No. 05-5705

In The

Supreme Court of the United States

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writ Of Certiorari To The Indiana Supreme Court

BRIEF AMICUS CURIAE FOR WAYNE COUNTY, MICHIGAN IN SUPPORT OF RESPONDENT

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STATEMENT OF THE QUESTION

I.

Is a statement made by a declarant who does not testify at trial testimonial and within the Confrontation Clause where not taken under circumstances accompanied by the solemnity and formality related to statements taken by magistrates at the common law?

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Amicus adopts the factual statement presented by the State.

INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of his constitutional and statutory duties, particularly with regard to child abuse and domestic violence cases.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

SUMMARY OF ARGUMENT

An out-of-court statement is testimonial if it was made to a governmental official or officials, who acquired it through structured questioning, and where the statement was made in a formal or solemn manner.

Whether a statement, such as one made to a 911 operator, is made to seek help, or instead to report a completed crime, is not the pertinent inquiry. A statement that truly meets the foundational requirements of the excited utterance exception cannot be testimonial. And the

constitution play no role regarding the admissibility of nontestimonial statements; questions of sufficient "reliability" of evidence to justify its admission are questions for the law of evidence of each particular jurisdiction.

ARGUMENT

A. The Task At Hand Is to Discover Meaning of the Phrase in Question As Understood At the Time of Its Adoption

The question here is a difficult one concerning the meaning of a part of the Sixth Amendment. How is ascertainment of meaning of a constitutional provision to be approached? Amicus believes that it must be approached bearing in mind that the political genius of our Revolution was its ultimate view of a constitution as something distinct from and superior to the entire government, expressing fixed principles designed to endure unless altered by the people.[1] The colonists "recognized from the beginning that a constitution ought to be different in kind from ordinary legislation" and "ought to bear some sort of direct popular authorization that would place it beyond the power of government to change," embodying "the difference between the constituent power of the people and the legislative power of the people's representatives."[2] A constitution "should not be altered without the Consent, or Consulting with the Majority of the people."[3]

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[1] Gordon S. Wood, *The Creation of the American Republic*, 1776-1787 (1969), p. 266.

[2] Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988), p. 256-258.

[3] Wood, p. 274.

Thus, by 1770 a constitution was said to be a "line which marks out the enclosure"; in 1773 it was the "standing measure of the proceedings of government" of which rulers are "by no means to attempt an alteration . . . without public consent." In 1775 it was said that a constitution was "certain great first principles" on whose "certainty and permanency the rights of both the ruler and the subjects depend; nor may they be altered or changed by ruler or people, but only by the whole collective body . . . nor may they be touched by the legislator."[4] Such a constitution must be written so as to acquire permanence, and, to stand above the government as the fundamental source of authority, it must represent the sovereign power; that is, the people, through an "act of all."[5]

The meaning of a constitutional provision, then, is to be garnered understanding that the ratifiers looked to the words employed "in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense to be conveyed."[6] Though the Constitution is certainly "as meant to apply to the present state of things as well as to all other past or future circumstances," "[i]t is not competent for any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things."[7]

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[4] Bernard Bailyn, *The Ideological Origins of the American Revolution*, p. 182.

[5] Bailyn, *Origins*, p. 183-189.

[6] Cooley, *Constitutional Limitations* at 66.

[7] And see unposted letter of Madison to professor John Davis, 3 *Letters and Other Writings of James Madison* (1884), p. 232, 242: "After all, we must be guided . . . by the intention of those who framed, or, rather, who adopted the constitution . . . the intention, if ascertained by contemporaneous interpretation and continued practice, could not be overruled by any latter meaning put on the phrase, however warranted

(Continued on following page)

The Confrontation Clause provides that in criminal cases the accused has the right to be "confronted with the witnesses against him." The text is not particularly revealing; here, then, in determining what, in their sovereign capacity, the people promulgated requires an examination of the history that led to the clause – that is, the harm it was designed to prevent. *Crawford* has started, but only started, this task of interpretation,[8] and the meaning of "testimonial" must now be fleshed out.

B. The Confrontation Clause and Crawford[9]

(1) Gleanings from Crawford

(a) Historical background

The text of the clause provides a right in the accused to be "confronted with the witnesses against him." Critical to the Court in *Crawford* was the historical development of the Confrontation Clause, for that development informs its

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by the grammatical rules of construction were those at variance with it."

[8] This Court took this approach only recently in *Granholm v. Heald*, ___ U.S. ___, 125 S.Ct. 1885 (2005) in construing Section 2 of the Twenty-first Amendment. The Court looked to the history of the amendment and that which it was designed to allow: "The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. . . . The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." 125 S.Ct. 1902.

[9] *Crawford v. Washington*, 541 U.S. 36 (2004).

meaning.[10] The founding generation's immediate source of the concept was the English common law, which reveals that though the Confrontation Clause is related to the rules concerning hearsay, it was meant to prohibit only a specific sort of hearsay, not to freeze the law of evidence.

