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 OF PETITIONER HERSHEL HAMMON

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

KIMBERLY A. JACKSON
JENSEN & ASSOCIATES
7440 North Shadeland, Suite 202
Indianapolis, Indiana 46250
(317) 849-5834

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Attorney: Friedman

QUESTION PRESENTED

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

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JURISDICTION

The Indiana Supreme Court issued its decision in this case on June 16, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Responding to a report of a domestic disturbance, Officers Jason Mooney and Rod Richard of the Peru, Indiana, Police Department came to the house of Petitioner Hershel Hammon and his wife Amy on the evening of February 26, 2003. No evidence indicated how much time had elapsed between the incident that led to the report and the arrival of the police officers. Mrs. Hammon was the first person the officers encountered; according to Mooney's testimony at trial, she appeared to be "timid" and "frightened." Mooney testified that he asked whether there was a "problem" or "anything was going on," and that Mrs. Hammon replied in the negative. J.A. 81.

Mooney sought and received permission from Mrs. Hammon to enter the house. There he found indications of an altercation: In the corner of the living room, the glass front of a gas heating unit was broken, with fragments of the glass on the floor and flames emerging as a result. J.A. 81. Mooney found Petitioner in the kitchen and asked what had happened.

Petitioner answered that he and Mrs. Hammon had "been in an argument" but that it "never became physical" and "everything was fine now." J.A. 81. Richard remained with Petitioner in the kitchen while Mooney went to speak with Mrs. Hammon once again. This time, according to Mooney's testimony,

> She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater. . . .
>
> She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

J.A. 82.[1] Mooney then asked that Mrs. Hammon complete and sign a battery affidavit, and she did so. J.A. 82. The affidavit was on a prepared fill-in-the-blank form that Mooney apparently had with him and that tracked the language of the battery statute, IC 35-42-2-1, by alleging in general terms that the defendant "did knowingly touch" the victim "in a rude, insolent and angry manner," resulting in bodily injury to the victim. J.A. 2. In the longest blank, which contained the

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[1] Nevertheless, Officer Mooney did not notice any personal injury to Mrs. Hammon, and she did not complain that she had any pain. J.A. 26-27, 29.

instruction "Describe the Acts," Mrs. Hammon wrote the following:

> Broke our furnace and shoved me down on the floor into the broken glass and hit me in the chest and threw me down. Broke our lamps and phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

J.A. 82 n.1. She then signed her name twice, once under an acknowledgment that the "investigating officer" was relying upon her allegations "as establishing Probable Cause for the arrest of the defendant on the charge of Battery under IC 35-42-2-1," and once under an affirmation that the representations in the affidavit were true, that she understood the provisions of the "false informing statute," and that she was reporting a crime. J.A. 2-3.

The State charged Petitioner with Domestic Battery, a Class A misdemeanor. On May 9, 2003, the Circuit Court of Miami County held a bench trial on this charge, consolidated with a hearing on an allegation that the incident violated the terms of Petitioner's probation on an earlier battery conviction. Mrs. Hammon was not present at the consolidated proceeding. Although the state had subpoenaed her, it never made any attempt to show that she was unavailable for trial. Over Petitioner's objections, the court admitted both Officer Mooney's testimony reporting Mrs. Hammon's oral statements and Mrs. Hammon's affidavit. The court rejected hearsay objections on the grounds that the oral statement fit within the excited utterance exception to the hearsay rule and that the affidavit was a present sense impression. The only other evidence was brief testimony by the secretary of the county probation department establishing Petitioner's probation status. Petitioner offered no evidence.

The trial court convicted Petitioner of Domestic Battery and also found that he had violated the terms of his probation. The court sentenced Petitioner to a prison term of one year, with all but twenty days suspended. It also instructed him to complete a drug and alcohol evaluation and a counseling program.

Petitioner took an appeal to the Indiana Court of Appeals, which upheld the conviction. The appellate court agreed with the trial court that Mrs. Hammon's oral statement was an excited utterance. While the appeal was pending, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, if the statement was testimonial in nature, it could have been admitted against Petitioner only if he had an opportunity to cross-examine Mrs. Hammon *and* she were shown to be unavailable, but neither of these conditions was true. Accordingly, the court of appeals considered whether the oral statement was testimonial within the meaning of *Crawford*. The court held, however, that the statement was not testimonial, and it concluded that admission of the statement did not violate Petitioner's rights under the Confrontation Clause. The court did not reach the question of whether admission of the affidavit was erroneous, because it concluded that the affidavit was "cumulative" of the report of Mrs. Hammon's oral statement, so any error in admitting the affidavit was harmless. In reaching the conclusion that Mrs. Hammon's oral statement was not testimonial, the court emphasized that the statement lacked a formal quality and that the statement was not, in its view, made in response to interrogation.

The Indiana Supreme Court granted a petition for transfer, *Hammon v. State,* 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004), but it too upheld the conviction. While recognizing that it was "unclear precisely how much time had passed between the event and the statement," the court agreed with the lower courts that Mrs. Hammon's statement was excepted from the rule

against hearsay as an excited utterance under Indiana Rule of Evidence 803(2). The court then turned to the Confrontation Clause issue, focusing on the meaning of the term "testimonial." After reviewing the decisions of the court of appeals in this case and of courts from other jurisdictions, the supreme court distanced itself from the court of appeals' analysis but nevertheless concluded that

> a "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either be principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motiva-tion of the individual taking the statement or the ob-jectively evaluated purpose of the procedure is sufficient.

J.A. 100-01.

Focusing on *Crawford*'s reference to statements made in "police interrogations," the supreme court drew the inference that such an interrogation "is properly limited to 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." Thus, "responses to initial inquiries by officers arriving at a scene are typically not testimonial." J.A. 102.

Turning to the facts of the case before it, the supreme court asserted that "the motivations of the questioner and declarant are the central concerns." Though it noted the absence of findings on point, the court then concluded that what

it characterized as "the initial exchange between Mooney and Amy"

> fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial.

J.A. 104. Thus, the court held that Mrs. Hammon's oral statements were not testimonial, and there was no error in admitting them.

The court also held that admission of the affidavit violated Petitioner's confrontation right. It indicated that if the case had been tried to a jury the error may not have been harmless, despite the fact that the affidavit "merely repeated the substance of Amy's statements to Officer Mooney," because "the formality of the affidavit may have lent credibility in a jury's mind." But, given that the case was tried to the bench, the court concluded that the error was harmless. J.A. 106. Accordingly, Petitioner's conviction was affirmed. Petitioner then petitioned this Court for a writ of *certiorari*, and the Court granted the writ.

SUMMARY OF ARGUMENT

The Court can decide this case by adopting a simple principle: A statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of *Crawford*.

The Confrontation Clause is an affirmative guarantee that testimony introduced against an accused must be given under a prescribed procedure – in the presence of the accused and subject to cross-examination. The determination of whether a statement is testimonial in nature therefore depends not on whether the statement has the *characteristics* of trial testimony but on whether the statement fulfills the *function* of testimony. As suggested by the frequently used locution "to confront one's accusers," an accusation made to a known police officer lies at the core of that function. Indeed, if such an accusation is allowed as proof at trial, then our system has countenanced a method of testifying that is radically different from the one constitutionally prescribed.

