No. 05-5705

IN THE

Supreme Court of the United States

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

RESPONDENT STATE OF INDIANA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6201

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
NICOLE SCHUSTER
Deputy Attorney General

**Counsel of Record*

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QUESTION PRESENTED

Whether disclosure of a crime to a first-responding police officer a few minutes after the officer arrives is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), when neither the declarant nor the officer acted with the intention of producing evidence for a criminal prosecution.

STATEMENT

On February 26, 2003, Peru Police Department Officers Jason Mooney and Rod Richard responded to a domestic disturbance dispatch at the Hammon home. Pet. App. 3. Arriving at the scene, Officer Mooney encountered Amy Hammon on the porch of the house. *Id.* At first, Amy was timid or frightened while she spoke to Officer Mooney. *Id.* Officer Mooney asked if a problem existed and Amy answered "'No.'" *Id.* at 3-4. Amy told Officer Mooney that, "'nothing was the matter'" and "'that everything was okay.'" *Id.* at 4. Amy allowed Officer Mooney to enter her home. *Id.*

Upon entering the Hammon home, Officer Mooney noticed immediately that Amy's living room was in disarray. *Id.* A glass heating unit, apparently broken recently, sat shattered in the living room with flames escaping through the front. *Id.* at 26.

Officer Mooney encountered Hershel Hammon, the Petitioner, in the house. *Id.* Hershel told Officer Mooney that he and his wife had had an argument, but that it was over and had not become physical. *Id.* at 27. Officer Mooney separated Hershel and Amy and Officer Richardson remained with Hershel in the kitchen while Officer Mooney spoke with Amy in the living room. *Id.* at 27, 31.

After being separated from Hershel, Amy confirmed to Officer Mooney that she and Hershel had had an argument. *Id.* at 27. Amy told Officer Mooney that, while they argued verbally, Hershel had begun smashing living room furnishings, including the telephone, a lamp,

and the front of the heater. *Id.* Amy told Officer Mooney that Hershel had thrown her down onto the broken glass in front of the heater and pushed her to the ground, shoved her head into the broken glass of the heater and punched her twice in the chest. *Id.* at 27-28. Officer Mooney had Amy fill out and sign a battery affidavit. *Id.* at 28.

Officer Mooney did not observe any physical injuries on Amy. *Id.* at 20. However, Amy did indicate some pain as a result of the attack. *Id.* Hershel tried at least twice to enter the living room where Officer Mooney was speaking with Amy, and each time Amy became quiet, as though afraid to speak. *Id.* at 31.

Indiana charged Hershel with Class A misdemeanor domestic battery, and he was found guilty after a bench trial. *Id.* at 4. Amy was not present at the trial, despite the prosecutor's subpoena. *Id.* Over Hershel's continuing hearsay objections, the trial court admitted, as excited utterances, Officer Mooney's testimony reciting Amy's statements. *Id.*[1] The trial court sentenced Hershel to one year in jail, with all but twenty days suspended. *Id.*

Hershel appealed his conviction, claiming the trial court erred when it admitted Officer Mooney's testimony as to Amy's oral statements pursuant to the excited utterance exception to the rule against hearsay. *Id.* at 20. After the case was fully briefed, but before the decision was handed down, *Crawford v. Washington*, 541 U.S. 36 (2004), ruled that out-of-court testimonial statements are inadmissible under the Confrontation Clause absent declarant unavailability and prior opportunity for cross-examination, abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980).

[1] It should be noted that at trial the Petitioner did not make an explicit Confrontation Clause objection to Officer Mooney's testimony reciting Amy's statements. However, the trial occurred before this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and the defense did raise a hearsay objection to Officer Mooney's testimony about Amy's statements. Pet. App. 4, 27. Furthermore, both the Indiana Court of Appeals and the Indiana Supreme Court have squarely addressed the issue presented in this case (*id.* at 3, 19) and the State has never argued, and is not now arguing, that the issue has been waived.

Crawford notwithstanding, the Indiana Court of Appeals affirmed the trial court's admission of Officer Mooney's testimony about Amy's oral statements, concluding that Amy's oral statements were not "testimonial" under *Crawford*. Pet. App. 24.

