No. 05-5224

IN THE
Supreme Court of the United States

ADRIAN MARTELL DAVIS,
Petitioner,

v.

WASHINGTON,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Before the State had any incentive to shy away from the true nature of McCottry's statements to the 911 operator, it told the jury that those statements constituted her "testimony" on the day she was assaulted. J.A. 81. The State, however, now contends that McCottry's "testimony" was not testimonial.

To justify this position – which, to say the least, is rather counterintuitive – the State says that an accusation is testimonial only if it resembles the kinds of statements that led to abuses during one period of history, the era of Sir Walter Raleigh. This argument lacks foundation and makes no practical sense. 911 operators, just like questioners during the Raleigh era, generate statements in part for prosecutorial use, and it is silly to contend otherwise. But to whatever extent accusations to 911 operators differ from those abused during the Raleigh era, it turns the Confrontation Clause on its head to say that while it prohibits prosecutions based on out-of-court accusations governmental agents obtain under "formal" circumstances, it allows prosecutions based on accusations agents obtain with *fewer* procedural protections in place. This Court should reject this upside-down notion and hold that statements are testimonial whenever people knowingly tell a governmental agent associated with law enforcement that someone committed a crime. The government may not evade the prohibition on trial-by-affidavit by conducting "victimless" prosecutions on the basis of accusations it obtains with even less ceremony. Either way, defendants like Petitioner are denied their right to confront their accusers.

ARGUMENT

I. 911 Interviews Share Core Characteristics With Other Types of Governmental Actions That Produce Testimonial Statements.

The State's foundational contention is that 911 operators' "police incident interviews" (J.A. 112) like the one here do not have any evidence-producing function akin to the

governmental interviews abused during the Raleigh era. Resp. Br. 24-26. This contention is willfully blind to reality.

The entire recent practice of "victimless," or "evidence-based," prosecutions is premised on using statements to 911 operators and responding officers, instead of live testimony, to prove "elements of [crimes], such as the identification of the assailant." American Prosecutors Research Institute, *Non-Participating Victim*, at 4-9 <http://www.ndaa-apri.org/apri/programs/vawa/nonparticipating_victim.html> (last visited March 1, 2006). The State's *amici* in this very case describe this evidence as "critical." Nat'l Network to End Domestic Violence Br. 58a; *see also id.* at 20a ("key"); *id.* at 22a ("prosecutors rely to a very great extent on the existence of 911 tapes"); American Prosecutors Research Institute, *Creative Prosecution*, at 4 <http://www.ndaa-apri.org/apri/programs/vawa/creative_prosecution.html> (last visited March 1, 2006) (911 tapes are "key pieces of evidence").

Even though this evidence is so useful, the State nevertheless asserts that its agents do not try to seek it out. Resp. Br. 24-26. The United States similarly claims that when 911 operators conduct police incident interviews or responding officers arrive at the scene of suspected crimes, "[r]esponsible officials can be expected to be focused on averting harm as their prime goal, rather than generating evidence for trial." U.S. Br. 6. Thankfully, this Court need not engage in speculation on this matter. The law enforcement community's own publicly available training materials demonstrate that during initial contacts with crime victims, agents consciously generate evidence for use in ensuing prosecutions. This is especially so when, as here, agents are "responding to [allegations of] domestic abuse," where "police and prosecutors . . . often proceed in their investigations and prosecutions with the assumption that the victim will not be available" to testify at a trial. American Prosecutors Research Institute, *Non-Participating Victim*, *supra,* at 4; *accord* Officer Navin Sharma, et al., *Domestic Violence, Break the Silence, Break the*

Cycle, at 10-22 <http://www.doh.wa.gov/hsqa/emstrauma/OTEP/domviolence.ppt> (last visited March 1, 2006) (Washington State training power-point).

Recommended protocols funded by the U.S. Department of Justice's Violence Against Women Grants Office are informative. One protocol advises that 911 dispatchers dealing with domestic violence calls should "expect victims to recant *so collection of evidence should begin at the communications level*. [Dispatchers should] [d]etermine the details of the threat, injury, crime, how injury occurred, why it occurred, *who committed it*." Administration of Justice Studies Program, Mesa Community College, *Law Enforcement Response to Violence Against Women* <www.mc.maricopa.edu/dept/d52/ajs/vaw/911.htm> (emphasis added). The protocol further explains:

> • An excited utterance statement recorded on a 911 call . . . can be an important prosecutorial tool. Because the victim may not appear for trial or may appear and change their statement, it is important to record words made by the victim that qualify as an excited utterance.
>
> . . . .
>
> • Do not try to immediately calm the victim down. Allow the victim to continue talking in order to preserve the excited utterance exception. . . .