In assessing whether a statement is testimonial, the critical perspective is not that of the questioner, if there even is a questioner, but that of the speaker, the person who made the statement and whom the accused assertedly has a right to confront. The best standard is whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime. Under this standard, an accusation made to a known police officer is clearly testimonial.

The decision of the Indiana Supreme Court cannot be saved by a doctrine allowing otherwise inadmissible statements because of the proximity of time to the incident at issue or the stress under which the speaker made the statement. There was no such doctrine at the time of the Framing, and it was not

established as a matter of common law until many years afterward.

Finally, the decision of the Indiana Supreme Court invites manipulation and creates inappropriate incentives. Without saying so, the decision amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene before any writing or other recording has been made is *not* testimonial. In the court's view, the critical question was whether, in receiving Mrs. Hammon's oral accusation, Officer Mooney was engaged in "the preliminary tasks of securing and assessing the scene." The vulnerability of this standard to manipulation is demonstrated by the way the court applied it in this case. The officer procured the oral accusation at least in substantial part as a step in the process of gathering proof for prosecution. He did not need the accusation to secure the scene, and he did not use it for that purpose. And if he is deemed to have taken the accusation for purposes of assessing the scene, then that characterization will always be possible – until an accusation is made.

The decision of the Indiana Supreme Court gives an investigating officer an incentive to delay securing the scene, and to delay the appearance of the scene being secured, so that oral accusations made at the scene may be introduced at trial if the accuser does not testify subject to cross-examination. It also gives the officer an incentive to avoid questions that might be deemed to be interrogation, even if that would be the most effective method of learning useful information. The accusation made at the scene of the incident in this case is no less testimonial than the station-house statement made in *Crawford*, and using it to convict the Petitioner without affording him an opportunity for confrontation violates the Constitution.

ARGUMENT

I. AN ACCUSATION MADE TO A KNOWN POLICE OFFICER IS TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD*.

The Confrontation Clause imposes three basic conditions on testimony offered against an accused: First, it must be given in the presence of the accused. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).[2] Second, the accused must have an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Third, the witness must give the testimony at trial unless she is unable to testify there. *Id.*

Amy Hammon made a statement to Officer Mooney accusing Petitioner of a crime. This statement satisfied *none* of the conditions stated above. Petitioner was not present when the accusation was made, nor did he ever have an opportunity to cross-examine Mrs. Hammon, nor did she testify at trial, nor was her unavailability to testify at trial demonstrated.[3] If the accusation is deemed to be testimonial, therefore, its use at trial

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[2] The question of when or whether this aspect of the right can be satisfied when the witness and the accused are in different rooms but connected electronically, *cf.* Maryland v. Craig, 497 U.S. 836 (1990); Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 535 U.S. 1159 (April 29, 2002) (statement of Scalia, J.) (explaining Court's decision not to transmit to Congress proposed amendment that would allow testimony from a remote location in some instances), is not raised by this case.

[3] A further condition of testimony is that it be sworn. *See Crawford*, 541 U.S. at 52 n.3. This condition, too, may be protected by the Confrontation Clause; cross-examination would lose considerable bite were the witness not subject to the penalties of perjury. Mrs. Hammon's affidavit was made subject to those penalties. J.A. 2-3. Her oral accusation, the one that provided the basis for Petitioner's conviction, was not.

– which was essential to Petitioner's conviction – violated Petitioner's rights under the Confrontation Clause as elucidated in *Crawford*.

To decide this case, then, the Court need go no further than to adopt a simple principle: A statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of *Crawford*. *See Crawford*, 541 U.S. at 58 n.8 (treating the statements involved in *White v. Illinois*, 502 U.S. 346 (1992) – accusations made by a child victim to an investigating police officer – as testimonial and doubting that spontaneity could justify their admission).

These conditions are sufficient, but not necessary, for a statement to be testimonial. Decision of this case does not require a determination of other sets of conditions in which a statement should be deemed testimonial.

A. An Accusation Made to a Known Police Officer Lies at the Core of the Concerns Underlying the Confrontation Clause.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Unlike some clauses of the Constitution,[4] this one does not merely prohibit a given procedure. Rather, like the rest of the Sixth Amendment,[5] it provides an affirmative guarantee of the

[4] *See* U.S. Const. art. I, § 9, cl. 3 (ex post facto and Bill of Attainder clauses); art. III, § 3, cl. 2; (Attainder of Treason clause); amend. V (Self-Incrimination clause); amend. VIII (prohibition of excessive bail and fines and cruel and unusual punishments).

[5] U.S. Const. amend. VI (providing that "in all criminal

procedure described. Witnesses against the accused must give their testimony subject to confrontation by the accused – in his presence, subject to an opportunity for cross-examination, and at trial if reasonably possible. Assuming the accused has not waived or forfeited the right, no other way of giving testimony is permissible. Thus, the Clause would be violated if a prosecution witness gave her testimony according to the civil-law tradition, by examination in private by judicial officers. *Crawford*, 541 U.S. at 43. And if an adjudicative system allowed a prosecution witness to give her testimony by writing it and placing it in a pot sealed until the time of trial, according to the later Athenian tradition,[6] or by relating it to a friend whom she designated to transmit it to court, the violation would be just as clear.[7]

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prosecutions, the accused shall enjoy" various rights, including, in addition to confrontation, the rights to speedy and public trial, by a jury of the district in which the crime was committed, to compulsory process and to assistance of counsel); *see also* art. III, § 3, cl. 1 (requiring "Testimony of two Witnesses" for proof of treason).

[6] S.C. TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993).

[7] The Court's statement in *Crawford* that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," 541 U.S. at 50, should be understood in this light. As the Court amply documents in *Crawford*, "the civil-law mode" was the most salient alternative to the common-law model of testimony, and it was the one that had been used to oppressive effect both in England and in America. But this does not mean that the Confrontation Clause meant to allow judicial systems to provide any mode of testimony so long as it did not resemble that of the civil law. Indeed, the civil-law system, while not the one adopted by the common law, was the one adopted by the great civilizations of continental Europe, and it included some important protections, such as the oath and cross-examination on written

It follows that, in determining whether a statement is testimonial within the meaning of *Crawford* – or, put another way, whether the speaker is acting as a witness for purposes of the Confrontation Clause – it is not necessary that the statement have been made under conditions bearing any resemblance at all to those of a common-law trial. The whole point of the Confrontation Clause, as demonstrated by the historical discussion in *Crawford*, 541 U.S. at 42-56, is to *ensure* that testimony be given at trial or, if necessary, at some other formal proceeding at which the accused is present and can cross-examine. The determination of whether a statement is testimonial cannot depend, therefore, on the extent to which it shares the *characteristics* of trial testimony. (If it did, those who make and receive statements in anticipation of prosecution would have a clear incentive to avoid those characteristics.) Rather, the critical consideration is whether, assuming statements of its kind are admissible, a system will have been created in which witnesses may testify against an accused in some way other than the one required in a common-law trial, subject to confrontation of the accused. And this determination will depend, whatever the circumstances in which the statement was made, on whether the statement performs the *function* of testimony.