On discretionary review, the Indiana Supreme Court unanimously affirmed Hershel's conviction. *Id.* at 16. The court agreed with the Indiana Court of Appeals that Amy's oral statements to Officer Mooney qualified as excited utterances under Indiana Rule of Evidence 803(2) and were not "testimonial" under *Crawford*. *Id.* at 6, 10. The court stated that under *Crawford* "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." *Id.* at 13. Amy's oral statement was not testimonial because neither she nor Officer Mooney intended to produce evidence for trial. *Id.* at 13, 15. In fact, Officer Mooney's objective was merely to "accomplish[] the preliminary tasks of securing and assessing the scene." *Id.* at 15. The court also ruled that Amy's battery affidavit was inadmissible under *Crawford*, but that its admission was harmless error. *Id.* at 15-16.

REASONS FOR DENYING THE PETITION

1. Review is not warranted because the Indiana Supreme Court's decision represents nothing more than an ordinary application of *Crawford v. Washington*, 541 U.S. 36 (2004), to one among a potentially infinite variety of factual circumstances where courts will need to determine whether a non-testifying witness's oral statement is "testimonial." Petitioner attempts to argue that the Indiana Supreme Court misstated the applicable law, but the petition cites no rule from *Crawford* or any other decision of this Court that the decision below supposedly contravened. *See* Pet. 13-17. In fact, in at least one place, the petition implicitly acknowledges that precedent supplies no contrary rule. *Id.* at 15 ("[The decision below] speaks repeatedly of

motivation and purpose. But this, *we submit*, is the wrong inquiry; instead, the question *should be* whether a reasonable person in the position of the declarant would *anticipate* use of the statement in litigation.") (emphasis added).

The Court's own rules, of course, state that a petition for writ of certiorari is "rarely granted" based on "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10. Yet the petition explicitly argues for consideration of the sort of error that Rule 10 says is generally unworthy of review: that the Indiana Supreme Court "applied inaccurately the standard it articulated." *Id.* at 20. That is, Petitioner seeks review because he believes that the Indiana Supreme Court applied *Crawford* erroneously to these facts. Such a complaint does not warrant review.

2. The petition also urges review based on quibbles with the evidentiary basis for the factual finding that Officer Mooney was not conducting an interrogation of Amy when she informed him that Hershel had battered her. The Indiana Supreme Court concluded that Officer Mooney was attempting to secure the scene, assess the situation, and determine whether a crime had been committed. Pet. App. 15. Petitioner objects to this characterization based on details in the transcript concerning Amy's initial statement when Officer Mooney arrived, the timing of Officer Mooney's conversation with Amy, and Amy's execution of an affidavit immediately after disclosing the crime. *See, e.g.*, Pet. 21. When Amy told Officer Mooney of the crime, Petitioner contends, "the scene was already secure" because Amy and Hershel were already separated. *Id.* Furthermore, the original disturbance report, according to Petitioner, was enough to inform Officer Mooney that a crime had already been committed. *Id.* at 22.

The Indiana Supreme Court, Petitioner argues, erred in its conclusion that, factually speaking, Officer Mooney was simply trying to determine what was going on when Amy told

him of the crime. Determining whether a particular officer in a particular set of circumstances had a particular mindset is not worth this Court's attention.

3. Nor do Petitioner's cases establish a well-developed, meaningful lower court conflict over the meaning of *Crawford*. The Indiana Supreme Court's decision, again, turned on whether Officer Mooney was, at the time of Amy's declaration, determining whether a crime had been committed or investigating a known crime. Pet. App. 15. In the Indiana Supreme Court's view, these circumstances were critical for purposes of determining whether Amy's statement was made in response to interrogation and was therefore testimonial. *Id.* at 14-15. However, only one of the many cases cited by Petitioner as being in conflict with this proposition (*Mason v. State*, No. 05-04-00451-CR, 2005 WL 1531286, at *6 (Tex. Ct. App. June 30, 2005)) plainly tracks all facts material to the Indiana Supreme Court's decision: (1) that neither declarant nor audience was acting with the purpose of creating evidence; and (2) that the police officer that elicited the statement did so before having evidence that a crime had been committed. Furthermore, the recent decision in *Commonwealth v. Gonsalves*, ___ N.E. 2d ___, 2005 WL 2046000 (Mass. Aug. 29, 2005), is distinguishable because there, unlike here, the defendant had left the scene when police arrived and there was no ongoing threat to be assessed through questioning.

As mentioned, Petitioner's essential argument is a factual dispute concerning whether the Indiana Supreme Court made an erroneous determination that Officer Mooney was merely attempting to determine whether a crime had been committed. Its resolution would not change the fact that this Court cannot know from the cases cited by Petitioner how other jurisdictions (besides Texas) would rule based on the same factual premise. This important distinction serves as a reminder that it may take much more time before the Court can discern authentic

discrepancies concerning how lower courts apply *Crawford*. This is a highly factual issue—one subject to incremental development over time.