Id.; *see also* U.S. Dep't of Justice, Office on Violence Against Women, *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998) <http://www.vaw.umn.edu/documents/promise/pplaw/pplaw.html#id73537> (911 operators should "[r]ecord the victim's excited utterances" and tell her to preserve physical evidence). The American Prosecutors Research Institute (the research arm of *amicus* National District Attorneys Association), and other

law enforcement authorities urge similar protocols.[1] Parallel protocols – as petitioner Hammon presumably will elaborate – direct responding officers to take the same kinds of measures.[2] And domestic violence groups appearing here as *amici* forthrightly confirm that they train and collaborate closely with law enforcement agencies to develop these evidence-gathering techniques supporting victimless prosecutions. Nat'l Network To End Domestic Violence Br. 8a, 10a, 11a, 15a, 16a, 20a, 23a-24a, 26a-27a, 28a, 29a, 32a.

It does not matter whether 911 systems were designed specifically for the purpose of generating evidence for trial. The Marion statutes were not developed for that purpose. *See Crawford v. Washington*, 541 U.S. 36, 44 (2004). But both mechanisms may be used that way. Nor is anything in this description of law enforcement policies – a form of which was

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[1] *See* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 Prosecutor 18, 20 (Feb. 2005) (advocating "training . . . the dispatchers who take 911 calls from domestic violence victims" because "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution is the 911 call of a scared, crying victim"); Victor I. Veith, *Investigating Domestic Violence: A Call to Protect and Serve Our Families*, 2 Protocol No. 1, at 3 (1997) <http://www.idaho-post.org/JW/Protocol/Protocol_Oct97.pdf> ("officers and prosecutors need to include in their protocols a mechanism to preserve 911 calls" because such calls can constitute "excited utterances" that may allow "the prosecutor's case [to] survive even if the victim recants or otherwise becomes uncooperative with the government").

[2] *See, e.g.*, *People v. Ruiz*, 2004 WL 2383676, at *9 (Cal. App. 2004) (not officially published) ("California police officers are well trained . . . to be vigilant in recording complete statements" of initial encounters with victims "and to record the witnesses' statements in their reports so that the statements may later support a victimless prosecution."), *review granted* (Cal. 2005); American Prosecutors Research Institute, *Non-Participating Victim*, *supra*, at 7 (admonishing that "the excited utterance exception is lost if, when law enforcement arrive on the scene and encounter the hysterical victim who has recently been beaten, the police calm the victim down before getting her statement").

followed in this case (*see* J.A. 112-15) – meant to impugn the salutary objectives of officials seeking to identify and document criminal conduct. This is what 911 operators and other agents associated with law enforcement should do. Such evidence can be used to aid criminal investigations, to support arrests of suspects, and at trials when declarants testify. Even when no criminal case is pursued, "excited utterance" accusations can be used in civil proceedings such as child custody disputes, requests for no-contact orders, and tort actions for damages. All the Confrontation Clause provides is that such out-of-court accusations cannot be used in place of live testimony in criminal prosecutions.

II. To the Extent 911 Reports Are Less Formal Than Accusations to Magistrates During the Raleigh Era, Using 911 Reports Poses a *More* Serious Threat to the Confrontation Clause.

The State, as well as its *amici*, argue that the Framers intended the Confrontation Clause to prohibit only a particular set of abuses from "the Sir Walter Raleigh era," when governmental agents "produce[d] evidence through an interrogation of suspects and witnesses in a manner that shaped such evidence to suit the needs of prosecution." Resp. Br. 8. This argument misconceives the true nature of the right to confrontation and leads to incongruous results.

A. The State Misconceives the True Nature of the Right to Confrontation.

This Court does not generally follow an "abuses only" approach when determining the scope of constitutional criminal procedure rights. *See, e.g., Smith v. Massachusetts*, 125 S. Ct. 1129, 1133-34 (2005) (Double Jeopardy Clause applies to judicial acquittals even though it developed only to safeguard jury acquittals); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (Fourth Amendment applies to technological

surveillance even though such practices were not used prior to the Framing); *Jones v. United States*, 526 U.S. 227, 244 (1999) (Sixth Amendment – through what became *Apprendi* rule – applies to "sentence enhancements" even though "the scholarship of which we are aware does not show a question exactly like this one was ever raised and resolved in the period before the Framing"). There is no reason here either to follow such a cramped approach to constitutional law.

1. "The right to confront one's accusers is a concept that dates back to Roman times," and that was firmly planted in the common law long before Raleigh's trial. *Crawford*, 541 U.S. at 43. Raleigh himself explained that "[t]he Proof of the Common Law is by witness and jury." *Id* at 44 (quoting *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603)). Blackstone and Hale likewise spoke of the right to confrontation not simply as a prohibition against any particular practices, but as a positive requirement that accusers give their testimony in court, so that cross-examination can occur and the jury can "have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 William Blackstone, Commentaries on the Laws of England 373-74 (1768); Matthew Hale, The History of the Common Law of England 164 (Charles M. Gray ed. 1713) (right requires "personal appearance and Testimony of Witnesses"). This Court consistently has characterized the right this way as well. *See, e.g., Lee v. Illinois*, 476 U.S. 530, 540 (1986) (Confrontation Clause ensures that "the accused and the accuser engage in an open and even contest in a public trial").