The present case does not demand a detailed or precise exegesis of what that function is. A serviceable, shorthand,

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questions. R.C. van Caenegem, *History of European Civil Procedure, in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 19 (Mauro Cappelletti ed., c. 1972); W. Ullmann, *Medieval Principles of Evidence*, 62 L.Q. REV. 77, 84-85 (1946). A system that offered *fewer* protections would not stand in *better* position under the Confrontation Clause. *Cf. Crawford*, 541 U.S. at 52 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK.").

standard is that a statement performs the function of testimony, and the speaker acts as a witness, if the statement transmits information for use in investigation or prosecution of crime. However the function may be described, it appears plain that an accusation made to a known police officer lies at the heart of it.

Indeed, it is hard to imagine a statement more testimonial in nature, or one that, if admitted against the person accused without an opportunity for confrontation, more clearly violates the Confrontation Clause. Accusations are so much the core of the Clause's concern that this Court has often referred to "the right to confront one's accusers,"[8] sometimes explicitly associating that locution – rather than the actual term "the witnesses against him" – with the Sixth Amendment.[9] An accusation does not provide merely peripheral or supporting information for a prosecution. Rather, it is an assertion that a person has committed a crime and, in a case like this one, a description of the circumstances and nature of the crime. When it asserts all the elements of the crime – as in this case – it may be sufficient in itself to support conviction.

Furthermore, the audience for such an accusation makes it about as far from being a "casual remark to an acquaintance," *Crawford*, 541 U.S. at 51, as possible. The accusation is made directly to a law enforcement officer, whose responsibility it is

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[8] *E.g.*, Florida v. Nixon, 543 U.S. 175, 185 (2004); *Crawford*, 541 U.S. at 43 ("The right to confront one's accusers is a concept that dates back to Roman times."); Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[9] *E.g.,* United States v. Ruiz, 536 U.S. 622, 629 (2002); ("the Sixth Amendment right to confront one's accusers"); Portuondo v. Agard, 529 U.S. 61, 64 (2000) ("Sixth Amendment rights to be present at trial and confront his accusers"); Maryland v. Craig 497 U.S. 836, 849-50 (1990) ("the Sixth Amendment's guarantee of the right to confront one's accusers").

to make an arrest, if he deems it appropriate, to transmit material information to the prosecutor, and, if the occasion arises and he is allowed to do so, to testify in court about the information he has received.

In short, if an accusation made to a police officer, whatever the circumstances in which it was made, may be admitted against an accused without an opportunity for confrontation, then virtually the whole of the confrontation right is lost: Rather than saying that a prosecution witness must testify in the presence of the accused and subject to cross-examination, as the Confrontation Clause requires, we must add a qualifier, that the witness may also testify by making an accusation to a police officer.

B. As Judged by the Proper Standard – the Reasonable Expectation of a Person in the Position of the Declarant – Mrs. Hammon's Accusation was Clearly Testimonial.

In determining whether Mrs. Hammon's accusation was testimonial, the Indiana Supreme Court explicitly put primary weight on the motivation of the questioner. J.A. 100. But whether a statement is testimonial should be determined from the perspective of the declarant. The decisive consideration is the reasonable anticipation of a person in the declarant's position.

Though the Indiana Supreme Court indicated that it would be *sufficient* to render a statement testimonial that the questioner was "principally motivated by a desire to preserve the statement" for "potential future use in legal proceedings," J.A. 100, this principle is untenable. It would extend the confrontation right *too* far; indeed, it would require a major change in police investigative practices. Suppose a conspirator makes a statement in support of the conspiracy to an undercover police officer or a confidential informant, who surreptitiously records the statement for evidentiary purposes. Admission of

such a statement against another member of the conspiracy has never been considered to violate the confrontation right.[10] Nor should it be: The police officer may be trying to secure evidence from the declarant, as police secure evidence from many sources, non-human as well as human, but that does not make the process testimonial.

More significantly for this case, a questioner's motivation to preserve a statement for potential evidentiary use cannot be *necessary* to render the statement testimonial. Several considerations support this conclusion.

First, declining to characterize a statement as testimonial unless a questioner took the statement for potential use in legal proceedings would lead to absurd and intolerable results. Suppose Mrs. Hammon had gone to the police station on her own initiative and said, "Here is an affidavit relating a battery committed on me by my husband. I hope you will use it to help convict him of the crime." Clearly, this is testimonial even though there was no questioner at all.[11]

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[10] *See Crawford*, 541 U.S. at 58 (citing with approval, as among the Court's cases that, "in their outcomes, hew closely to the traditional line," *Bourjaily v. United States*, 483 U.S. 171 (1987), which "admitted statements made unwittingly to a Federal Bureau of Investigation informant"); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004) (concluding "that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."); *but cf.* United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) (citing as supporting admissibility the fact that the recipient of the statement "was not a police officer or a government informant seeking to elicit the statements to further a prosecution").

[11] The same conclusion would hold if she made her accusation in the form of a letter or a videotape that she gave to an intermediary whom she asked to relay the accusation to the police.

Second, making the role of the questioner decisive ignores the fundamental nature of the accused's right, which is to be confronted with the *witnesses* against him. The existence of police officers and public prosecutors is not essential to the existence of the confrontation right. Indeed, the right to confront adverse witnesses predates the institutions of police forces and public prosecutors by more than two millennia.[12] Even at the time the Confrontation Clause incorporated the right into the Constitution, there was nothing resembling the modern police force,[13] and both in England and in parts of America most crime was still privately prosecuted.[14]

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[12] Deuteronomy 19:15-18 (providing that if a witness makes an accusation of wrongdoing, "then both parties to the dispute shall appear before the Lord, before the priests and the judges who are in office in those days; the judges shall inquire diligently"); Acts 25:16 ("It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."), *quoted in* Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988); LAWRENCE H. SCHIFFMAN, SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY AND THE PENAL CODE 73 (1983) (quoting Dead Sea Scroll on procedure in case only one person witnesses a capital offense; witness must report crime to examiner in presence of accused, and testimony is recorded, allowing for accumulation of testimony across episodes to satisfy three-witness requirement).

[13] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67 (1993) (describing the rise of the modern police force as one of the "major social inventions" of the nineteenth century).

[14] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986), *quoted in* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1248 n.295 (2002); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511,

Third, it is not the police or prosecutors or other questioners who violate the confrontation right. There is nothing wrong with police officers or prosecutors taking statements privately, without offering the accused a chance to be confronted by the witness. Good investigation often demands that they do so, as they did both in *Crawford* and in this case. The Clause is violated only when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness. That the statement in question was made to a government officer who was openly attempting to gather evidence for use in a prosecution may be a significant factor supporting the conclusion that the statement is testimonial; that was so in *Crawford* and it is so in this case as well.[15] But for a statement to be deemed testimonial, it is not essential that it be received by a government officer, or that such an officer be motivated by a desire to record evidence for purposes of prosecution.

The critical perspective, therefore, is not that of the questioner, if there even is a questioner, but that of the speaker, the person who made the statement and whom the accused assertedly has a right to confront. The Indiana Supreme Court did purport to consider Mrs. Hammon's motivation as well as that of Officer Mooney, but it did so in such a dismissive way, without any genuine examination of the evidence bearing on the

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518-19 (1994).

[15] It is true, as *Crawford* said, that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." 541 U.S. at 56 n.7. The abuse by prosecutors consists not in taking the statements privately but in taking advantage of such leeway as the courts allow them to introduce privately given testimony in evidence at trial without affording the accused the benefit of confrontation.

question,[16] that her motivation cannot have played a substantial role in the court's decision.