Amicus will not here review in depth the familiar history informing the meaning of the Confrontation Clause. Suffice it to say that the practice of admission of testimony taking at magisterial examinations in lieu of the testimony of the witness in court reached its apogee with the infamous trial of Sir Walter Raleigh in 1603 for treason. Depositions given by Raleigh's alleged accomplice, Cobham, were admitted, and Chief Justice Popham refused to produce him to testify, stating that "where no circumstances do concur to make a matter probable, then an accuser may be heard in court, and not merely by extrajudicial statement, but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced."[11]

These practices were viewed as abusive, and the law developed relatively strict rules of unavailability, admitting examinations only on a showing of inability to testify in person. But was even unavailability enough without cross-examination at the magisterial examination? *King v. Paine*[12] in 1696 held not. Though the case involved a misdemeanor, *Crawford* points out that by 1791 – the year the

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[10] "A page of history is worth a volume of logic." *NY Trust Co. v. Eisner*, 256 U.S. 345 (1921) (Justice Holmes). See also the method of interpretation in *Granholm v. Heald*, at footnote 34, supra. And see Section A, supra.

[11] 5 Wigmore § 1364, p. 16-17; *California v. Green*, 399 U.S. 149 (1970) (fn 9 and 11, p.507-508);

[12] *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696) (cited in *Crawford*).

sixth amendment was ratified – courts were applying the cross-examination requirement to examinations by justices of the peace in felony cases.[13] Early 19th century treatises confirm the requirement, and in 1848 parliament amended statutes to make it explicit, confirming what was already afforded the defendant by the equitable construction of the law.[14]

Colonial practices, observed *Crawford*, were sometime abusive in a similar manner as the early common-law practice, and confrontation arguments were advanced. Many declarations of rights about the time of the Revolution included, then, a right to confrontation,[15] and early state decisions held that depositions could be read against an accused only if taken in his presence – "no man shall be prejudiced by evidence which he had not the liberty to cross examine."[16]

(b) Conclusions drawn in Crawford

From these historical materials the conclusion ineluctably follows that the principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations used as evidence at trial in the absence of the in-court testimony of the declarant. But this focus also suggests that not all hearsay implicates the Confrontation Clause; the admission of out-of-court statements from unavailable declarants where the statements occurred in situations that bear "little resemblance to the

[13] 124 S.Ct. at 1361.

[14] 124 S.Ct. at 1361.

[15] 124 S.Ct. at 1363.

[16] 124 S.Ct. at 1363.

civil-law abuses the Confrontation Clause targeted"[17] is left to the law of evidence of the federal system and the various states.[18]

What statements bear sufficient resemblance to the abuses of the civil-law practice as to warrant their exclusion under the Confrontation Clause and which not? The text of the clause applies the right of confrontation to a confrontation of "witnesses" – those who "bear testimony." Testimony is typically a "*solemn* declaration or affirmation made for the purpose of establishing or proving some fact."[19] Thus, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[20] Because the context bears a "striking resemblance" to examinations by justices of the peace in England, "statements taken by police officers in the course of interrogations[21] are also testimonial." But what of other statements and other contexts? How are they to be measured?

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[17] 124 S.Ct. at 1364.

[18] 124 S.Ct. at 1374.

[19] 124 S.Ct. at 1375.

[20] 124 S.Ct. at 1364.

[21] The Court observed that "[w]e use the term "interrogation" in its colloquial, rather than any technical legal, sense. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. Sylvia's [Crawford's wife's] recorded statement, knowingly given in response to *structured police questioning*, qualifies under any conceivable definition." 541 U.S. 36, 53, 124 S.Ct. 1354, 1365.

C. Can I Get A Witness: Testimonial Statements

(1) Dispelling a misconception: Crawford does *not* endorse three definitions of "Witnesses Against"

Crawford has come to be widely misrepresented and misapplied in critical particulars, sewing confusion in the decisions. *Crawford* did not provide a comprehensive definition of "testimonial"; indeed, it disclaimed any such attempt: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' "[22] Nonetheless the following section of *Crawford* has been taken by an unfortunately increasing number of courts as establishing the "three faces" of testimonial statements:

> *Various formulations of this core class of "testimonial" statements exist*:
>
> - "*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," Brief for Petitioner 23;
> - "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment);
> - "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would

[22] 541 U.S. 36, 68, 124 S.Ct. 1354, 1374.

> be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae.
>
> These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. *Regardless of the precise articulation*, some statements qualify under any definition – for example, *ex parte* testimony at a preliminary hearing. Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.[23]

But this section of the *Crawford* opinion does *not* create three "categories" or "classes" of testimonial statements, it being the task of a court reviewing the evidence in question to see if it fits within one of these categories[24]; problematically, many courts are reviewing statements in precisely this fashion.[25]

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[23] 541 U.S. 36, 51-52, 124 S.Ct. 1363-1364 (bullet points and emphasis added).