It thus stands logic on its head to suggest that "the 'accusers' that the Confrontation Clause contemplates" were limited to "*formal accusers* (as in Raleigh's case)." U.S. Br. 6 (emphasis added). The whole point of the right to confrontation was (and is) to ensure that accusations are leveled in "a public and solemn trial," subject to adversarial testing. 3 Blackstone, *supra*, at 373. That is why this Court in *Crawford* found it "implausible that a provision which concededly

condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." 541 U.S. at 52 n.3. It is equally implausible, as a more general matter, that a provision that excluded extrajudicial accusations obtained in formal settings (that is, with some, but not all, procedural protections present) would now admit accusations obtained by governmental agents under *no* sense of formality or "solemn[nity]," 3 Blackstone, *supra*, at 373.

Put another way, the "abuses" during the 16th and 17th centuries occurred only because the Crown thought it could encroach, through a veneer of formality, upon the common-law requirement that criminal accusations be leveled in solemn court proceedings. No one dared even suggest that the government could prosecute criminal cases based on accusations it obtained under supposedly informal circumstances. As Chief Justice Marshall later wrote, "I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if *mere verbal declarations*, made in his absence, may be evidence against him." *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807) (emphasis added).

2. The State's related idea that the Confrontation Clause applies only when governmental agents have the opportunity to "manipulate or shape" a declarant's statement (Resp. Br. 21) is equally misguided. The right to confrontation always has applied to statements that the government never had a chance to "manipulate or shape." The right, in fact, existed long before governmental investigators existed. It also traditionally has applied to "voluntary affidavit[s]." 1 Thomas Starkie, A Practical Treatise of the Law of Evidence and Digests of Proofs, in Civil and Criminal Proceedings 267 (1826); *accord* Lord Chief Baron Geoffrey Gilbert, The Law of Evidence 61 (1805). It would apply today to an unprompted letter someone mailed to a prosecutor or to an uninterrupted statement at a police station accusing someone of committing a crime.

The reason why the Confrontation Clause applies in all these situations is because "[t]he right to confrontation is basically a *trial right*," not something that regulates police practices. *Barber v. Page*, 390 U.S. 719, 725 (1968) (emphasis added); *cf. Mayle v. Felix*, 125 S. Ct. 2562, 2572-73 (2005). Police and other governmental agents do absolutely nothing wrong when they ask victims to describe what happened and who hurt them. This is what law enforcement agents are *supposed* to do. They are supposed to obtain information from people reporting crimes in order to determine who wrongdoers are, and so that wrongdoers can be arrested and brought to justice. The more "thorough," "structured [and] targeted" the agents' questions are, Resp. Br. 20-21, the better.

The same conceptual problem infects the United States' insistence on separating supposedly "emergency" situations from other circumstances under which governmental agents obtain accusatorial statements. Such a distinction can be important with respect to constitutional provisions that regulate the way governmental agents gather evidence. *See, e.g.*, *United States v. Banks*, 540 U.S. 31 (2003) (Fourth Amendment's knock-and-announce rule); *New York v. Quarles*, 467 U.S. 649 (1984) (*Miranda* warnings). But the Confrontation Clause has nothing at all to say about how governmental agents interact with crime suspects or witnesses. The Confrontation Clause is concerned only with the method by which the prosecution proves cases in court. And in that respect, cross-examination is vital not just to curb potential governmental manipulation but also to "sift out the truth," 3 Blackstone, *supra*, at 373, with respect to completely voluntary or unfiltered testimony.

3. Once the right to confrontation is properly understood, it comes as no surprise that neither the State nor any of its *amici* can point to *one single case* (putting aside the "one deviation" of dying declarations, *Crawford*, 541 U.S. at 56 n.6) prior to the Founding or in the several decades that followed in which a prosecutor in a criminal trial was allowed to introduce

a nontestifying witness's accusatory statement made to a governmental agent.[3] There cannot be any doubt that such statements then, as today, would have been powerful prosecutorial evidence and would have allowed many prosecutions to proceed in the absence of victim testimony. But when the victim failed to appear for trial, the case was simply dismissed; "[w]ithout the accuser there could not even be a prosecution." Leonard W. Levy, Origins of the Fifth Amendment 29 (1968). Indeed, the closest analog to the statement in this case, a "hue and cry" to a local constable, was not even admissible in a *pretrial* hearing to detain a defendant pending trial. *See* Petr. Br. 20.