Furthermore, the court erred by posing the issue in terms of Mrs. Hammon's *motivation*. Instead, the question should be whether a reasonable person in the position of the declarant would *anticipate* use of the statement in investigation or prosecution of a crime. Many different motivations may impel a witness to make a testimonial statement: She may be responding to pressure, believing that her own status in the criminal justice system or other interests of hers (such as her ability to maintain custody of her children) are dependent on her making an accusation to the authorities.[17] In some such cases, she might hope that the statement will never be used against the person she has accused. Or she might make the statement for purposes of personal expiation, or catharsis, or to secure her immediate personal safety.[18] In none of these cases does the actual motive of the declarant – or combination of motives, because of course several may have operated at once – diminish the testimonial nature of the statement: Whatever her inner motivations may have been, she has knowingly created evidence that a reasonable person understands will likely be used by the criminal justice system. The jurisprudence of the Confrontation Clause should recognize that such self-conscious creation of evidence is testimonial without the need to flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court.

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[16] See *infra* note 48.

[17] Petitioner has asserted that the police threatened to take the couple's children away if Mrs. Hammon did not sign an accusatory statement. J.A. 59.

[18] *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOKLYN L. REV. 241, 253 (2005).

Furthermore, focusing on reasonable anticipation rather than on motivation allows for straightforward adoption of an objective test: It makes perfect sense to ask, "What would a reasonable person have anticipated in these circumstances?" But the question, "If a reasonable person made this statement in these circumstances, what would her motivation have been?" is conceptually very difficult, if not incoherent. Even if applied on a case-by-case basis, an objective test is easier to implement than a subjective one, which requires an inquiry into the particular speaker's mind. Moreover, unlike a subjective test, which necessarily depends on the circumstances of each particular case, an objective test lends itself to the development of categorical rules addressing defined portions of the confrontation landscape. Such rules further simplify implementation of the right, and they protect it against erosion. The greatest value of establishing rights of an accused in the Constitution, subject to review by one Supreme Court, lies in the fact that courts that are responsible for the actual implementation of criminal procedure will often be tempted in adjudicating particular cases to disregard those rights or minimize their value. Broad, general tests are of limited utility in counteracting this factor; brief as the history is under *Crawford*, it is enough to show that some courts are inclined to manipulate the meaning of "testimonial" to admit evidence about as much as they manipulated the meaning of "reliable" for the same purpose under the prior regime of *Ohio v. Roberts*, 448 U.S. 56 (1980);[19] some of the post-*Crawford* decisions – often applying complex, multi-part tests just as the state

[19] *Crawford*, 541 U.S. at 63-64 (discussing how manipulation of reliability standard made it "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations"). Similarly, beginning decades before *Roberts*, some courts and commentators manipulated the boundaries of the hearsay exception for excited utterances. *See infra* p. 32.

supreme court in *Crawford* did – are quite startling in this respect.[20]

The Court can decide this case by staying on the prudent path on which it started two terms ago. *Crawford* identified several categories of statement that are necessarily testimonial – "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements made in response to] police interrogations," 541 U.S. at 68. In this case, the Court merely needs to add "accusations made to known police officers" to that list. Such accusations – asserting that another person has committed a crime, and made to an officer responsible for

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[20] *See, e.g.*, State v. Barnes, 854 A.2d 208, 210-12 (Me. 2004) (victim's "statements to the police when she *reported a crime,*" made after driving herself to the station-house, were not testimonial because she initiated the encounter, "she was still under the stress of the alleged assault," and her statements were not in response to "tactically structured police questioning") (emphasis added); State v. Wright, 701 N.W.2d 802, 813-14 (Minn. 2005) (victim's responses to police questioning about half an hour after the alleged incident were not testimonial because police were merely "determin[ing] what happened," although they already had the suspect in custody and the officers took notes later used to refresh their memories at trial); State v. Lewis, 619 S.E.2d 830, 844 (N.C. 2005) (reasons for holding accusation non-testimonial include: questioner was a field officer, not a detective; focus of the questioning was "to gather as much preliminary information as possible about the alleged incident," officer not yet being certain of seriousness of crime; accuser did not initiate conversation; officer was not only other person present; accuser "did not know the status of the investigation"); State v. Mason, 110 P.3d 245, 246, 249-51 (Wash. Ct. App. 2005) (victim's statements made the day after an attack to "report the crime" were not testimonial – despite the fact that the victim was questioned at two separate police stations by several officers – because he was seeking protection).

initiating the machinery of criminal justice – lie at the core of the concern of the Confrontation Clause.

II. AN ACCUSATION IS NOT EXEMPTED FROM THE CONFRONTATION CLAUSE ON THE GROUND THAT IT WAS MADE UNDER STRESS OF THE INCIDENT.

If, as Part I has argued, there is a categorical rule that accusatory statements to police officers are testimonial, then the State cannot prevail unless it brings the case within an exception to that rule. But none applies.[21]

The Indiana Supreme Court held that Mrs. Hammon's accusation came within the State's hearsay exception for "excited utterances," Indiana Evidence Rule 803(2). Because Indiana does not have a residual exception to the hearsay rule, the court noted, the "excited utterance" exception "has been interpreted broadly to permit admission of statements deemed trustworthy." J.A. 85. While noting that "[i]t is unclear precisely how much time had passed between the event and the statement," the court held that "a prompt police response was a reasonable inference from this record." J.A. 86-87; the court

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[21] *Crawford* left open the possibility that there is a "dying declaration" exception to the confrontation right, 541 U.S. at 56 n.6. Even if so, plainly it does not apply. Counsel has argued in academic writing that the reason the Confrontation Clause poses no obstacle to some dying declarations accusing the defendant of homicide is not that such declarations fit within an exception to the rule against hearsay but that the defendant has forfeited the confrontation right. *See generally* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997). *Crawford* also explicitly preserves forfeiture doctrine. 541 U.S. at 62. But the State has never claimed that Petitioner forfeited the right, as by intimidating Mrs. Hammon, and there is no basis for doing so; indeed, she specifically stated that she did not feel threatened by Petitioner. J.A. 64-65.

failed even to speculate, however, as to how much time may have passed between the event and the domestic disturbance report that generated the police response.

Indiana is free to make its own hearsay rules, of course, but the decision contains a strong suggestion that characterizing the statement as an excited utterance has constitutional significance. This may explain the court's cursory dismissal of the speaker's perspective. J.A. 95 ("The Court of Appeals is likely correct that the declarant of an excited utterance will ordinarily lack the requisite motive because the heat of the moment makes it unlikely that the declarant is focusing on preservation rather than communication of information.") But the suggestion is incorrect. There is no "excited utterance" exception to the Confrontation Clause, nor does the excited state of the speaker render a statement non-testimonial for purposes of the Clause. And even if there were such a doctrine, it would not come close to fitting this case.