[24] This approach to *Crawford* reminds one of Chief Justice (then Justice) Rehnquist's observation in a different context, that this mode of analysis reveals a "mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on. . . . " *Florida v. Royer*, 460 U.S. 491, 520, 103 S.Ct. 1319, 1336 (1983).

[25] One court, as an example of this approach, has said that "[o]ur initial task then is to determine whether the statement . . . was testimonial. In a passage of the *Crawford* opinion that is often quoted [the passage quoted above], the Court identified three kinds of statements that could be properly regarded as testimonial statements. . . ." *Lopez v. State*, 888 So. 2d 693, 698 (Fla. Ct. App. 2004). Another, in the same vein, asserts that the Court in Crawford "also stated that testimonial statements were '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.' " *Anderson v. State*, 11 P.3d 350 (Alaska App. 2005).

At least one commentator has accurately observed that "[t]he Court did not endorse any of these three potential definitions."[26] One must look, then, to whether there are other practices that can fairly be said to bear close kinship to the abuses at which the Confrontation Clause was directed, and one discovers that while the clause "applies at a minimum" to prior testimony (including depositions and affidavits) and to police interrogations, it covers very little else (though many other statements may be excluded by the law of hearsay, a matter for decision by each state).

(2) The impossibility of "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" as a test for "Witnesses Against"

The definition advanced in *Crawford* by the National Association of Criminal Defense Lawyers that testimonial statements are "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" is both under and over-inclusive; it is also contrary to human experience, and essentially useless in the inquiry, if not downright misleading.[27] An examination of every out-of-court statement to determine whether it was

[26] King-Reis, Andrew, "*Crawford v. Washington*: The End of Victimless Prosecution?" 28 Seattle U. L. Rev. 301, 316 (2005). The title of the article is itself a misnomer, however, for crimes where the victim does not testify are scarcely "victimless" (see all murder prosecutions).

[27] And the same is true for the formulation in the petitioner's brief in *Crawford* that a statement should be considered testimonial if it is one that the declarant "declarants would reasonably expect to be used *prosecutorially*" – whatever *that* means.

made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial is akin to "a snipe hunt carried on at midnight on a moonless landscape."[28] And it is a snipe hunt in which many courts, as indicated, are currently engaged.[29] This enterprise is bootless for reasons noted by Justice Thomas concurring in *White v. Illinois*:[30]

> Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would *entangle the courts in a multitude of difficulties*. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who

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[28] *590 Realty Co., Ltd. v. City of Keene*, 444 A.2d 535, 536 (N.H., 1982).

[29] As one judge has cogently observed, " . . . these [the potential definitions mentioned in Crawford] formulations have engendered a 'miasma of uncertainty' among lower courts trying to identify testimonial hearsay. . . . Many courts have resolved this uncertainty by seizing on the most general formulation – a statement is testimonial if the circumstance under which the statement was made would lead an objective witness reasonably to believe that the statement would be available for use at a later trial – and applying it, without sufficient attention to *Crawford*'s textual and historical rationale. . . . Courts that have adopted this approach have divided on close questions such as the categorization of various 911 calls. . . . A sounder, more predictable body of law will emerge if, when applying the various 'formulations,' we hew closely to what I suggest is the foundational thrust of *Crawford*. *Crawford* employed a historical approach to define the reach of the Confrontation Clause. . . . In reviewing the historical record, the Court identified 'the civil-law mode of criminal procedure' as 'the principal evil at which the Confrontation Clause was directed.' " See *U.S. v. Brito*, ___ F.3d ___ (2005 WL 2673671, 12 (CA 1, 2005) (Howard, J. concurring).

[30] *White v. Illinois* 502 U.S. 346, 364 112 S.Ct. 736, 747 (1992) (emphasis suppled).

> blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse). It is also not clear . . . whether the declarant or the listener (or both) must be contemplating legal proceedings.

Professor Akhil Reed Amar concludes that to read "witness against" as referring to witnesses actually testifying in court, and also to such materials as videotapes, transcripts, depositions, and affidavits, *when prepared for court use and introduced as testimony*, is consistent with the text of the Confrontation Clause, its context within the Constitution, and with history.[31] On the other hand, while the approach of professor Richard Friedman is largely consistent with that of Professor Amar, and with Justice Thomas's approach in *White*, it goes a fatal step further – the step later championed in *Crawford* by the National Association of Defense Attorneys. Professor Friedman includes within the Confrontation Clause not only "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" but also any statement made by a person who at the time of its making "reasonably should be viewed as having made it with the anticipation that it would be presented at trial."[32] And he quickly slips away even from this formulation later in his article, and in a way that some courts attempting to apply this "test" have also, phrasing the test as whether the declarant "anticipates that the statement will be used in the prosecution *or investigation* of a crime."[33] A test requiring an expectation by the declarant that the statement will be used at trial, though itself unworkable,

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[31] Akhil Reed Amar, *The Constitution and Criminal Procedure* (Yale University, 1997) 129-130.