4. Because all of the historical authority that is most closely on point favors Petitioner, the State focuses on the collection of cases during the 19th century excluding accusatory statements *to private parties* (*see* Petr. Br. 23-29), and argues that these cases are irrelevant because they rest solely on hearsay law. The State further protests that the scope

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[3] What is more, neither the State nor any of its *amici* can point to a single criminal case in America before the much criticized *State v. McPike*, 3 Cush. 181 (Mass. 1849), or in England before the much-criticized *Rex v. Foster*, 6 Car. & P. 325 (1834), in which a nontestifying victim's accusatory statement *even to a private person* was validly admitted in a criminal case. *See* Petr. Br. 25-26 & n.5. The United States cites two cases from the Old Bailey Session Papers that supposedly show that such statements were admissible. *See* U.S. Br. 25 n.4. But the accusatory statement in *Rex v. Salter* was made on the victim's "death-bed," and thus was obviously a dying declaration. *Id.* at 330 <http://www.oldbaileyonline.org/html_units/1750s/t17550910-29.html>. The statement in *Rex v. Matthews* was not even accusatory; it simply described for purposes of medical treatment how the declarant had been injured. *Id.* at 152-53 <http://www.oldbaileyonline.org/html_units/1750s/t17550409-12.html>. The NACC brief (at 19-21) mentions other Old Bailey cases involving children's statements to family members, but the King's Bench implicitly disapproved these cases in *King v. Brasier*, 1 Leach 199 (K.B. 1779). There, the full King's Bench held that children's out-of-court accusations were admissible *only if they testified*. *Id.* at 200. Since the victim there had not been, in fact, "sworn or produced as a witness at trial," her accusatory statement was inadmissible. *Id.*

of Founding-era hearsay exceptions sheds no light on the scope of *Crawford*'s testimonial principle. Resp. Br. 28-32. Neither of these arguments holds up.

The development of the *res gestae* doctrine was *not* shaped solely by hearsay law. As Petitioner already explained, the doctrine's strict prohibition against admitting reports of past criminal conduct developed, especially in criminal cases, in significant part to avoid treading on the right to confrontation. *See* Petr. Br. 26-29. Indeed, the predominant reason courts invoked to exclude such statements was one that the United States labels a "central feature" of statements implicating confrontation concerns: that they were "nothing more than a weak version of live testimony." U.S. Br. 5, 18; *compare* 3 Simon Greenleaf, A Treatise on the Law of Evidence § 124, at 148 (1842) (reports outside *res gestae* inadmissible because such declarants are "not subject to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of testimony," namely "oath" and "cross-examination"); *Brasier*, 1 Leach at 199-200 (characterizing out-of-court statement describing recent assault as "testimony" given under inadequate safeguards); Petr. Br. 26-27 (collecting other authorities).[4] Even when courts excluded

[4] The State's *amici* are correct – as Petitioner already pointed out, *see* Petr. Br. 31 – that in the latter part of the 19th century some courts began to admit statements describing recently completed criminal conduct. *See* U.S. Br. 25; Br. for Illinois, et al. at 16. But none of these decisions involved statements to agents of law enforcement, a situation that brings the Confrontation Clause "unique[ly]" into play. *Crawford*, 541 U.S. at 56 n.7; *see also id.* at 53. And all of the courts upheld the admission of the statements based on perceived reliability – not on the traditional *res gestae* basis that they were part of the event itself. *See, e.g.*, Petr. Br. 31; *People v. Del Verno*, 192 N.Y. 470, 487 (1908) (emphasizing distinction between declarations that constitute part of the transaction itself and those describing recently completed conduct; upholding the admission of a statement in the latter class because of the "great improbability that the [statement] should be false"). Accordingly, their reasoning could not be used to turn back a Confrontation Clause objection. *Crawford*, 541 U.S. at 61.

such statements because they were not made under oath, *see* Resp. Br. 31, this amounted to the same complaint because *testimony* (and only testimony) is supposed to be given under oath. *E.g., Maryland v. Craig*, 497 U.S. 836, 845-46 (1990). It would not make any sense to complain that a co-conspirator statement or a family-history record was not made under oath.

None of this, of course, is to suggest that hearsay law in criminal cases was (or is) coextensive with the right to confrontation. These are distinct doctrines that serve different purposes. But as this Court repeatedly explained in *Crawford*, the scope of hearsay exceptions in 1791 sheds light on the testimonial principle, because the law at that time would not have condoned an exception that "admit[ted] *testimonial* statements against the accused in a *criminal* case." 541 U.S. at 56 (emphasis in original); *see also id.* at 58 n.8 (invoking this reasoning with respect to spontaneous declarations).[5] This supposition is especially forceful when, as here, contemporaneous authorities refused to extend a hearsay exception in criminal cases expressly to avoid impairing the right to confrontation.

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[5] This emphasis on *criminal* cases makes clear that neither *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694), nor *Aveson v. Kinnaird*, 6 East. 189, 193, 102 Eng. Rep. 1258 (1805), cited by *amici*, is informative regarding the scope of right to confrontation during the Founding period. But even if these cases were relevant, neither would help the State here. Even assuming, contrary to the prevailing understanding in early treatises (*see* Petr. Br. 30), that the statement in *Thompson* was admitted in the declarant's absence for the truth of the matter asserted, it apparently was part of the *res gestae*, not a report of a completed event. *See* Petr. Br. 30. The statement in *Aveson* was admitted because it described medical symptoms and because it was an admission against interest, not something "mean[t] to criminate." 6 East. at 195-97 (Lord Ellenborough, C.J. & Lawrence, J.). Neither *Thompson* nor *Aveson* remotely suggest that reporting a crime to a governmental agent associated with law enforcement could have been deemed admissible. Nor did any other Founding era civil case. Thus, contrary to the United States' suggestion (U.S Br. 27), there would have been no need for cases during that period to distinguish between civil and criminal cases with respect to the *res gestae* doctrine.

