall within a hearsay exception recognized before 1791 (see Davis Brief: 11-12, 22-34).[2] This Court has never -- including in Crawford v. Washington – suggested that the Confrontation Clause froze hearsay law in 1791.

[2] The brief of petitioner Hammon sometimes appears to endorse that position as well (see Hammon Brief: 22, 28).

Petitioner Hammon puts forward an equally flawed theory, finding "testimonial" any statement that transmits to a known public official "information for use in investigation or prosecution of crime" (Hammon Brief: 13). In Hammon's view, it makes no difference whether the officer or the declarant intended that the information would be used at a trial; nor does it matter why the information was transmitted or whether the officer was involved in preparing a case for trial (see Hammon Brief: 7, 10, 12-14, 18, 20-21, 41). In fact, Hammon would extend the meaning of "testimonial" to include many statements made to civilians (see id. at 11, 15 n. 11, 17). This expansive view of the Confrontation Clause ignores the Framers' view: the clause was designed to serve the limited purpose of protecting against the common-law evil of "trial by affidavit."

As a review of this Court's decisions makes plain, the Confrontation Clause bars prosecutors from collecting formalized statements from witnesses and then using those statements at trial, without affording the defendant an opportunity for cross-examination. Beyond that core purpose, the Founders left the states free to develop hearsay exceptions, just as they are free to develop other aspects of evidentiary law and criminal procedure, in a manner consistent with due process. Otherwise, the Confrontation Clause will become a meta-hearsay rule imposed, unjustifiably, upon the states by the federal courts.

The argument of amicus NDAA consists of three parts. Part One examines the historical pronouncements of this Court to demonstrate that the Framers intended that the Confrontation Clause serve a limited purpose and did not seek to freeze hearsay law in 1791. Part Two discusses this Court's recent decision in Crawford v. Washington, 541

U.S. 36 (2004), which focused its analysis on the core purpose of the clause and rejected the view that virtually all hearsay is subject to Sixth Amendment scrutiny. Specifically, as Crawford explained, the Confrontation Clause imposes close constitutional scrutiny only on "testimonial" hearsay – that is, formal statements of witnesses created for use at trial, or their close equivalents. Part Three addresses the regulations, apart from the Confrontation Clause, which govern non-testimonial hearsay.

## ARGUMENT

### Part One: Supreme Court Pronouncements Regarding the Core Confrontation Right and its Relationship to the Hearsay Rule

### A. The Text of the Confrontation Clause

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added). It is undisputed that this clause permits a criminal defendant to confront and cross-examine any witness who gives live testimony at trial. However, from the text alone, it is not clear whether the clause bars the prosecution from introducing hearsay statements of declarants who do not appear at trial. As this Court noted in Crawford, "witnesses against" could be understood to mean only "those who actually testify at trial." Crawford, 541 U.S. at 42-43. If that definition were adopted, a hearsay declarant would not qualify as a "witness" within the meaning of the Confrontation Clause, just as a hearsay declarant is not ordinarily considered a "witness" within the

meaning of the compulsory process clause of the Sixth Amendment or the self-incrimination clause of the Fifth Amendment. See Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L.J. 1045, 1047 (1998). Alternatively, "witnesses against" could be interpreted to mean "those whose statements are offered at trial," which would encompass all hearsay declarants. See Crawford, 541 U.S. at 43. Or, perhaps, the solution is "something in-between." Id.

**B. Supreme Court Interpretations of the Confrontation Clause Prior To Ohio v. Roberts**

The Confrontation Clause was not held applicable to the states until 1965. See Pointer v. Texas, 380 U.S. 400 (1965). In this Court's earlier decisions, few controversies arose regarding the Sixth Amendment right of confrontation, and the clause had little impact on the conduct of criminal trials. In fact, this Court did not consider whether the Confrontation Clause might bar admission of out-of-court statements at criminal trials until Reynolds v. United States, 98 U.S. 145 (1878), which was decided nearly 90 years after the adoption of the Bill of Rights.[3] And, when faced with that question, this Court adopted a circumscribed view that the confrontation right was grounded in its history and was a response to grave abuses that occurred at common law.

[3] In Reynolds, this Court upheld the admission of an unavailable witness's prior testimony, because the defendant had an opportunity to cross-examine the witness at the prior trial and, also, the defendant was responsible for the witness's failure to appear. See id. at 159-61.