These points are clear from *Crawford*, from a footnote *not even cited* by the Indiana Supreme Court.[22] Treating the accusatory statements in *White v. Illinois*, 502 U.S. 346 (1992), as testimonial, the note then addressed the issue of whether characterizing the statements as "spontaneous declarations" could justify the absence of cross-examination. The Court said:

> It is questionable whether testimonial statements would ever have been admissible on that ground [as "spontaneous declarations"] in 1791; to the extent the hearsay exception for spontaneous declarations

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[22] Other courts as well, among those reaching similar results, have disregarded the footnote, presumably because otherwise they would have to follow its clear implication. *E.g.,* United States v. Brun, 416 F.3d 703 (8th Cir. 2005); People v. King, 121 P.3d 234 (Colo. App. 2005).

> existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694).

541 U.S. at 58 n.8.[23]

We may now go beyond this statement, because it is clear that as of 1791 there was no doctrine allowing admissibility of otherwise inadmissible statements on the ground that they were spontaneous declarations or excited utterances. Such a doctrine did not develop until many years later.[24]

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[23] *Thompson* is reported as having been decided in Michaelmas term, 5 Wm. & Mary, which was 1693, EDWARD ALEXANDER FRY, ALMANACKS FOR STUDENTS OF ENGLISH HISTORY 126, 137 (1915), as indicated by Wigmore, 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 196, § 1749, at 200 (James H. Chadbourn rev., 1976), rather than 1694; this is the *only* respect in which Wigmore is better authority than *Crawford*.

[24] In a review of hearsay law from 1754 to 1824, Professor Thomas Gallanis writes,

> [T]he treatises indicate that most of the modern exceptions to the rule against hearsay were in place by the end of the eighteenth century, even if their contours in particular cases required clarification. These exceptions were: legitimacy, family relationships, pedigree, prescription, custom, general reputation, prior consistent and inconsistent statements, and dying declarations.

T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 533 (1999) (footnotes omitted). Conspicuously absent from this list, of course, is an exception for excited utterances.

First, note that *Thompson* was a civil case.[25] It therefore has little or no relevance to the confrontation right.

Second, *Thompson* appears never to have been cited by another judge or court – not once – until 1805, and then in another civil case. It was reported in 1728, Skinner 402, 90 E.R. 179, the report was repeated in virtually identical form in a compilation of decisions by the judge, Sir John Holt, published ten years later, Holt 286, 90 E.R. 1057, and then the case seems to have escaped judicial mention for nearly seventy years.

Third, *Thompson*, a brief decision by a single judge, never even mentions the contents of the statement, its audience, or the purpose for which it was offered at trial. Was the statement one that, timing aside, should be considered testimonial? Was it offered to prove the truth of what it asserted, which would violate the confrontation right if it was testimonial in nature and was offered against the accused in a criminal case, or was it relevant as part of the story being proven, *res gestae* in the term that later became accepted? We can only speculate on these matters. Because *Thompson* was so cryptic, later courts and commentators did not know what to make of it; they cited it for a wide variety of propositions, but not until the latter part of the nineteenth century was it thought to provide good support for the proposition that an accusation made shortly after an event

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[25] The caption names private parties first rather than the Crown, describes the case as an "action" rather than arising by indictment, and states that it was heard at *nisi prius*, which (except in a removal case, which *Thompson* was not) is a forum for civil litigation. *See* J.S. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558-1714 134 (1972); 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 279 (7th ed. 1956).

might be introduced, absent trial testimony by the speaker, as an accurate narrative.[26]

Fourth, *Thompson* speaks in terms of immediacy. In 1693 and in 1791, immediate meant what it does today – one event follows another immediately if nothing occurs in between.[27]

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[26] For an early sign of confusion see 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 313 (1st ed. London 1736) (citing *Thompson* by citation for a general paragraph saying: "It seems agreed, that what another has been heard to say is no Evidence, because the Party was not on Oath; also, because the Party, who is affected thereby, had not an Opportunity of Cross-examining; but such Speeches or Discourses may be made use of by Way of Inducement or Illustration of what is properly Evidence.").

The proposition for which *Thompson* is cited in the annotations published with Gilbert's treatise, GEOFFREY GILBERT, THE LAW OF EVIDENCE 108 (1754) ("But tho' Hearsay be not allow'd as direct Evidence, yet it may be in Corroboration of a Witness Testimony to shew that he affirmed the same thing before on other Occasions, and that the Witness is still consistent with himself; for such Evidence is only in Support of the Witness that gives in his Testimony upon Oath."), is inapposite to the case; the declarant presumably did not testify at trial because she was a party in a civil case and so was disqualified.

One of the leading treatises of the first part of the nineteenth century treated *Thompson* as standing only for the proposition that "the fact of making the complaint immediately . . . is admissible in evidence." 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 161 (5th ed. 1834).

[27] J. BULLOKAR, AN ENGLISH EXPOSITOR (8th ed. 1688) ("That which cometh directly from one thing to another without any thing between."); E. PHILLIPS, THE NEW WORLD OF WORDS (5th ed. 1696) ("next, and presently following"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773) ("Being in such a state with respect to something else as that there is nothing between them."); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH

And if, as *Thompson* suggests, the rationale is that the speaker has no time to create a self-serving falsehood, then the permissible time frame is indeed instantaneous, because in many situations such creation takes no more than an instant.[28] Immediacy does not remotely resemble the present case.

DICTIONARY (25th ed. 1783) ("which follows without any thing coming between."); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) ("instant; present with regard to time.").

[28] Consider this episode related by an experienced Evidence teacher:

> My wife and I had decided to remodel the den in our home and I . . . decided to refrain from sharing that fact with two of our sons, Nathan, then age 3, and Chris, age 4. On the day work was to begin, I took them off to daycare. During the day, we ripped out the carpet in the room, tore out the bookcases, stripped off the wallpaper, knocked out the walls of a closet, and generally reduced the room to a bare shell. At the end of the day, I picked up Nathan and Chris at daycare, took them home, and led them by the hand into the now-demolished room. They stood there, beholding the wreckage, eyes wide and mouths agape, clearly in the stress of excitement caused by the event. And in that moment, Nathan turned to me and said, "Chris did it."

Peter B. Knapp, *Excited Utterances in the Real World: What My Children Have Taught Me About Reliability*, *available at* http://www.wmitchell.edu/academics/faculty/knapp3.asp. *See also* Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 460 (1990) ("Commentators cite to psychological studies indicating that the interval which separates cognition from the onset of the capacity to fabricate is brief – often a matter of fractions of seconds – and impossible to gauge without the aid of instruments.").

Between the alleged incident and Mrs. Hammon's accusation, there passed not only an unknown amount of time but also two attempts by the police to secure a statement from her. Indeed, it is clear that there was more than ample time to falsify because *on the State's own theory* Mrs. Hammon did just that *well before* making her accusation: Her first statement to Officer Mooney, inconsistent with the later accusation, denied that there was a problem.

In contrast to *Thompson*, note the well-known case of *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (1779). There, a young girl, under seven years of age, "immediately on her coming home" told her mother and a woman who lodged with her of a sexual assault by the accused. The two women testified at trial, but the girl "was not sworn or produced as a witness on the trial." After Brasier was convicted, the judge referred the matter to the Twelve Judges, who decided unanimously that the two women should not have been allowed to recount what the girl had told them. Strikingly, and explicitly, the judges referred to the girl's statement as testimony. They held that "no testimony whatever can be legally received except upon oath." Even very young children could take the oath if they had sufficient knowledge of its nature and consequences, but if found incompetent "their testimony cannot be received."