[32] Richard Friedman, "Confrontation: The Search for Basic Principles," 86 Geo. L.J. 1011, 1040 (1998).

[33] Friedman, at 1042.

atextual, and ahistorical, is quite a different thing from a test that the declarant have a reasonable expectation that the statement might be used in an *investigation*. Friedman's definition of "witnesses against" as including all unavailable out-of-court declarants who make statements to investigating police officers cannot be justified historically, contextually, or textually.[34]

One particularly apt example reveals Justice Thomas's prescience in this regard.[35] An individual called the 911 operator, and reported a shooting as it was occurring before his very eyes, including such remarks to the operator as "Oh, he's shooting at him, he's shooting at him"; "He's killing him, he's killing him, he's shooting him again"; and "He shot him and now he's running. And he shot him two or three times."[36] The declarant was unknown, and the tape admitted. Though the statements qualified both as excited utterances and present sense impression, they were found to be testimonial nonetheless. Because 911 operators are trained in how to gather information from callers reporting crimes that have occurred and also ongoing crimes, the court found the questions of the operator to constitute "interrogation." Further, though the caller was describing a shooting as it happened before his eyes the court reached the stunning conclusion that:

- The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or

[34] And see Amar, "Confrontation Clause First Principles: A Reply to Professor Friedman," 86 Geo. L.J. 1045 (1998): "Methodologically, his [Professor Friedman's] definition unwittingly reflects residual traces of hearsay doctrine and tends to slight constitutional text, history, and structure."

[35] *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. 2004).

[36] 781 N.Y.S.2d at 403-404.

> JPs under the Marian committal statute. Like the victims and witnesses before the King's courts an objective reasonable person knows that when he or she reports a crime the statement *will be used in an investigation and at proceedings relating to a prosecution*.[37]

This is risible (and fortunately stands essentially alone in the post-*Crawford* decisions and literature); it also demonstrates how the itself inappropriate "test" that a statement the declarant should reasonably expect to be used in-court is testimonial is quite often morphed into the quite different test that a statement the declarant should reasonably expect the police to make use of in their investigative efforts is testimonial (and one assumes the police do not take or receive statements simply for their possible amusement value, or to wile away the time).

The cases after *Crawford* often take different approaches, and reach wildly divergent results, because the framework employed is, for the reasons given by Justice Thomas, incoherent and problematic. This Court should set its face against the "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as a test for "witnesses against" as unworkable and, perhaps even more importantly, unjustified by the text and history of the Confrontation Clause.

(3) The Confrontation Clause was not designed to "freeze" the law of hearsay

One view of the matter is a claim that the excited utterance or spontaneous declaration hearsay exception did not exist in 1791, and so cannot be employed now

[37] 781 N.Y.S.2d at 415 (emphasis supplied).

without violating the Confrontation Clause. This is the view that the Confrontation Clause is simply a "super-hearsay" rule, incorporating whatever the law of hearsay was in the 1790's. A particularly esteemed former Solicitor General of the United States has well-put the matter; the Confrontation Clause "was to be interpreted in light of the law as it existed at the time of the adoption of the sixth amendment, and that law recognized exceptions to the hearsay rule. The Confrontation Clause had a purpose, clearly, but it was not designed to freeze the law of evidence or to exclude all hearsay evidence."[38] And three and a half decades before *Crawford* this Court itself rejected the notion that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[39] One commentator has explained that an "incorporation of hearsay rules" approach would require that any development of the law of hearsay come only through constitutional amendment; instead, however, there "are more than a few plausible historical reasons to conclude that the Framers left the admissibility of hearsay to the law of

[38] Erwin N. Griswold, "The Due Process Revolution and Confrontation," 119 U. Pa. L. Rev. 711, 714 (1971).

[39] *California v. Green*, 399 U.S. 149, 155 (1970). Note, for example, that a good 70 years after the adoption of the Sixth Amendment Professor Greenleaf, in his renowned evidence treatise, refers to statements that are "part of the res gestae" as being original evidence, and not hearsay at all, discussing what today would be the exceptions for present sense impression, statements of mental condition, such as intent, and statements of physical condition. See 1 Greenleaf, *The Law of Evidence*, §§ 98-114, § 123 (H.O. Houghton, 1863). With regard to hearsay exceptions, the treatise refers only to statements concerning reputation; statements concerning ancient possessions; declarations against interest; dying declarations; prior recorded testimony; and admissions and confessions. See 1 Greenleaf, Chapters VI-XII.

evidence,"[40] save a particular kind of hearsay – uncross-examined *formal statements taken by the government*.