In particular, this Court's earliest decisions reveal that the "primary object" of the provision was "to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness." Mattox v. United States, 156 U.S. 237, 242 (1895); see also Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); Dowdell v. United States, 221 U.S. 325, 330 (1911). Consistent with that purpose, many of the early Confrontation Clause disputes involved efforts by the prosecution to introduce formalized documents or the prior sworn statements of nontestifying witnesses. See, e.g., Dowdell, 221 U.S. at 328-30 (certified record of prior court proceedings); Motes v. United States, 178 U.S. 458, 470-74 (1900) (testimony at a "preliminary trial"); Kirby v. United States, 174 U.S. 47, 49-50, 53-54 (1899) (guilty pleas of accomplices); Mattox, 156 U.S. at 240-43 (prior sworn testimony of deceased witness); Reynolds v. United States, 98 U.S. 145, 158-61 (1878) (testimony at prior trial).[4]

To be sure, this Court realized that the confrontation right might sometimes overlap with common law hearsay prohibitions. For instance, in Mattox, the Court discussed in dicta whether the Confrontation Clause barred admission

[4] The admission of formalized statements does not necessarily constitute a violation of the Confrontation Clause if the defendant had a prior opportunity to confront and cross-examine the witness. See Mattox, 156 U.S. at 240-43 (no error in admission of former testimony of deceased witness, whom the defendant had cross-examined at a prior trial: "the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read").

of dying declarations, concluding that such statements were admissible under a longstanding common-law exception. See Mattox, 156 U.S. at 243-44; see also Dowdell, 221 U.S. at 330.[5] But critically, not one of this Court's early cases held that the Confrontation Clause barred the admission of statements that lacked the formal trappings of affidavits, depositions, prior sworn testimony, or the like.

Further, in its early decisions, this Court refused to expand the confrontation right beyond its core if doing so would interfere with state court procedures and evidentiary rules. For instance, in Snyder v. Massachusetts, supra, 291 U.S. at 102-22, this Court (per Justice Cardozo) rejected the defendant's argument that the state court violated his confrontation rights by permitting the jury to view the crime scene in the defendant's absence. Assuming without deciding that the Fourteenth Amendment made the Confrontation Clause applicable to the states, see id. at 106, Justice Cardozo observed that a state court procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Id. at 105. This Court explained that there had always been "recognized exceptions" to the "privilege of confrontation," such as dying declarations. Id. at 107. The Court added that the "exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." Id.

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[5] Similarly, the Court noted in Dowdell that the Confrontation Clause did not bar admission of documentary evidence used to prove collateral facts, because such evidence had been admissible at common law. See Dowdell, 221 U.S. at 330.

As noted, in 1965, Pointer held that the Confrontation Clause is applicable to the states. See Pointer, 380 U.S. at 403. After Pointer, this Court continued to make clear that the clause had not "constitutionalized" the general, common-law restrictions on hearsay. For instance, in California v. Green, 399 U.S. 149 (1970), this Court held that the defendant's confrontation rights were not violated by a California hearsay rule which, contravening the "orthodox" common law rule, allowed admission of prior inconsistent statements for their truth. See id. at 153-64. While noting that the Confrontation Clause and hearsay rules sometimes "protect similar values," this Court stated pointedly that the clause does not represent "a codification of the rules of hearsay and their exceptions as they existed historically at common law." Id. at 155. On the contrary, "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." Id. at 156. Notably, in concurrence, Chief Justice Burger "emphasize[d] the importance of allowing the States to experiment and innovate." Id. at 171. Justice Harlan, too, observed that the Confrontation Clause protects against "flagrant abuses" and does not "ordain common law rules of evidence with constitutional sanction." Id. at 179.

In the same vein, this Court held in Dutton v. Evans, 400 U.S. 74 (1970), that the Confrontation Clause did not prevent Georgia from adopting a hearsay rule under which coconspirator statements were admitted more liberally than under federal law. This Court emphasized that the relatively limited federal hearsay exception was "a product, not of the Sixth Amendment," but of other policy concerns. Id. at 82. Moreover, the defendant's challenge to

the Georgia rule did not fall within the core of the confrontation right, because it did not involve, for instance, "a confession made in the coercive atmosphere of official interrogation" or a "wholesale denial of cross-examination." Id. at 87. Likewise, in concurrence, Justice Harlan observed that it was not the "core purpose" of the Confrontation Clause to "prevent overly broad exceptions to the hearsay rule," because "the clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence." Id. at 94, 96.