The manifest premise of the judges' discussion was that if the speaker had been an adult it would have been plainly improper for other persons to relay her accusations – her "testimony" – to court; the only question, answered in the negative, was whether the youth of the speaker made a difference. *Brasier* clearly reflects the law of its time,[29] and it

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[29] The case was soon picked up by treatises. *See, e.g.,* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 293 (5th ed. 1790), and it continues to be good law with respect to the competence of child witnesses. JOHN E.B. MYERS,

held squarely against admissibility notwithstanding the presence of several factors, absent in the present case, that might have been argued to point the other way – the demonstration of immediacy, and the facts that the speaker was a child, that her audience was not government officials, and that she was not responding to questioning.

Thus, at the time of the Framing, there was no special rule allowing admissibility of accusatorial statements because they were made under stress of excitement. There were two situations in which such statements might be admitted. *First*, as *Crawford* noted, there was a well-established doctrine admitting certain dying declarations. 541 U.S. at 56 n.6. Without deciding "whether the Sixth Amendment incorporates an exception for testimonial dying declarations," *Crawford* said, "If this exception must be accepted on historical grounds, it is *sui generis*." *Id.* Arguably, the doctrine is better regarded as a reflection of the forfeiture principle.[30] Either way, it has no bearing on this case. *Second*, throughout the 18th century courts were lenient in admitting prior consistent statements of a trial witness to bolster the witness's testimony in court.[31] Indeed, an annotation placed in the margin of Gilbert's celebrated treatise on evidence when that work was published posthumously in 1754 refers to *Thompson* (by citation only, not by name) for this proposition only.[32] But this doctrine also is clearly inapposite

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EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 3.2, at 206-07 (3d ed. 1997).

[30] *See supra* note 21.

[31] 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (James H. Chadbourn rev. 1972) § 1123, at 254; *see, e.g.,* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 431 (1721).

[32] *See supra* note 26.

to a case like the present one, in which the complainant did not testify at trial.[33]

In the decades after the adoption of the Confrontation Clause in 1791, the common law continued, generally under the rubric of hearsay, to develop in solicitous regard for the confrontation right. The modern concept of hearsay – an out-of-court statement offered to prove the truth of what it asserts – emerged.[34] The general rule excluding hearsay was subject to two sorts of limitations.

First, some types of statements that fit the definition of hearsay were excepted from the rule – but as noted in *Crawford*, 541 U.S. at 56, except for dying declarations, these did not include statements of a testimonial nature offered against a criminal defendant. *See supra* note 24.

Second, a statement might be admitted to prove the truth of some proposition other than what it asserted; with admissibility limited in this way, the statement did not pose a confrontation problem.[35] For example, especially in rape cases it was common practice to prove that the alleged victim had made a complaint shortly after the incident. But only "the fact of making the complaint immediately" was admissible,

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[33] *See Crawford*, 541 U.S. at 59 n.9 (preserving the rule of *California* v. *Green*, 399 U.S. 149 (1970), that there is no Confrontation Clause violation if the declarant testifies at trial).

[34] Note, for example, the following passage from 1 S. MARCH. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 229 (7th ed. 1829), not found in earlier editions (including the 6th edition of 1824): "Hearsay is not admitted in our courts of justice, as proof of the fact which is stated by a third person."

[35] That continues to be the law. *See Crawford*, 541 U.S. at 59 n.9, affirming the rule of Tennessee v. Street, 471 U.S. 409 (1985).

generally because it supported her credibility;[36] the particulars of the complaint, including the identity of the assailant, were not.[37]

Similarly, alongside the hearsay rule developed the concept of *res gestae*, which provides not an exception to the rule against hearsay but a way around it: If the making of the statement has significance as a part of the incident that is the subject of the litigation, then it may be admitted on that basis, without relying on the statement as an accurate narrative of events.[38] Professor Gallanis cites a case from 1794 relying on

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[36] 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 148 (3d ed. 1830). Starkie cites *Thompson* for this proposition. *See supra* note 26.

[37] *See, e.g.*, 1 S. MARCH PHILLIPPS, *supra* note 34, 233 ("the particulars of the complaint, stated by her on the former occasion, are clearly not admissible as evidence of the truth of her statement"); R. v. Osborne, Car. & M. 622, 624, 174 E. R. 662, 663 (1842) (allowing evidence that the victim named some person as the perpetrator immediately after the attack, but the question "whose name was mentioned" could not be asked); R. v. Megson, 9 Car. & P. 420, 422, 173 E. R. 894, 895 (1840) ("All that could safely be received was . . . her complaint that a dreadful outrage had been perpetrated upon her," not "the particulars of the complaint as independent evidence"); R. v. Walker, 2 M. & Rob. 212, 174 E. R. 266 (1839).

[38] One leading treatise described the distinction this way:

> If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the *credit* of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances,

this doctrine – but a civil case, not involving an excited utterance, and not even referring to the doctrine by name.[39] The term itself appeared shortly after that and in 1805 a judge in a civil case referred to the statement in *Thompson* as having been "given in evidence as part of the res gestæ"; this appears to be the first judicial citation of *Thompson*.[40] Soon after that, the *res gestae* doctrine began to be elaborated in the treatises.[41]

Through most of the nineteenth century and well into the twentieth, courts on both sides of the ocean adhered rigidly to the principle that the *res gestae* doctrine only supported admissibility of a statement that was (a) made contemporaneously with, or at most a short time after the event it described, and (b) not "a narrative of a past occurrence."[42] By the time Wigmore wrote the first edition of his treatise at the turn of the twentieth century, these constraints had begun to

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> independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence.

1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, at pt. I, § 28, at 47 (1st Am. ed. 1826).

[39] Gallanis, *supra* note 24, at 535 & n. 266, 537 & n. 288.

[40] Aveson v. Kinnaird, 6 East 188, 193-94, 102 E.R. 1258, 1261 (1805).

[41] Gallanis, *supra* note 24, at 533 & n.251.

[42] 22 CORPUS JURIS § 556, at 467-68 (1920) ("A statement which is merely narrative of past transactions or events is not admissible as part of the res gestæ, even though it was made soon after the occurrence to which it relates.") (citations omitted); Friedman & McCormack, *supra* note 14, at 1215, *quoting* Upton v. Commonwealth, 2 S.E.2d 337, 339 (Va. 1934).

bend. Wigmore greatly accelerated the development.[43] Citing *Thompson* as his earliest authority, he argued that some cases reflected not merely the *res gestae* doctrine but a genuine hearsay exception – that is, if uttered under sufficient excitement caused by a stressful event or condition, a statement *could* be admitted as an accurate report of what it asserted. Acknowledging that the existence of this exception had not always been clear, he claimed only that it had been established for about a generation.[44]

Over the course of the twentieth century, the restraints on the excited utterance exception progressively loosened.[45] This Court's decision in *White v. Illinois,* 502 U.S. 346 (1992), ensured – until *Crawford* – that the Confrontation Clause would pose no obstacle to the admission of statements that were deemed excited utterances or spontaneous declarations for purposes of hearsay law. Prosecutors naturally took advantage of the leeway the courts allowed them, frequently securing admission of accusatory statements made shortly after the incident at issue, without even the need to demonstrate the accuser's unavailability. But, common as the practice had become before *Crawford* restored independent force to the confrontation right, it remains clear that at the time of the Framing and for many years before and after, the practice would not have been tolerated.