B. The State's Specific Arguments for Excluding McCottry's Statement from the Ambit of the Confrontation Clause Are Unavailing.

All that is necessary to decide this case is to hold that McCottry's statements accusing Petitioner of assaulting her are testimonial because they were knowingly made to a governmental agent associated with law enforcement accusing someone of committing a crime. The State argues, however, that (1) accusatory statements are not testimonial unless "questioning [producing them] is done by a governmental official with a primarily investigative function who, acting in his investigative capacity, conducts a structured interrogation, under circumstances where the investigator could manipulate or shape the witness's statement into something that resembles trial testimony," Resp. Br. 20-21; (2) it is improper to focus, even as a backstop to historical authority and inferences, on whether a reasonable declarant reporting a crime to a 911 operator would anticipate her statements would be used prosecutorially. Neither of these arguments withstands scrutiny.

1. None of the four components of the State's proposed rule advance its cause. Nor do any of them find any support in the text, history, or purpose of the Confrontation Clause.

First, the State's focus on agents' "investigatory" actions has no purchase here. All governmental agents associated with law enforcement, including 911 operators, are duty-bound to pass criminal accusations onto prosecutorial authorities. That is more than enough to implicate the Confrontation Clause, just as it is more than enough to implicate the Self Incrimination Clause. *See Grosso v. United States*, 390 U.S. 62, 66-67 (1968) (statement is testimonial if declarant "may reasonably expect [it] would be provided to prosecutorial authorities").

Second, the State's insistence on "structured" questioning is a red herring. The State never disputes that the questioning here was, indeed, "structured." The 911 operator followed "almost exactly" a detailed policy for obtaining information in

"police incident interviews." J.A. 135 n.5 (Sanders, J., dissenting); J.A. 112-15. The operator asked twenty-six questions over the course of the interview; implored McCottry to "listen carefully"; and once even interrupted her to demand that she "[s]top talking and answer my questions." J.A. 8-13.

In any event, it does not matter whether a governmental agent proffers "structured" questions in obtaining an out-of-court accusation. For starters, accomplices' confessions are not always given in response to "structured" questioning. *See, e.g.*, *Douglas v. Alabama*, 380 U.S. 415 (1965) (applying Clause to confession that was narrative in nature). Even two of Lord Cobham's statements used against Sir Walter Raleigh were given in the absence of structured questioning. One statement was a letter Cobham "voluntarily" wrote himself; another was an accusation "exclaimed" in response to learning that Raleigh allegedly had betrayed him. *See Trial of Sir Walter Raleigh*, 1 Jardine's Criminal Trials 389, 415, 444-46 (1832). Yet it always has been agreed that introducing such a nontestifying accomplice's confession constitutes a "paradigmatic confrontation violation." *See Crawford*, 541 U.S. at 52.

Statements obtained under the Marion statutes were not always given in response to structured questioning either. Those statutes required justices of the peace to "take the *examination* of the said Prisoner and the *information* of them that bring him." 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 c. 10 (1555) (emphasis added). Thus, magistrates apparently often simply received "information" from the accusers; no "examination" was even contemplated. Yet here as well, there is no dispute that statements obtained in this manner were testimonial. *Crawford*, 541 U.S. at 46-47.

This, of course, makes eminent sense. In run-of-the-mill criminal prosecutions, such as this one, all the information "essential to the prosecution of [a] case" (J.A. 128) often can be obtained by one question – "who did it?" – or just a few more. At trials themselves, prosecutors often ask victims only a handful of questions along the lines of, "and then what

happened?" The relevant inquiry, therefore, is not what kinds of questions are asked but what kinds of answers are given.

Third, the State's insistence on an "interrogation" does it no good. The State contends that questioning does not amount to interrogation unless it is "formal" and "thorough." Resp. Br. 20. But this Court in *Crawford* emphasized that it was using the term "interrogation" in its "colloquial, rather than any technical, legal sense," and it cited to *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). *See Crawford*, 541 U.S. at 53 n.4. This suggests that interrogation, at a minimum, includes "express questioning or its functional equivalent" – that is, "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 300-01. Asking an assault victim who assaulted her easily meets this standard.

In any event, it does not matter whether a governmental agent "interrogates" a declarant. Nothing in Fifth Amendment law limits the realm of testimonial statements to those produced during interrogations. Nor does anything in *Crawford*. To the contrary, *Crawford* says repeatedly that statements made during police interrogations are part of a class of "paradigmatic" or "core" testimonial statements, 541 U.S. at 52, 63, indicating that other types of statements also are testimonial. *See also id.* at 68. *Crawford* also stated, without referring to any "interrogation" requirement, that the statements the alleged victim in *White v. Illinois* made "to an investigating police officer admitted as spontaneous declarations" were "testimonial statements." *Id.* at 58 n.8.