Underpinning the notion that the Confrontation Clause served a limited, core purpose, nearly all of this Court's confrontation cases from the era of Pointer, Dutton, and Green -- like the earlier cases from the Mattox era – prohibited the introduction only of formal statements akin to affidavits or depositions, such as prior sworn testimony or confessions obtained as a result of police interrogation. See, e.g., Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (prior testimony); Green, 399 U.S. at 151-52 (preliminary hearing testimony and inculpatory statement to the police); Roberts v. Russell, 392 U.S. 293, 293-95 (1968) (codefendant's confession); Bruton v. United States, 391 U.S. 123, 126-28 and n. 3 (1968) (same); Berger v. California, 393 U.S. 314 (1969) (preliminary hearing testimony); Barber v. Page, 390 U.S. 719, 720-25 (1968) (same); Brookhart v. Janis, 384 U.S. 1, 4 (1966) (codefendant's confession); Douglas v. Alabama, 380 U.S. 415, 416-20 (1965) (same); Pointer, 380 U.S. at 401-08 (preliminary hearing testimony). In fact, prior to 1980, this Court heard hardly any cases in which defendants alleged that the admission of non-formalized hearsay statements violated their confrontation rights. And, when faced with such claims, this Court rejected them out of hand. See

Dutton, 400 U.S. at 76-90 (statement of coconspirator); Delaney v. United States, 263 U.S. 586, 590 (1924) (same).

### C. Ohio v. Roberts and the "Constitutionalization" of Hearsay Law

This Court charted a new course in Ohio v. Roberts, 448 U.S. 56 (1980), subjecting every hearsay statement admitted at a criminal trial to Confrontation Clause scrutiny. Notably, the contested evidence in Roberts -- a witness's sworn testimony at a preliminary hearing, see id. at 58-59 -- fell within the core class of statements to which the Confrontation Clause had always been applied. Hence, the Court in Roberts had no need to consider whether the Confrontation Clause applied to all hearsay. And notably, the Roberts Court expressed no desire to "map out a theory" of confrontation that "would determine the validity of all hearsay . . . exceptions." Id. at 64-65 (internal quotations omitted). Nevertheless, seeking a general standard to reconcile the Confrontation Clause and the hearsay rule, this Court held that the prosecution could not "normally" introduce the hearsay statement of a nontestifying declarant without first demonstrating the declarant's unavailability. Id. at 66. Even then, the statement was admissible only if it fell within a "firmly rooted" hearsay exception or bore other "particularized guarantees of trustworthiness." Id.[6]

[6] In Roberts, the Court held that admission of the witness's preliminary hearing testimony did not violate the defendant's confrontation rights, because the hearing testimony bore sufficient indicia of reliability. See Roberts, 448 U.S. at 70-74. The Court eschewed a resolution more compatible with the traditional interpretation of the clause: that the defendant's (continued . . .)

Significantly, even while applying the far-reaching Roberts standard, this Court abided generally by the core principles of the Confrontation Clause. That is, the Court held formalized hearsay accusations, including statements made during police-arranged interrogations, inadmissible under the clause and permitted the admission of less-than-formal declarations. Compare Lilly v. Virginia, 527 U.S. 116, 120-21, 127-39 (1999) (holding that admission of accomplice's confession to the police, which incriminated defendant, violated defendant's confrontation rights); Idaho v. Wright, 497 U.S. 805 (1990) (state court violated defendant's confrontation rights by admitting statements made by child victim to pediatrician during examination of victim arranged by police and child welfare officials); and Lee v. Illinois, 476 U.S. 530, 546-47 (1986) (codefendant's confession to the police was improperly admitted at defendant's trial); with White v. Illinois, 502 U.S. 346, 348-58 (1992) (holding that the Confrontation Clause did not bar admission of excited statements made by the child victim to her babysitter, her mother, and a police officer who arrived on the scene); and United States v. Inadi, 475 U.S. 387, 388-400 (1986) (holding that the Confrontation Clause did not require the prosecutor to prove unavailability before introducing the statements of a nontestifying coconspirator).