That older rule, the one that prevailed before Wigmore's focus on reliability dominated understanding of the confrontation right, is the one that squares with a sound conception of the right. The present context, involving an

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[43] Friedman & McCormack, *supra* note 14, at 1217-20.

[44] 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 2249-50 (1st ed. 1904)

[45] Friedman & McCormack, *supra* note 14, at 1220-24.

accusation made to a police officer, illustrates the point vividly. That such an accusation is made hastily or in excitement does not rob it of its testimonial character or mean that it is of no concern under the Confrontation Clause. On the contrary, if such accusations may be used to secure a conviction, then we have countenanced a system in which accusers may make their accusations in a form that may easily be relayed to court but without satisfying any of the conditions long required for prosecution testimony – so long as the accusers speak in haste and excitement.

III. THE INDIANA SUPREME COURT'S RULE INVITES MANIPULATION AND CREATES IMPROPER INCENTIVES.

A. The Indiana Supreme Court's Rule Improperly Treats Pre-Recording Oral Accusations Made at the Scene of the Alleged Crime as Not Testimonial.

The basic principle advocated here is that accusatorial statements made to a known police officer are testimonial. Far from advocating such a categorical rule, the Indiana Supreme Court declared explicitly that "responses to initial inquiries by officers arriving at a scene are typically not testimonial." J.A. 102. This assertion understates the effect of the court's decision in two respects.

First, the decision applies broadly to inquiries made at the scene of an investigation, not merely to initial inquiries made upon arrival there. Although Mrs. Hammon's accusation resulted from what the Indiana Supreme Court characterized as "the initial exchange between Mooney and Amy," J.A. 104, the *actual* initial exchange – the one that was made when the officers "arriv[ed] at [the] scene" – was utterly unproductive from the viewpoint of the officers and, later, the prosecution.

In *that* exchange, Officer Mooney asked Mrs. Hammon whether there was a problem[46] and she answered that "nothing was the matter, that everything was okay." J.A. 14. It was only after the officers went inside the house, looked around, spoke to Petitioner, met Mrs. Hammon separately from the Petitioner, and pressed the matter again that she made the accusation that was the basis for Petitioner's conviction.[47]

Second, the decision is not merely an assessment of the typical case. Rather, it amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene before any writing or other recording has been made is not testimonial. Given the Indiana Supreme Court's holding in this case it is hard to imagine circumstances in which that court would regard as testimonial an oral accusation made at the scene before any recording. The court supposedly considered the situation from the perspective of the speaker, Mrs. Hammon, but in such a cursory and conclusory way that this amounted to no consideration at all.[48] Rather, the court explicitly gave principal

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[46] The officer himself characterized this as his "initial question." J.A. 15.

[47] This repeated questioning gives the interaction between Officer Mooney and Mrs. Hammon the quality of an "interrogation," though the case should not turn on that matter.

[48] The court said, "Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial." J.A. 104. The court provided no support for this conclusion, which is patently dubious at best. Indeed, the "basic facts" that Mrs. Hammon conveyed in her [not really initial] oral statement were those constituting a battery. Whatever her reluctance and mix of feelings, Mrs. Hammon was making an accusation of a serious crime to an investigating police officer; the only plausible conclusion is that she anticipated governmental use of this accusation, and she should be

consideration – incorrectly, for reasons discussed above in Part I – to the motivation of the questioning officer, J.A. 100 ("the motive of the questioner, more than that of the declarant, is determinative"), concluding that Officer Mooney "was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene." J.A. 104. But the court's application of the standard to this case demonstrates how manipulable that standard is.[49]

If Officer Mooney is deemed to have taken Mrs. Hammon's oral statement to "secure" the scene, then that characterization will always be possible. The officers needed no new information to secure the scene; they knew who and where the protagonists were. Indeed, the scene was already secure – Mrs. Hammon and Petitioner were separated, one officer with each. Moreover, Officer Mooney's next move after receiving the oral statement did nothing to make the scene more secure. In compliance with his routine practice, he brought out an affidavit form for Mrs. Hammon to complete and sign, which she did.[50] There is no indication in the record that he had

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deemed to have intended this natural consequence of her actions. Even if the question were whether Mrs. Hammon "wanted" her oral statement preserved or used against Petitioner, and even if Petitioner had the burden of demonstrating that this was so – neither of which is so – the contents of the statement, together with the fact that *the very next thing Mrs. Hammon did* was to fill our a battery affidavit, would be far more than sufficient to carry that burden.

[49] *Cf. Crawford*, 541 U.S. at 65-66 ("*Roberts*' failings were on full display in the proceedings below. . . . The case is . . . a self-contained demonstration of *Roberts*' unpredictable and inconsistent application.").

[50] Q After your conversation with Mrs. Hammon, where did you direct your attention next? What did you do after you finished your conversation with Mr. [sic] Hammon?

to leave the house to get the form. The affidavit was simply an effort to record evidence,[51] and the oral conversation immediately beforehand was part of the process by which the officer secured the affidavit. On any reasonable view of the facts, then, at least "in significant part" Officer Mooney took the oral statement "for purposes of . . . potential future use in legal proceedings," J.A. 100.[52]

Similarly, if Mrs. Hammon's statement is deemed to have been taken for the purpose of assessing the scene, then this characterization will be satisfied by any oral accusation made at the scene of an alleged crime before any writing or other recording has been taken. By the time Mrs. Hammon made her

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A I had her fill out and sign a battery affidavit and I asked her if she would.

J.A. 18.

[51] Q And what's the purpose of that document?

A To establish events that have occurred previously.

J.A. 18.

[52] Indeed, Counsel of Record for the State appears to have acknowledged as much when he said, referring to the possibility that this Court might hold Mrs. Hammon's accusation to be testimonial, "The confrontation clause should not be construed in a way that would discourage police from determining whether the victim needs immediate protection." Leonard Post, *Eyes on Clarifying 'Crawford': Thousands of Cases Hang in Balance*, Nat'l L. J., Oct. 24, 2005, at 1. We believe the fear reflected by this comment is completely unfounded, *see infra* p. 40, but what is relevant here is that the only way conduct of the police at the scene of the alleged crime *could* be altered by a judicial holding that certain statements are inadmissible is if the police are thinking ahead to trial and motivated at least in substantial part by evidentiary considerations.

accusation, Officer Mooney had, by his own account, considerable evidence that Petitioner had committed a battery on his wife. He began with the original disturbance report, which appears to have been enough for him to bring a battery affidavit form into the house with him. At the house, he observed Mrs. Hammon's frightened demeanor, Petitioner's acknowledgment that there had been an argument, and the physical signs of a very recent disturbance. This was enough to warrant pressing the matter a second time with Mrs. Hammon because it strongly suggested an assault, but one key piece of evidence was lacking: an accusation by her. Of course, it was possible that no crime had been committed (and Petitioner denies that one had been), but that is always true; it is not the job of the investigating officer to determine guilt beyond a reasonable doubt. Even after hearing an accusation, the officer may have considerable doubt as to whether a crime has been committed. In any event, *before* an accusation has been made, the officer will always have – and will always be able to testify that he had – significant doubt on that score. If that is enough to render a statement non-testimonial, as the Indiana Supreme Court held in this case, then the first accusation made orally and at the scene will never be deemed testimonial, no matter how strong the officer's understanding may be beforehand that one consequence of his efforts will be the gathering of evidence for potential use in prosecution.