(4) Testimonial statements are marked by formality

The Framers were "a group of lawyers and statesmen who were familiar with the evolutionary process by which common-law courts developed and modified the rules of evidence generally and the hearsay rules in particular."[41] The only lesson from history is that, as *Crawford* says, it was the purpose of the Confrontation Clause to prevent the Government from trying an accused by ex parte affidavits and depositions. The task, then, is to see if there *are* any modern practices with a close kinship to the ex parte examinations by magistrates beyond those identified in *Crawford* (which includes structured police questioning). The task is *not* to determine whether a particular hearsay exception was, in its modern form, embraced at the common-law at the time of the ratification of the Sixth Amendment. An insight of Professor Keith Whittington expressed in his brilliant exposition on constitutional interpretation[42] – that the Constitution "supports not only what its text requires but also much that it merely suggests or allows" – means that faced with a question of meaning such as that involved here, a court must not "strike down every government action that cannot be

[40] John G. Douglass, "Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay," 67 Geo. Wash. L. Rev. 191, 240 (1999).

[41] Douglas, at 240.

[42] Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas: 1999).

justified in originalist terms but only those that are *inconsistent* with known constitutional requirements."[43] It is not required that the law of hearsay as it now exists be shown to have been *embraced* by the common law of evidence at the time of the ratification of the Sixth Amendment, but only that any evidentiary principle now at issue is not *inconsistent* with that which was intended to be prohibited by the Confrontation Clause.

Admission at trial of the results of government interrogation without presentation of the declarant, be it of suspects or witnesses, amicus submits, constitutes the universe of practices sought to be precluded by the Confrontation Clause – along with governmentally acquired affidavits or depositions, prior testimony at a preliminary hearing, before a grand jury, or at a former trial – that are akin to the practice of admission at trial of ex parte pretrial examinations of witnesses by magistrates. This result is reached by examining the "common nucleus" of these various statements. That common nucleus has been mistakenly identified by some courts in the following manner:

> . . . we believe an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment. . . . Thus we hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in *the investigation* or prosecution of a crime.[44]

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[43] *Whittington*, at 172, 211 (emphasis supplied).

[44] *United States v. Summers*, 414 F.3d 387 (CA 10, 2005) (emphasis supplied).

The Tenth Circuit has, amicus submits, misapprehended the clues available in *Crawford*; further, inclusion of an objective belief by the declarant that the statement might be used in the *investigation* of a crime is wholly unrelated to the taking by magistrates of pretrial depositions for use at trial in lieu of testimony from the declarant.[45] Closer to the mark is this conclusion by the Maryland Supreme Court:

> these standards share a common nucleus in that *each involves a formal or official statement made or elicited with the purpose of being introduced at a criminal trial*. . . . Although these standards focus on the objective quality of the statement made, the uniting theme underlying the *Crawford* holding is that *when a statement is made in the course of a criminal investigation initiated by the government*, the Confrontation Clause forbids its introduction unless the defendant has had an opportunity to cross-examine the declarant.[46]

It is the Maryland Supreme Court and not the Tenth Circuit that is on the right path.

The path to *Crawford* begins with *White*, a case decided under the Confrontation Clause view overturned by *Crawford*. Multiple out-of-court statements of a child were admitted, the child not testifying. Applying then-extant principles, this Court affirmed, finding the statements sufficiently reliable.[47] Justice Thomas, joined by Justice Scalia, expressed a different view, one pointing

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[45] And, for reasons previously stated, the test is unworkable and makes no sense.

[46] *State v. Snowden*, 867 A.2d 314, 324 (Md., 2005) (emphasis supplied).

[47] The prevailing test at the time being, of course, *Ohio v. Roberts*, 448 U.S. 56 (1986).

toward *Crawford*. That concurring opinion suggested that the "relevant historical materials" point to a "narrower reading of the Clause that the one given to it since 1980. . . ."[48] It concluded that there is "little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation," and found that the then-current Confrontation Clause standards had "no basis in the text of the Sixth Amendment."[49] In addition to finding problematic a test for "testimonial" statements based on the contemplation of the declarant of future legal proceedings at the time of the making of the statement, adverted to previously, the concurring opinion focused as an alternative on *formal* materials:

> One possible formulation is 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 . . . [for] [I]t was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process . . . and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.[50]

Thus, the concern of the concurring opinion of Justices Thomas and Scalia was that the Confrontation Clause was being read too broadly, not too narrowly, and they looked to two features shared by materials the admission of

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[48] 112 S.Ct. at 745.

[49] 112 S.Ct. at 746.