The State essentially admits that its "interrogation" rule cannot be squared with this description of *White*. Resp. Br. 22 n.9. And there is no doubt the State's test also would mean that a person could go to a police station to report a crime and, so long as officers did not interrupt to ask questions, the complainant's accusation would not be testimonial. *See* Cal. Evid. Code § 1370 (new *Roberts*-era statute allowing admission of such statements); Or. Rev. Stat. § 40.460 (same);

State v. Barnes, 854 A.2d 208, 211 (Me. 2004) (post-*Crawford* decision allowing use of such a statement because complainant was not "interrogated"). This result is difficult to square with any sensible view of the Confrontation Clause.

The State's emphasis on the lack of thoroughness in the operator's interview in this case (Resp. Br. 26) is especially perverse. The operator's questioning established all of the elements of the crime the State charged. *See* J.A. 81-82 (prosecutor summarizing 911 tape for the jury). The only manner in which the operator's questioning was *not* thorough was with respect to potential lines of cross-examination, such as who exactly "Mike" (the other man allegedly present) was and whether he might have been the one who assaulted her. *See* Petr. Br. 37; J.A. 10-11, 136 n.7 (Sanders, J., dissenting). It cannot possibly be that that kind of governmental "brevity" (Resp. Br. 26) in questioning excludes out-of-court accusations from the ambit of the Confrontation Clause.

Fourth, it does not matter, as described *supra* at 5-8, whether the government obtains an accusation in a way allowing it to generate "something that resembles trial testimony." Resp. Br. 20-21. Even if such a requirement existed, the State here, quite correctly, explained to the jury that the audio recording that the 911 operator's questions produced did not just resemble trial testimony; it actually amounted to McCottry's "testimony on the day that this happened." J.A. 81. Nothing more need be added to the State's own words.

2. To the extent that historical traditions and inferences leave any question whether McCottry's accusation that Petitioner assaulted her was testimonial, the fact that a reasonable person in her position would have anticipated that her statement would be used prosecutorially confirms that it was. Although the State asserts that this generalized "reasonable declarant" test lacks any textual basis (Resp. Br. 30), it flows directly from the Confrontation Clause's words "witness against." One needs to interpret those words functionally, since defining them to refer only to in-court

testimony would elevate form over substance, rendering the Clause "powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51. And, functionally speaking, a person is a witness against another – just as this Court has long held she is a "witness against" herself under the Fifth Amendment – when providing information she "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *see also Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189-91 (2004) (terming such statements "testimonial"); *United States v. Hubbell*, 530 U.S. 27, 34-38 (2000) (same); *id.* at 55 n.5 (Thomas, J., concurring) (drawing parallel between Fifth Amendment and Confrontation Clause).[6]

In contrast to the State's multi-pronged balancing test, this rule also is easily administrable. Once this Court establishes whether a reasonable person would anticipate that reporting a recent crime to a governmental agent would be used prosecutorially, lower courts will be able to implement that rule without difficulty. By contrast, the State's proposed test – to borrow Justice Thomas' words – would present a "multitude of difficulties." *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in the judgment). In every case, courts would have to determine, among other things, whether the governmental agent who obtained the statement was "acting in his investigative capacity"; whether he conducted "structured," "targeted," "thorough," and "formal" questioning; and whether the circumstances gave rise to a danger of "manipulat[ion]." Resp. Br. 20-21. One sees no end to such litigation.

The State and the United States also maintain that a reasonable person calling 911 to report a crime would not

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[6] The State's attack on the objective nature of the reasonable declarant rule (Resp. Br. 37-38) is nothing more than an attack on objective standards generally. This attack is inconsistent with *Kastigar* and innumerable other criminal procedure doctrines. *See* Petr. Br. 41.

believe that her statements were being taken for use "at trial," Resp. Br. 35, or "in a legal proceeding," U.S. Br. 11-14. But this frames the inquiry too narrowly. This Court has made clear that people are "witnesses" not just when they provide evidence specifically for trial but also when they understand that their statements could be used *prosecutorially* – that is, for law enforcement purposes. *See Hubbell*, 530 U.S. at 37-38; *Kastigar*, 406 U.S. at 445; *Grosso*, 390 U.S. at 66-67.[7] This recognition comports with the historical bar against using victims' "hues and cries" – which would have been no more focused on future trials than modern 911 calls – as evidence against the accused. *See* Petr. Br. 18-22. And it finds support in *Crawford*, where this Court noted that statements obtained for "investigative" reasons are testimonial. 541 U.S. at 53.