Moreover, even while the Roberts standard prevailed, this Court acknowledged that the Confrontation Clause should not be viewed as a "general rule prohibiting

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confrontation rights were not violated because he had an opportunity to examine the witness at the preliminary hearing. See Crawford, 541 U.S. at 58; Roberts, 448 U.S. at 70.

the admission of hearsay statements." Wright, 497 U.S. at 814; see also White, 502 U.S. at 357 (declining to interpret the Confrontation Clause to work a "wholesale revision of the laws of evidence") (internal quotations omitted); Inadi, 475 U.S. at 392 ("Roberts itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay"); cf. Lilly, 527 U.S. at 137 (analogizing accomplice confession at issue to "the core concerns of the old ex parte affidavit practice").

The attempt of Roberts to "steer a middle course," White, 502 U.S. at 352 (quoting Roberts, 448 U.S. at 68 n. 9), ultimately failed. Almost from its inception, Justices and commentators criticized Roberts for abandoning a century of precedents regarding the core meaning of the Confrontation Clause. Concurring in White, Justice Thomas (joined by Justice Scalia) argued that the Roberts standard "complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence" by assuming that "all hearsay declarants are 'witnesses against' a defendant within the meaning of the Clause" -- "an assumption that is neither warranted nor supported by the history or text" of the Sixth Amendment. White, 502 U.S. at 358-59 (Thomas, J., concurring) (emphasis in original). Justice Thomas advocated a return to the historical interpretation that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Id. at 365; see also Lilly, 527 U.S. at 143-44 (Thomas, J., concurring).

Similarly, in Lilly, Justice Breyer argued that the effort to "tie the [Confrontation] Clause so directly to the

hearsay rule" was "of fairly recent vintage" and that the reliability standard of Roberts was "too narrow and too broad" when viewed in light of the "traditional purposes" of the clause. Lilly, 527 U.S. at 140-41 (Breyer, J., concurring). Specifically, Justice Breyer explained that the reliability rule was too broad, because it "would make a constitutional issue out of the admission of any relevant hearsay statement," even one "made long before the crime occurred and without relation to the prospect of a future trial." Id. at 142 (emphasis in original). In addition, the reliability rule was too narrow, because it would permit admission of "testimony" prepared out of court so long as it fell within a "well-recognized hearsay rule exception." Id. at 141. Justice Breyer also questioned the notion, implicit in the Roberts standard, that the Sixth Amendment inquiry should focus on the "trustworthiness" of the statement at issue. See id. at 142. Justice Breyer predicted that, in a future case, it might be necessary to "reexamine the current connection between the Confrontation Clause and the hearsay rule." Id.; see also Amar, Confrontation Clause First Principles, 86 Geo. L.J. at 1048-49; Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998).

## Part Two: The Supreme Court Returns to the Core Principles of the Confrontation Clause in Crawford v. Washington

### A. Crawford Overrules Roberts and Restores the Understanding that the Confrontation Clause Is Aimed at Only a Limited Class of Hearsay.

In Crawford, supra, this Court rejected the Roberts analysis and returned to an understanding of the Confrontation Clause consistent with its jurisprudence for

the 100 years prior to Roberts. This Court held that Roberts had wrongly departed from the historical focus of the Confrontation Clause, which was to prevent the "use of ex parte examinations as evidence against the accused." Crawford, 541 U.S. at 50. This Court explained that the confrontation right was designed to redress flagrant abuses that occurred in civil-law practice and under the Marian statutes in 16th- and 17th-century England, and particularly during the treason trial of Sir Walter Raleigh. See id. at 43-47. A confrontation right restricting the prosecutorial use of ex parte examinations arose as a result. See id. at 45-47.

Further, the text of the Confrontation Clause, which guarantees an accused the right to confront the "witnesses" against him, Crawford, 541 U.S. at 51, demonstrates its focus. "Witnesses," this Court noted, are "those who 'bear testimony.'" Id. (quoting 1 N. Webster, An American Dictionary of the English Language (1828) (emphasis added)). Hence, the Confrontation Clause was designed to prevent "admission of testimonial statements of a witness who did not appear at trial." Id. at 53-54 (emphasis added).[7] The clause was not, as Roberts suggested, aimed at all hearsay. Id. at 51 ("not all hearsay implicates the Sixth Amendment's core concerns"). Crawford plainly stated that Roberts had reached too far in subjecting all hearsay to "close constitutional scrutiny." Crawford, 541 U.S. at 60; see also Wright & Graham, Federal Practice

[7] Consistent with the confrontation right, the prosecution may introduce even a testimonial statement of a nontestifying witness if the witness is unavailable and the defendant had a prior opportunity to cross-examine him. See id. at 54; accord Mattox, 156 U.S. at 240-43.

and Procedure: Evidence §§ 6343, 6344, pp. 326-30, 345, 393-94 (1997).