[50] 112 S.Ct. at 747 (emphasis supplied).

which without cross-examination the Confrontation Clause was aimed to prohibit: 1) governmental action; and 2) a formalized setting in the obtaining of the material. Justice Scalia authored *Crawford*, in an opinion fully joined by Justice Thomas, and the opinion signals no retreat from these concerns.

As with Justice Thomas's concurring opinion in *White*, Justice Scalia's majority opinion in *Crawford* reviewed the relevant historical materials concerning the evil at which the Confrontation Clause was aimed, concluding that the principal evil the Clause was designed to prevent was "ex parte examinations as evidence against the accused."[51] "Reliability" of out-of-court statements from unavailable declarants as a general matter was *not* the concern of the Clause; unreliable off-hand remarks are not within the Clause (though ordinarily inadmissible under the law of evidence), and quite reliable ex parte examinations of unavailable declarants are within the Clause, even if the law of evidence developed some exception to permit them.[52] The text of the Clause itself, said the Court, reveals its focus, for it applies to "witnesses" against the accused, and these are those who "bear testimony," which in itself is typically a "*solemn declaration* or affirmation made for the purpose of establishing or proving some fact . . . [a]n accuser who makes a *formal statement* to *government officers* bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[53] Again, the emphasis is on 1) governmental activity in the taking of the statement, and 2) the solemnity or formality of the occasion in which this is done. And the Court readily

[51] *Crawford*, 124 S.Ct. at 1363.

[52] *Crawford*, 124 S.Ct. at 1364.

[53] 124 S.Ct. at 1364.

concluded that interrogation of a criminal suspect by the police is sufficiently akin to the common-law practice of ex parte examination as to fall within the Confrontation Clause, emphasizing that the statement of Crawford's wife was given "in response to *structured* police questioning." This adds a third component; the statement must not only be made to a governmental agent, but in response to interrogation – to "structured" police questioning – questioning designed to obtain evidence. If *any* of these components is missing, the statement is not testimonial. That is, if the statement is not made to a governmental official, then no matter the degree of its solemnity or formality it is not within the Confrontation Clause; on the other hand, if it *is* made to a governmental official, but is not the result of interrogation – of structured police questioning – or is not solemn or formal, it remains without the Clause. The historical record reveals no concern with either the subjective or objective beliefs of the *declarant* as to the use to be put to a statement made to a governmental official[54] – and certainly not a belief that it would be put to use in investigating a crime – it reveals an abhorrence with the *gathering* of evidence in this manner by *the government* for use at trial without presenting the declarant for cross-examination.

[54] If a governmental official took a formal statement from a witness with explicit oral and written assurances that the statement would not be used at any trial, this would certainly both subjectively and objectively justify the declarant in so believing, but the statement would nonetheless be testimonial (and as amicus has argued earlier, even witnesses giving formal statements do not ordinarily have any expectation at all that their statements will be admitted in court against the accused; if anything, they expect that the information they are supplying may well lead to the government calling them as witnesses at trial to present this information to the factfinder).

In sum, amicus submits that an out-of-court statement is testimonial if:

- it was made to a governmental official or officials, who
- acquired it through structured questioning, and it was
- made in a formal or solemn manner.[55]

(5) An excited utterance, even one made to the police, is not testimonial

(a) Historical background

At the time of the ratification of the Sixth Amendment, and on into the 1800's, "the understanding of what is and what is not hearsay was not well developed and the various exceptions to the hearsay rule were not clearly defined."[56] Wigmore has said of the "res gestae exception" that one might well approach its exposition "with a feeling akin to despair," for there has been "such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth res gestae, that it is difficult to disentangle the real basis of the principle involved."[57] But at least a form of what today is known as the "excited utterance" or "spontaneous declaration" exception appears to have been part of this conglomeration early on, though not known by modern terms. Greenleaf's eleventh edition of his treatise in 1863, for example, makes no mention of the "excited utterance," referring to the "res gestae."[58] The "spontaneous

[55] Points 2 and 3 will doubtless generally merge, though not always.

[56] McCormick, *Evidence* (2nd ed., 1972), § 288, p. 686.

[57] VI Wigmore, *Evidence* (Chadbourn Revision), § 1745, p. 191-192.

[58] 1 Greenleaf, *Evidence* (11th ed., 1863), § 108, p. 148.

declaration" part of the "res gestae" amalgam, which came to be known as the excited utterance, first seems to have developed as an exception permitting the declaration of one who had been injured made "immediately upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage. . . .",[59] and may only have extended to the person injured and not someone observing the incident. There thus may have been no excited utterance exception to the rule against admission of hearsay at the time of the ratification of the Sixth Amendment other than as applied to the victim of some hurt or injury. Over time, however, the excited utterance developed as a distinct exception applicable to a statement made by any person, where there had been some event so startling as to render normal reflective thought processes "inoperative," and where the statement was made as a reaction to that event and not as a matter of reflection.[60] Initially, it appears, "immediacy" was required; that is, the statement had to have been made immediately upon observation of the startling event, but this requirement was a result of a confusion of the exception with verbal-act principles, and it became clear that the declaration was not required to be contemporaneous with the event, but rather made when the declarant was still under the influence of the excitement caused by the event.[61]

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[59] *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.: 1694).