Perhaps most important, focusing on prosecutorial use instead of trial use comports with common sense. When, for example, people report crimes but say they would prefer not to press charges, they may not think their statements would be used in future trials. But such statements obviously should be treated as testimonial. As prosecutors often point out, "the decision to prosecute lies with the prosecutor and should not be usurped by . . . the victim." American Prosecutors Research Institute, *Non-Participating Victim*, *supra*, at 5. Accordingly, the Confrontation Clause is concerned with *all* accusatory statements to law enforcement agents, not just those that declarants think will be used specifically at legal proceedings.

Once the reasonable-declarant inquiry is properly framed, it is clear – and the State does not contend otherwise – that the test is satisfied here. People report crimes to 911 in order to produce a law enforcement response. They know that accusatory statements are likely to trigger arrests and the machinery

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[7] The State suggests the word "prosecutorially" is different than phrase "for law enforcement purposes." Resp. Br. 34. Petitioner conceives of both phrases as having the same meaning – namely, as evidence "in a criminal prosecution or [leading] to other evidence that could be so used," *Kastigar*, 406 U.S. at 445 – and uses the phrases interchangeably.

of the criminal justice system. That is particularly so in the context of domestic violence accusations, because state law *requires* the police to arrest suspected abusers, Petr. Br. 38-39, and "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985).

Contrary to the United States' assertion (Br. 14-15), this analysis does not ignore the exigent nature of 911 calls reporting recently completed crimes. No matter how upset or frenzied people are when they call 911 to report a crime, they are, of course, calling 911 – instead of their friend, family member, business colleague, or anyone else – for an important reason: they know that a 911 operator connects them to the police, the agency charged with enforcing the criminal laws. That knowledge is sufficient to make such declarants' accusations testimonial, even if they are not "focused on . . . providing evidence" (U.S. Br. 16) at the time.

Creating an exception for accusations made in response to supposedly "emergency questioning" would open a gaping hole in the Confrontation Clause. The United States says that a statement providing "the identity of a person who may pose a current danger" satisfies its emergency test. U.S. Br. 29. It also says that a statement obtained at the scene in order to decide whether to arrest a suspect satisfies its test. U.S. Br. in *Hammon* at 13. There is no temporal limitation on either of these proposed rules. Nor does a statement even appear to have to come from a victim. Presumably, then, every time a person calls 911 or tells the police that someone who is still at large committed a felony – or at least a violent crime – that statement would not be testimonial. Calling 911 to say that John Doe committed two rapes over the past week certainly would identify "a person who may pose a current danger." U.S. Br. 29. So would telling that to the police in person. The government, in short, always would be able prosecute defendants based on first reports instead of producing accusers in court. This cannot be squared with the history of the Confrontation Clause or its true nature as a trial right.

III. Adopting the State's Position Would Demolish Our System of Adversarial Justice With Respect to Prosecuting a Broad Array of Street Crime.

Nothing short of the adversarial process itself is at stake in this case. Washington and other states use "excited utterance" statements to governmental agents in place of live testimony not just in domestic violence cases but also in prosecuting crimes as varied as ordinary assault, carjacking, arson, robbery, kidnapping, and drug crimes. *See* Appendix A (collecting recent cases). Contrary to suggestions from the State's *amici,* this practice did not germinate until the "mid-1990's," when this Court's decision in *White* opened the door to proceeding in this manner. *See* Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?,* 28 Seattle L. Rev. 301, 301 (2005); NACDL Br. in *Hammon* 27 n.16. But there is no mistaking the vigor with which prosecutors now want to try cases without putting alleged victims or other witnesses on the stand. So long as it is permissible, the American Prosecutors Research Institute predicts that "the criminal justice system will experience an ever increasing number of cases prosecuted on the basis of the excited utterance exception." American Prosecutors Research Institute, *Non-Participating Victim, supra,* at 9.

To this end, the Institute already has published a detailed protocol for "overcom[ing] a [*Crawford*] challenge to the introduction of excited utterances made by a victim to a police officer." Cindy Dyer, *Sample* Crawford *Predicate Questions,* 1 The Voice 8 (Nov. 2004) <http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf>. Typical questions are: "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were those questions asked in order to determine whether a crime had even occurred?"; and "At this time, did the victim make any statements to you that were not in response to any questions?" *Id.* at 8-9. Other publications likewise urge that 911 operators be trained to gather evidence "that will ultimately lead to the conviction of batterers" while

"avoid[ing] the victim's statements being classified as testimonial." Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. Cal. L. Rev. 213, 254-55 (2005). Some courts already have rested decisions upon such spoon-fed testimony. *See, e.g., State v. Hembertt*, 696 N.E.2d 473, 479 (Neb. 2005) (noting that officer "agreed" with prosecutor's suggestion that the victim's statement to him "was not in response to a question that [he] or another officer asked"), *pet'n for cert. pending* (No. 05-5981); *Marc v. State*, 166 S.W.3d 767, 779 (Tex. App. 2005) ("The officers' testimony indicates that each one asked questions of a lone, visibly upset female . . . in an attempt to determine the reason for her emotional state.").