B. The Indiana Supreme Court's Rule Encourages Manipulation by Police Officers and Gives Them Improper Incentives.

Assuming hypothetically that, notwithstanding all the above arguments, an accusation to a police officer falls outside *Crawford* if the officer was still "securing and assessing the scene," the police have a ready protocol to secure from cooperative witnesses accusations that can be admitted at trial

without the accuser ever taking an oath or facing the accused or cross-examination.

First, the officer should refrain from securing the scene until after interviewing the person he thinks may be an accuser – or at least he should not complete the task, so that he can later contend that the scene was not yet secure.

Second, the officer should interview the person he thinks may be an accuser at the scene of the incident, rather than at the station-house; if he waits until the station-house, he cannot contend that he was securing and assessing the scene.

Third, in conducting the interview, the officer should attempt to avoid what might be characterized as "structured . . . questioning," the response to which is necessarily testimonial. *Crawford*, 541 U.S. at 53 n.4. But if one open-ended question does not yield an oral accusation, it is acceptable to try a second time; that is what Officer Mooney did.

Fourth, the officer should be prepared to testify that until the interviewee made an oral accusation – which will be sufficient to gain a conviction – he had not reached a conclusion as to whether a crime had been committed, and if so what.[53]

Fifth, the officer should be prepared to testify that until that time the accuser was still agitated or otherwise appeared to be under the influence of the event in question. This will presumably satisfy the excited utterance exception to the rule against hearsay and therefore also satisfy any remaining

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[53] *Cf.* State v. Lewis, 619 S.E.2d 830, 844 (N.C. 2005) (concluding that before speaking with accuser, officer "had reason to believe a crime may have been committed, but the seriousness and factual existence of a crime had not yet been established").

requirement under the Confrontation Clause, assuming the accusation is not deemed testimonial.[54]

Sixth, until after the making of that accusation, the officer should neither write anything down, otherwise record it, nor ask the witness to do so, because the recording itself and subsequent communications are likely to be considered testimonial. But once the witness has made an accusation orally, the prudent course is to record it.[55]

If the officer follows this roadmap, then under the Indiana Supreme Court's approach that will be enough for the oral accusation to be admitted without the accuser having to come to trial or take an oath and face cross-examination and without even a need to demonstrate her unavailability. This will be true irrespective of whether, in conducting the interview, the officer fully expected and hoped that the witness would accuse the defendant of a crime. Similarly it will not matter that, in

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[54] *Crawford* indicates that *Roberts* might still apply with respect to non-testimonial statements, 541 U.S. at 68, and *Roberts* would be satisfied by showing that a statement falls within the hearsay exception for excited utterances or spontaneous declarations. White v. Illinois, 502 U.S. 346 (1992).

[55] The Indiana Supreme Court recognizes that if the officer asks for a written statement as soon as the witness makes an oral one, that written statement itself is testimonial. J.A. 104. Nevertheless, the officer has good reason to ask for such a statement then. Perhaps most importantly, if the witness testifies subject to cross-examination at trial, then the Confrontation Clause "places no constraints at all on the use of his prior testimonial statements. See *California v. Green,* 399 U.S. 149, 162 (1970)." *Crawford*, 541 U.S. at 59 n.9. And, under the decision of the Indiana Supreme Court, the officer has no reason *not* to ask for a written statement then, because doing so does leaves unaffected the conclusion that the oral statement was not testimonial.

making an accusation to a police officer, a person of ordinary understanding in the witness's position would necessarily anticipate that the criminal justice system would use the information just conveyed against the defendant.

In short, the decision of the Indiana Supreme Court creates terrible incentives for police officers. First, the decision gives a police officer an incentive to delay securing the scene and protecting victims.[56] This is not simply a matter of balancing competing priorities of security and proof. Rather, the decision of the Indiana Supreme Court means that securing the scene will actually undermine the ability of the prosecution to introduce evidence, because once the scene is secure, then subsequent oral statements are likely to be deemed testimonial.

Second, the decision of the Indiana Supreme Court gives the officer hope that he may procure an accusation that could be admitted at trial in the absence of the accuser – but only if he avoids questioning that will be deemed to be an interrogation.[57] Thus, the officer must forgo arguably structured questioning and instead ask vague, open-ended questions that may be less likely both to yield full information and to allow him to secure

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[56] For this reason, we believe, with respect, that Counsel for the State got it exactly wrong when he suggested that reversing the decision of the Indiana Supreme Court "would discourage police from determining whether the victim needs immediate protection." *See supra* note 52.

[57] *See Sample* Crawford *Predicate Questions,* 1 THE VOICE 8 (Nov. 2004), *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf (proposing that police officers be asked predicate questions at trial such as: "Were the statements taken during 'the course of an interrogation'?" "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were these questions asked in order to determine whether a crime had even occurred?").

the scene quickly. Similarly, the officer should refrain from trying to calm the accuser down or give her a chance to compose herself before speaking to her, he should avoid anything that might seem like a reminder to tell the truth or an assessment of her truth-telling capacity.[58]

In contrast, the proper rule, under which accusatorial statements made to police officers are categorically recognized to be testimonial, leaves officers' incentives undistorted. It recognizes that the confrontation right is not a rule governing police conduct but rather a fundamental rule of judicial procedure.[59] Police are free to protect victims, to apprehend suspects, and to gather evidence, all as they see fit in the circumstances of the particular case. Performance of their duties is not deflected by an attempt to take accusatory statements in a form that can be introduced at trial if the accuser does not testify subject to confrontation.

Finally, and ironically, the evidence allowed by the Indiana Supreme Court in this case is inferior to that rejected by *Crawford*. In *Crawford*, the statement was audio-taped, so that at least the jurors had no doubt about what the witness actually said and they could hear how Sylvia Crawford sounded as she made her statement. Under the Indiana Supreme Court's holding, all the trier of fact had to go on was the police officer's second-hand report of an oral statement made to him in the presence of no one else.

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[58] *Cf.* Allie Phillips, *Child Forensic Interviews after* Crawford v. Washington: *Testimonial or Not?*, THE PROSECUTOR 17, 27 (July/August 2005) (suggesting danger under *Crawford* of using truth-lie test despite concern of many forensic interviewers that absent such test interview will lack legitimacy).

[59] *See* Kentucky v. Stincer, 482 U.S. 730, 738 n.9 (1987) ("The Court sometimes has referred to a defendant's right of confrontation as a 'trial right.'").

Crawford effectively ruled that testimony given in the station-house rather than face-to-face with the accused and subject to cross-examination is not an acceptable method of proof. The State should not be allowed to attain the same objective that *Crawford* denies them, by using at trial an accusation that was never subjected to confrontation and was given at the crime scene instead of in the station-house. No doubt, *Crawford* will pose some close and difficult cases. This is not one of them.

CONCLUSION

The decision of the Indiana Supreme Court should be reversed.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

KIMBERLY A. JACKSON
Jensen & Associates
7440 North Shadeland, Suite 202
Indianapolis, Indiana 46250

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