[60] McCormick, § 297, p. 704.

[61] Wigmore, § 1756, p. 230-231. Note that closeness in time is more strictly required with regard to the modern understanding of the present sense impression hearsay exception, which does not require that the event described be startling., but instead that the statement describing it be made as the event is occurring or *immediately* thereafter.

(b) A statement satisfying the excited utterance foundation is not testimonial

That the excited utterance exception may not have existed, at least in its current form, at the time of the ratification of the Sixth Amendment is not the point here;[62] what matters is whether the modern understanding of the exception – as it is applied to excited utterances made to governmental officials – is contrary to the prohibition of the Confrontation Clause. An excited utterance made to someone other than a governmental official raises no Confrontation Clause issues.[63] Both the wrong approach, in the majority opinion, and the correct approach, taken by the dissent, in considering excited utterances to governmental officers (either at the scene when officers

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[62] Amicus would note the important observation made by Professor Thayer with regard to the construction of hearsay exceptions in general:

> It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what are the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible To any such main rule there would, of course, be exceptions; but as in the case of other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course.

Thayer, *A Preliminary Treatise on Evidence* (Little, Brown, and Co., 1898), p. 522.

[63] That the statement must be to a governmental officer of some sort is not a matter of debate. See, e.g., *United States v. Gibson*, 409 F.3d 325, 338 (CA 6, 2005); *United States v. Manfre*, 368 F.3d 832, 838 n. 1 (CA 8, 2004); *United States v. Lee*, 374 F.3d 637, 645 (CA 8, 2004); *United States v. Saget*, 377 F.3d 223, 229 (CA 2, 2004).

respond, or through 911 emergency calls) are revealed in a recent opinion of the Sixth Circuit Court of Appeals.

Without belaboring the facts of the case, suffice it to say that the majority in *United States v. Arnold*[64] was of the view that a 911 call there was testimonial because in its view *any* statement made to government officials is testimonial under *Crawford*, this being the *only* question involved in the inquiry. The majority flatly said that "Gordon [the declarant] made the statements to government officials: the police. *This fact alone indicates that the statements were testimonial*."[65] This "reasoning" ignores references in *Crawford* to the formality of the occasion, to the solemness of the statement, and to the need for the statement to have been the result of interrogation (even with that term employed, as said in *Crawford*, in its "colloquial" rather than technical sense, meaning simply that the Court was not referring to the definition of interrogation applicable to the issue of when *Miranda* warnings are applicable,[66] which applies only to persons in custody, and would have no application at all to witnesses).

That the statement was to a government official is the starting point not the ending point of the analysis. *Crawford* refers to interrogation "colloquially" – in its everyday sense. The *Merriam-Webster Dictionary* defines "interrogate"

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[64] *United States v. Arnold*, 410 F.3d 895 (CA 6, 2005). The opinion was withdrawn on rehearing, and the majority reversed on a different ground. Because Judge Sutton disagreed with the new basis for reversal, his discussion of *Crawford* remained germane, and he reaffirmed it. *U.S. v. Arnold*, ___ F.3d ___, 2005 WL 3315297 (CA 6, 11-23, 2005).

[65] *United States v. Arnold*, 410 F.3d at 903 (emphasis supplied).

[66] See *Rhode Island v. Innis*: (interrogation of a suspect in custody occurs through questions or statements that are reasonably likely to elicit an incriminating response; clearly, this cannot be the test for interrogation with regard to ordinary witnesses).

as "to question formally and systematically." Lexicographer Bryan Garner says that the term "suggests formal or rigorous questioning."[67] And *Black's Law Dictionary*[68] (7th ed., 1999) defines "interrogation" as "the formal or systematic questioning of a person." With regard to 911 calls, or statements made to the responding police officers at the scene, where the statement at issue satisfies the foundational requirements of the excited utterance exception – and not all such statements will – it is by definition nontestimonial; no distinction can be made regarding whether the purpose of the statement is to report a crime that has just occurred, or to request assistance during an ongoing crime, as some cases have done. The question is whether the statement is or is not an excited utterance (or present sense impression, if the statement describes an event as it is occurring or *immediately* thereafter).

Judge Sutton's dissent in *Arnold* is precisely correct; amicus cannot improve upon his remarks, set forth below:

- As in this case, a 911 call generally will be a plea for help, not an effort to establish a record for future prosecution. *A 911 call represents a backward-looking response to an emergency that has already occurred or a contemporaneous response to an emergency that is occurring, not a forward-looking statement about a criminal prosecution that may or may not occur.*
- Such calls also bear poor analogies to the kinds of testimonial statements that the Court has said will traditionally qualify – "affidavits, depositions, prior testimony, or confessions,". . . .