Consequently, this Court should have no illusions concerning what will happen if it affirms here. Prosecutors, in conjunction with other law enforcement agents, will be able effectively to dispense with the adversarial process with respect to prosecuting a broad array street crime. Whenever 911 operators or responding officers are able to obtain accusatory statements shortly after the events at issue without asking too many "tactically structured" questions, prosecutors will have no need to produce alleged victims at trial. *See Crawford*, 541 U.S. at 68 (unavailability need not be shown to introduce nontestimonial hearsay); *White*, 502 U.S. at 355-58 (same with respect to "excited utterances"). Nor, in many cases, will prosecutors have any such incentive. Putting witnesses on the stand runs the risk that, through cross-examination, witnesses will be corrected, impeached, or exposed as exaggerators or liars. *See* NACDL Br. in *Hammon* at 21-22. It is much easier to simply to present recorded out-of-court accusations.

The Confrontation Clause is designed to prevent just such inquisitorial trial methods. This Court should enforce it here.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Washington Supreme Court.

Respectfully submitted,

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March 2, 2006

APPENDIX A

Recent Prosecutions Outside the Domestic Violence Realm Using Nontestifying Witness's "Excited Utterances" to Governmental Agents as Substantive Evidence of Guilt

State v. Walker, 118 P.3d 935 (Wash. App. 2005) (assault)

State v. Ohlson, 125 P.3d 990 (Wash. App. 2005) (assault)

State v. Talbott, 2005 WL 2630641 (Wash. App. 2005) (assault)

People v. Cordova, 2006 WL 45878 (Cal. App. 2006) (kidnapping, carjacking, robbery, possession, battery, trespass)

People v. Morris, 2005 WL 2982137 (Cal. App. 2005) (first-degree murder), *review denied* (Cal. 2006)

People v. Soliz, 2005 WL 2746784 (Cal. App. 2005) (robbery, carjacking)

People v. Lennon, 2005 WL 957751 (Cal. App. 2005) (attempted murder, assault, shooting at an occupied motor vehicle), *review denied* (Cal. Aug. 10, 2005)

In re Bryan S., 2005 WL 977668 (Cal. App. 2005) (attempted second-degree robbery), *review denied* (Cal. July 13, 2005)

People v. Saravia, 2005 WL 295789 (Cal. App. 2005) (attempted murder), *review denied* (Cal. Apr. 27, 2005)

People v. Davis, 2004 WL 2699998 (Cal. App. 2004) (shooting at an unoccupied car)

People v. Jimenez, 2004 WL 1832719 (Cal. App. 2004) (robbery), *cert. denied*, 125 S. Ct. 1713 (2005)

People v. Martin, 2004 WL 859187 (Cal. App. 2004) (attempted second degree robbery, assault with a deadly weapon), *review denied* (Cal. 2004)

Drayton v. United States, 877 A.2d 145 (D.C. 2005) (attempted possession of a prohibited weapon and assault)

Lopez v. State, 888 So.2d 693 (Fla. App. 2004) (felon in possession of a firearm)

People v. West, 823 N.E.2d 82 (Ill. App. 2005) (aggravated criminal sexual assault, aggravated vehicular hijacking, armed robbery, kidnapping)

In the Matter of A.L, 2006 WL 9511 (N.C. App. 2006) (assault)

State v. Sutton, 609 S.E.2d 270 (N.C. App. 2005) (murder, attempted robbery, assault)

State v. Forrest, 596 S.E.2d 22 (N.C. App. 2004) (first-degree kidnapping, assault with deadly weapon, and assault), *aff'd*, 359 N.C. 424 (N.C. 2005) (per curiam)

People v. Diaz, 798 N.Y.S.2d 21 (N.Y. App. 2005) (assault)

People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (attempted murder, assault, weapon possession)

People v. Conyers, 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004) (assault and weapon possession)

People v. Dobbin, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004) (robbery)

State v. Williams, 2005 WL 120054 (Ohio App. 2005) (assault with a firearm)

State v. Anderson, 2005 WL 171441 (Tenn. Crim. App.), *appeal granted* (Tenn. 2005) (burglary)

Wall v. State, __ S.W.3d __, 2006 WL 119575 (Tex. Crim. App. Jan. 18, 2006) (aggravated assault)

Marc v. State, 166 S.W.3d 767 (Tex. App. 2005) (aggravated sexual assault)

Cole v. State, 2005 WL 3115555 (Tex. App. 2005) (aggravated robbery)

Davis v. State, 2005 WL 183141 (Tex. App. 2005) (capital murder)

Wilson v. State, 151 S.W.3d 694 (Tex. App. 2004) (aggravated robbery), *review refused* (Tex. 2005)

Cassidy v. State, 149 S.W.3d 712 (Tex. App.) (aggravated assault with a deadly weapon), *cert. denied*, 125 S. Ct. 1648 (2005)

Delgado v. State, 2004 WL 3093477 (Tex. Crim. App. 2004) (murder)

State v. Ballos, 602 N.W.2d 117 (Wis. App. 1999) (arson), *review denied*, 609 N.W.2d 473 (Wis. 2000)