Significantly, Crawford cited this Court's pre-Roberts precedents with approval, finding them "largely consistent" with the principles underlying the Confrontation Clause. See Crawford, 541 U.S. at 57. Crawford also approved the "outcomes," if not the reasoning, of this Court's decisions during the Roberts era, stating that the results "hew[ed] closely to the traditional line." Id. at 58.[8] The Crawford Court adopted a new standard not in order to overrule precedents, but to guide lower courts, which had received little meaningful direction from the "amorphous" Roberts reliability rule. See id. at 63-64. In short, Crawford admonished lower courts to enforce core confrontation principles strictly and, when faced with cases outside the core, to forestall the "constitutionalization" of ordinary hearsay rules.

All of this explodes the central theme of the brief of petitioner Davis. As noted, Davis' argument assumes that the Confrontation Clause is a "super" codification of all hearsay rules extant in 1791. Thus, according to Davis, if there was no hearsay exception for "excited utterances" in

[8] This Court found possible "tension" in only one of the Roberts-era cases, White v. Illinois, supra, noting that the child victim's statement to the investigating officer in that case might not have been admissible under the historical understanding of the confrontation right. See id. at 58 n. 8. NDAA submits that, under a proper understanding of what hearsay is "testimonial," there is no "tension" at all; the victim's statement to the investigating officer was not testimonial, and thus was properly received. See Part Two (B) and Part Three, infra.

1791, the Confrontation Clause bars them. But, as explained in Crawford and in this Court's pre-Roberts decisions, the clause is aimed at only a limited class of hearsay statements: those which are "testimonial." Hence, the constitutional inquiry does not turn on whether excited utterances were admissible under a recognized hearsay exception in 1791 (or upon the adoption of the Fourteenth Amendment in 1868). Instead, the critical question is whether a particular utterance is "testimonial" within the meaning of the clause.[9]

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[9] Petitioner Davis would find support for his position in a footnote in Crawford which discusses dying declarations, 541 U.S. at 56 n. 6, but he misunderstands that footnote. In it, the Court notes that all dying declarations arguably are admissible, because an exception to the hearsay rule for dying declarations was recognized before 1791. Petitioner Davis believes that this amounts to an endorsement of his thesis that the Confrontation Clause allows the admission of hearsay only if an exception for such hearsay was recognized by 1791. See Davis Brief: 23; see also Hammon Brief: 29. But this Court did not by any means endorse petitioner's view. The Court simply stated that, because of the vintage of the dying declaration exception, even a testimonial dying declaration might be admissible. The Court did not state that all more-recently recognized hearsay exceptions are unconstitutional. Petitioner Hammon makes a similar mistake as to excited utterances. See Hammon Brief: 22-23.

**B. Crawford limits the class of "testimonial" statements to those akin to the ex parte affidavits used in Marian times.**

Petitioner Hammon's brief, and the amici submissions of defense groups and civil liberties organizations, appear generally to recognize that the Confrontation Clause applies only to "testimonial" hearsay. The flaw in these briefs is that they define testimonial hearsay far more broadly than is justified. According to the definitions proposed in these briefs, testimonial declarations include any "accusatory" statement, or any statement made by a person who reasonably would expect that the utterance will be of any use to law enforcement. See, e.g., Hammon Brief: 7-8, 41; Brief of NACDL: 3, 3-4, 5, 7-9, 14-17, 21, 23; ACLU Brief: 8, 14.[10] These tests have one thing in common: they find no basis in Crawford or earlier decisions of this Court.