* * *

[67] Garner, *A Dictionary of Modern Legal Usage* (2nd ed., 1995), p. 463.

[68] *Black's Law Dictionary* (7th ed., 1999).

- While this approach likely will mean that most 911 calls will be admissible, it does not mean that all of them will be admitted. There may well be situations where the 911 call is not far removed from a deliberative statement to investigating officers or where, to borrow a phrase from Professors Friedman and McCormack, it amounts to nothing less than "dial-in testimony." . . . Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L.Rev. 1171 (2002). District court judges are well equipped to determine on a case-by-case basis whether such an exception ought to apply, and we are well equipped to ensure that in the general run of cases "dial-in testimony" is not being admitted.
- In considering this issue, I cannot resist commenting on the nexus between the "excited utterance" inquiry and the "testimonial" inquiry. When a district court finds that a 911 call "relate[s] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" – when in other words the trial judge finds that the call qualifies as an excited utterance under Rule 803(2) of the Federal Rules of Evidence – it often would seem to be the case that the call is not testimonial in nature. *It is very difficult to imagine a "solemn" excited utterance or even a semi-solemn excited utterance.*
- Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a "solemn declaration . . . ," *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354) or to agreed-upon forms of testimonial evidence ("affidavits, depositions, prior testimony, or confessions," *id.* at 51-52, 124 S.Ct. 1354) would seem to depart

> from the prerequisites for establishing an excited utterance. *To respect the one set of requirements would seem to disrespect the other. In the end, the number of "solemn" statements that also happen to "relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be something approaching a null set.*[69]

To determine whether a statement is testimonial within the meaning of *Crawford*, so as to be barred from admission at trial by the Confrontation Clause unless the declarant testifies or the statement was subject to cross-examination when taken, a reviewing court should ask whether the statement was made to a governmental official, as a result of formal or systematic questioning, and given in a solemn or deliberate manner. That a statement falls within the exceptions for present sense impression or excited utterance means that the statement is not testimonial; that it falls without does not mean that it is, nor is the law of evidence frozen to exceptions as understood either in 1789 or currently.

D. Summary

The Confrontation Clause was designed to have a limited, though extremely important, role. A particular practice, that of the government gathering evidence through ex parte depositions and affidavits, and then admitting that evidence at trial without presenting the witnesses, was banned. Those modern practices which are

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[69] *United States v. Arnold*, 410 F.3d at 913-915 (emphasis added). See also *United States v. Manfre*, supra, 368 F.3d at 838 ("Mr. Rush's comments were made to loved ones or acquaintances and are not the kind of memorialized, *judicial-process-created* evidence of which *Crawford* speaks"), emphasis supplied.

closely akin this banned civil-law practice are also prohibited, so that when the government engages in formal or structured questioning of an individual, who "bears witness" with a solemn or formal statement, that testimonial statement is inadmissible under the Confrontation Clause unless the declarant testifies (and the out-of-court statement may remain barred by rules of evidence, but the Confrontation Clause has nothing to say on the point). The law of evidence, especially hearsay exceptions, was not well developed at the time of the ratification of the Sixth Amendment, and the policy considerations concerning whether certain hearsay exceptions should be created or even expanded is not one with which the Confrontation Clause is concerned, outside of the evil it was designed to prevent.[70] Much hearsay falls without the Confrontation Clause and also without any hearsay exception; that it is not barred by the Confrontation Clause does not render it admissible. Where the statement made by a declarant not testifying at trial was not testimonial in that it was not to a governmental agent; or if to a governmental agent, not the result of structured or formal questioning (as in a response to an arriving police officer's question, "what happened here?"); or if itself not solemn or formal but within an exception such as the excited utterance or present sense impression, the question is solely one of

[70] In *Crawford* Justice Scalia suggests that there may be some "tension" between *Crawford* and the majority opinion in *White*, noting that the spontaneous declaration exception may not have existed at all at the time of the ratification of the Sixth Amendment. This discussion was, of course, dicta, and is scarcely an exploration of the relationship between excited utterances, when made to a governmental officer, and the Confrontation Clause.

policy and not constitutional law, and belongs to the law of evidence of the particular jurisdiction.[71]

CONCLUSION

Wherefore, amicus submits that the convictions should be affirmed.

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[71] And amicus submits that *Ohio v. Roberts*, 448 U.S. 56 (1980) has no role to play with regard to nontestimonial statements to determine their "reliability." There is no general "reliability" component of due process that permits federal courts to superintend the evidentiary decisions of state courts so as to determine whether the evidence admitted was sufficiently "reliable" under some standard not itself either explicit or implicit in the constitution.