4. The Indiana Supreme Court properly ruled that Amy's statements to Officer Mooney were not testimonial statements under *Crawford*. First, the decision below correctly concluded that *Crawford* does not prohibit admission of *all* un-cross-examined hearsay elicited by police officers. *Crawford* merely ruled that responses to police *interrogations* were testimonial, not that all responses to all garden-variety police questions were necessarily testimonial. *Crawford*, 541 U.S. at 52.

Nor did the decision below rely on a formalistic understanding of "interrogation." The court recognized that any question by a police officer can be described as a "police interrogation," especially in light of this Court's usage of the term "in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4. But the Indiana Supreme Court nonetheless arrived at a reasonable operational definition of "interrogation" based on *Crawford's* indication that the term would include "attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." Pet. App. 14.

5. Next, the Indiana Supreme Court properly concluded that the crucial inquiry in determining whether a statement is "testimonial" is whether the police elicited the statement, or whether the declarant gave the statement, for "use in legal proceedings" or "with an eye toward trial." *Id.* at 13. This inquiry is common to all formulations of "testimonial" presented in *Crawford*, 541 U.S. at 51-52, and it dovetails with *Crawford*'s definitions of "witnesses" and "testimony." *Id.* It also protects against abuses "at which the Confrontation Clause was directed," namely those practices in "closest kinship" with the "use of *ex parte* examinations as

evidence against the accused," such as police questions designed to produce evidence. *Crawford*, 541 U.S. at 50, 68.

6. The Indiana Supreme Court's formulation of the "use in legal proceedings" standard also properly accounts for the point of view of both the declarant and the questioner. While initially holding that "the motive of the questioner, more than that of the declarant, is determinative," the court also observed that "if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement 'testimonial.'" Pet. App. 13. Focusing principally on the officer's intent makes sense because it is the officer who best understands whether the police are asking questions to secure an area, to render emergency aid, to determine whether a crime has been committed or to investigate a crime and gather information for prosecution. *Id.* at 14. This does not render the motivation of declarants irrelevant, however. *Id.* Regardless of the motivation of the police officers, a declarant's intent to establish a record for prosecution can render the statement testimonial and subject to *Crawford*. *Id.* at 13.

Furthermore, Petitioner is incorrect to suggest that, under the test applied by the Indiana Supreme Court, the reasonable expectations of the declarant (as opposed to the subjective designs of the declarant) are irrelevant. *See* Pet. 17. The test employed by the Indiana Supreme Court presupposes that a reasonable person in the declarant's shoes would understand the possibility that the statement might be used in legal proceedings. Pet. App. 14. That is, if a reasonable person in the declarant's shoes would *not* have that expectation, then the subjective motivations of the audience to gather evidence for criminal prosecution would not render the statement testimonial. *Id.* Undercover investigations where coconspirators unwittingly disclose valuable information to police or other informants are therefore not imperiled by this rule. *See*

Crawford, 541 U.S. at 55 (observing statements in furtherance of a conspiracy are not testimonial by their nature); *see also Dutton v. Evans*, 400 U.S. 74, 81 (1970) (plurality opinion).

7. Based on all of these premises, the Indiana Supreme Court properly ruled that "responses to initial inquiries by officers arriving at a scene are typically not testimonial." Pet. App. 14. Considering the multiple functions of first-responding law enforcement officers, this is a sensible conclusion. Police officers responding to emergency dispatch instructions often need information from individuals present at the scene to assist them with providing security, to render aid to the injured or vulnerable, to assess the need for further investigation, and to conduct that investigation. It is only the final category of activity—soliciting information from individuals at the crime scene as part of an ongoing investigation—that *Crawford* renders testimonial. Where, as here, an officer asks questions of an individual only as a means to determine whether that individual is in danger or whether a crime has been committed, the statement elicited may properly be used at trial.

8. In sum, the Indiana Supreme Court applied *Crawford* to produce an easily discernible rule that will enable more predictable lower court applications. The "use in legal proceedings" standard will cure pre-*Crawford* Confrontation Clause abuses and still permit the use at trial of many statements to police officers in circumstances at which the Confrontation Clause was not directed. A broader exclusionary rule might discourage open communication between citizens and law enforcement officers under emergency circumstances—a result that this Court surely did not intend.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

STEVE CARTER
Attorney General of Indiana

By: _____
THOMAS M. FISHER
Solicitor General

NICOLE SCHUSTER
Deputy Attorney General

Office of the Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
Telephone: (317) 232-6255