As Crawford explained, the Roberts test had departed from "historical principles" by being "too broad," since it applied "the same mode of analysis" to all hearsay, whether or not it "consist[ed] of ex parte testimony." Crawford, 541 U.S. at 60. In addition, the Roberts test was "too narrow," because it allowed the admission of "ex parte testimony upon a mere finding of reliability." Id. Hence,

[10] The latter two references are, more formally, to the brief submitted in the Hammon case by "The National Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia" and to the brief submitted in both cases by "The American Civil Liberties Union, the ACLU of Washington and the Indiana Civil Liberties Union."

this Court adopted a new standard in Crawford, focused on ex parte "testimonial" statements, in order to return the Confrontation Clause to its proper concern. That is, this Court sought to remove "close constitutional scrutiny" from most hearsay while ensuring strict enforcement of the clause for "paradigmatic confrontation violations." See Crawford, 541 U.S. at 60.

In promulgating this standard, Crawford adopted a limited definition of "testimonial." "Testimony" means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). Hence, an "accuser who makes a formal statement to government officers" bears "testimony" within the meaning of the Confrontation Clause. Others, such as "a person who makes a casual remark to an acquaintance," do not. Crawford, 541 U.S. at 51. Therefore, at its core, the confrontation right is concerned with formal declarations such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" -- and also "police interrogations" -- because those "are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id. at 68.

In finding that these types of statements were testimonial, Crawford did not attempt to provide a precise definition of "testimonial" declarations. The Court did, however, identify three possible definitions of this core class of statements: (1) "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 51-52.

We submit that the first two definitions, which are quite similar, correctly suggest the boundaries of "testimonial" hearsay. Under both definitions, a "testimonial" declaration would be a statement (1) created in a formal, out-of-court examination by a government agent (2) of a declarant aware that the statement was intended for use at a trial. Both definitions are consistent with this Court's pre-Roberts interpretations of the Confrontation Clause, which make plain that the clause excludes only formal hearsay statements. In that regard, both definitions include only "solemn declarations or affirmations." And both encompass the examples of testimonial hearsay identified in Crawford. See Crawford, 541 U.S. at 68. Helpfully, these definitions likewise simplify the task of the lower courts. They moot any debate about whether subjective motives or understandings of the speaker, or the listener, control whether a statement is "testimonial." See, e.g., Hammon Brief: 14-21. And they effectively eliminate the need to engage in speculation about the mental states of unavailable declarants.

Simply put, when an affidavit is signed or a statement is taken in a formal setting, both the declarant and the interrogator are well aware that it can be used for trial. It is only when both the declarant and the interrogating official are aware that a statement is being

taken for possible use at trial that the statement is "testimonial."

The third possible definition of testimonial hearsay reported in Crawford is not supported by any of this Court's pre-Roberts holdings. But even that formulation is far narrower than the ones proposed by petitioner Hammon and the supporting amici. Petitioner Hammon insists that "testimonial" hearsay includes any statement that the declarant might reasonably expect to be used for any law enforcement purpose, and not just at trial (Hammon Brief: 12-13, 18). For example, petitioner would have it that a victim's spontaneous statement to a 911 operator that he needs aid because he has been shot is no different from a sworn deposition or prior trial testimony. Needless to say, petitioner cites no precedent from this Court in making that suggestion.

Alternatively, petitioner Hammon urges this Court to rule that "a statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of Crawford" (Hammon Brief: 7, 10). He thus would remove from consideration whether either party to a statement anticipated its subsequent law enforcement use, and focuses only on whether the statement qualifies as an "accusation" – however an "accusation" might be defined. But petitioner Hammon weaves this test too from whole cloth, rather than any Confrontation Clause decision of this Court. Even the third possible definition of "testimonial" hearsay identified in Crawford suggests specifically that the declarant must believe that the statement would be used at the subsequent trial, and not that it simply is "accusatory." And petitioner Hammon's test would sweep into the "testimonial" category

an infinite number of statements that are not remotely "solemn declarations or affirmations." Crawford, 541 U.S. at 51.

Along those lines, Crawford made clear that many statements that might be useful to law enforcement are far afield from the core purpose of the confrontation right. For instance, the clause does not prevent prosecutorial use of an "off-hand, overheard remark" – for example, a "casual remark" made by a person to an acquaintance – because such a remark "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." Crawford, 541 U.S. at 51. In acknowledging that the clause has nothing to do with such remarks, this Court made no exception for casual remarks that are "accusatory," including even remarks made to a police officer.

And Crawford made plain that the statements governed by the clause are "solemn" and "formal." Crawford, 541 U.S. at 51. Obviously, not every statement to a police officer, even when offered in answer to the officer's questions, is solemn or formal. Crawford is thus inconsistent with petitioner Hammon's "one size fits all" approach, in which any accusatory declaration made to law enforcement personnel is testimonial. For instance, a witness's statement asking a police officer for aid against an attacker, during the commission of a crime or shortly thereafter – "officer, get him, he just robbed me" -- is not testimonial. It is not formal. The declarant does not anticipate that it will be introduced at trial. Indeed, even if such a statement is elicited by the officer's inquiry as to what has just happened, the officer likewise does not expect the answer to become evidence at a trial.

That informal statements may be the product of police questioning calls to mind another aspect of the Crawford analysis. This Court noted in Crawford that responses to "interrogation" may be testimonial, 541 U.S. at 52-53. But the statement found by Crawford to be testimonial was the fruit of structured questioning in a station house. That interrogation was the equivalent of an interrogation by a Marian justice of the peace. A public official in Washington State asked questions after having been persuaded that a crime had occurred, and having narrowed the scope of his investigation. Pursuant to an agenda, that public official engaged in structured questioning to develop a particular theory about what occurred and who was responsible. Such inquiries are readily recognized as "interrogations" by anyone with a television set; we see them constantly on "Law and Order" and on many other drama shows. And, as Crawford and innumerable other court cases demonstrate, such formal, structured interrogations are a part of everyday police work. It is fair to consider them testimonial. See Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557, 601-02, 609 (1992).

But all that has to do with agenda-driven interrogations. An officer who responds to a crime scene will have little, if any, information concerning what has happened. The officer will need to garner facts to ascertain whether a crime occurred, whether anyone was hurt and is in need of medical assistance, whether a suspect is still in the area and, if so, whether he poses a danger to the civilians who have remained and to the officers who are looking for him. The need fully to understand what has happened will regularly require officers to elicit more than a brief synopsis of the crime from the witnesses and

victims. Still, these on-the-scene inquiries are not "interrogations" designed to produce an evidentiary statement for trial. The officer has no agenda other than to learn what happened. These informal inquiries thus are not "testimonial."[11]

Crawford has created dramatic uncertainty in the state and federal courts as to whether hearsay will now generally be barred in criminal prosecutions. That uncertainty is reflected in the myriad cases citing Crawford, some of which have read Crawford as petitioners do. Even the most routine applications of hearsay exceptions, including those involving collateral facts -- such as the maintenance of breathalyzer equipment or the absence of a record from a government file -- have been disallowed. See, e.g., People v. Orpin, 8 Misc. 3d 768, 796 N.Y.S.2d 512 (Justice Court, Town of Irondequoit, Monroe Co. 2005); People v. Niene, 8 Misc. 3d 649, 798 N.Y.S.2d 891 (Crim. Ct. N.Y. Co. 2005). And the disagreement about excited utterances, including those in 911 calls, has been profound. If petitioners are successful here, the result will be that in many thousands of cases every year, juries will be denied information that, before Crawford, was routinely considered competent evidence and was never believed to violate the right of confrontation.

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[11] Petitioner Hammon supposes that, if this Court maintains its view that only formal interrogations constitute "testimonial" hearsay, initial responders to crimes may simply decide to avoid foreknowledge of what they will face at crime scenes. Hammon Brief: 8, 37-40. That cynical view not only reflects unjustified contempt for law enforcement officers, but also absurdly underestimates their instinct for self-preservation.

But the understanding of the Confrontation Clause that is championed by petitioners, and that is now routinely disrupting criminal cases, has no basis in history. The discredited Roberts analysis resulted in the scrutiny of a vast number of hearsay statements under the clause, but barred hearsay only sporadically. Crawford substituted a rule absolutely barring hearsay in a narrow category -- "testimonial" hearsay – if the defendant had no opportunity to cross-examine the declarant. Petitioners conflate the two approaches, seeking to have their cake and eat it too. They would extend the Confrontation Clause to vast amounts of hearsay, and at the same time bar all that hearsay absolutely. NDAA asks this Court to reject petitioners' invitation to follow that novel and unprecedented path, for it would make it far more difficult to obtain just results in criminal cases.

## Part Three: The Statements in the Present Cases are not "Testimonial," and Due Process should be the Ultimate Test of the Propriety of their Introduction at Trial

The statements at issue in the Hammon and Davis cases are not testimonial hearsay. They bear none of the indicia of the statements in the core area covered by the Confrontation Clause: they were not formal statements akin to testimony or affidavits, made for presentation in court.[12] To be sure, the declarants were asked questions by

[12] An affidavit signed by the victim was of course introduced at the trial of petitioner Hammon. The Indiana Supreme Court considered the introduction of the affidavit to be harmless Crawford error, given the oral statements of the victim that were recounted at trial. See Hammon Brief: 4-6.

agents of the state. But there was no "interrogation" of the sort addressed in Crawford, in which officials with an investigative agenda seek to obtain evidence about a past crime. Rather, in each case the declarant spoke with an agent of the state who lacked advance knowledge even that a crime had taken place.

It remains to discuss a question left open in Crawford. The fact that the statements at issue are not "testimonial" places them outside the core area of confrontation rights protected by the Confrontation Clause. In Crawford, however, this Court left open the question of whether the clause offers some protection outside this core area of concern. See Crawford, 541 U.S. at 68. Amicus urges the Court now to state, consistent with its decisions before Roberts, that the Confrontation Clause addresses testimonial statements alone, and does not more generally constitutionalize a prohibition against hearsay.

If instead the Confrontation Clause applied outside the testimonial area, its application would presumably take one of two forms. First, the clause might – as petitioner Davis in particular has urged – be read to bar any hearsay as to which no exception was recognized in 1791. As noted above, however, that approach is flatly inconsistent with the history of the clause, especially as it has always been understood by members of this Court. The clause was never designed to freeze in place the law of evidence as in stood in 1791. Second, the clause might be read to bar "unreliable" non-testimonial hearsay. But in Crawford this Court justly laid to rest the Roberts reliability framework, and that framework would be as inadequate for admitting non-testimonial hearsay as it has proved to be for admitting all hearsay.

Petitioners seem to believe that the Confrontation Clause must be broadly read, lest the courts be flooded with hearsay beyond the narrow class of testimonial statements. Petitioner Hammon, for example, is troubled by fears that if only a narrow class of testimonial hearsay is covered by the clause, a witness could seal a statement in a pot, or provide an account to a friend with the understanding that the friend would then repeat it in court. See Hammon Brief : 11.

But those fears are groundless. The Confrontation Clause is of course not the only rule that keeps hearsay out of criminal proceedings. State constitutional provisions also guarantee confrontation, and many of those provisions might, in the post-Crawford world, be read more broadly than the Sixth Amendment. More importantly, the Federal Rules of Evidence and every state's law of evidence restrict the introduction of hearsay. The statement in a pot, and the account provided to a friend, would not be admissible in any jurisdiction.

Moreover, the Due Process Clauses of the Fifth and Fourteenth Amendments will always provide a "backstop," in the event that a state employs an unreasonably permissive rule on the admissibility of non-testimonial hearsay. Due Process has already been declared the basis on which a defendant can obtain relief when a state hearsay rule is unduly restrictive. Chambers v. Mississippi, 410 U.S. 284 (1973). Similarly, the Due Process Clause would afford a defendant relief when a state rule about non-testimonial hearsay is unduly permissive. Notably, for this Court to recognize that principle in Hammon and Davis would create a logical complement to Chambers. But when due process guarantees are not implicated, the Framers intended to leave each state free to adopt rules of evidence that seem sensible to its own citizens. See Estelle v.

McGuire, 502 U.S. 62, 67-70 (1991); Spencer v. Texas, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure").

* * *

The short-lived Roberts era aside, this Court has never understood the Confrontation Clause to regulate all hearsay or to work a substantial revision of the rules of evidence. And certainly, this Court never hinted that the clause barred the states from refining their views on the admissibility of excited utterances or of any other garden-variety types of hearsay. As Crawford explained, a hearsay declarant does not qualify as a "witness" for confrontation purposes unless he has made a "solemn declaration" akin to a formal statement under oath. A 911 call or an excited remark at the scene of a crime -- whether made to a responding officer or to anyone else -- is not "testimony" in any sense of the word. Petitioners twist the plain meaning of the clause in an effort to expand the constitutional right of confrontation beyond all plausibility and precedent.

## CONCLUSION

The judgments against petitioners should be affirmed.

Respectfully submitted,

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