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 RESPONDENT

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QUESTION PRESENTED

Whether a victim's oral statements to police responding to an emergency dispatch are "testimonial" statements within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), when there is no evidence of interrogation and the police are merely assessing the situation.

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STATEMENT OF THE CASE

This case illustrates a phenomenon all too common in American society. A deeply conflicted battered wife, discovered alone on her front porch, denies to a first-responder that she has been abused and is in danger. Ultimately, when the police, concerned for her safety, discover the irrefutable physical traces of domestic abuse, she tells of her beating. The State prosecutes, but the wife, perhaps forgiving and loving, perhaps frightened, perhaps without independent means of support, will not bear witness at trial against her abuser, who, after all, is also her husband. To prosecute, the State must use the wife's oral statement at the scene to the first-responding officer.

The prosecution of this case bears no resemblance to the inquisitorial abuses that gave rise to the Confrontation Clause. The conviction does not depend on prior statements in the form of a deposition, prior hearing or trial testimony, or affidavit. There was no inquisition, no secret examination, no Tower of London, no interrogation, and no refusal to bring forth witnesses demanded by the defendant. Here, all we have are reasonable efforts by the police, dispatched to the scene of an emergency, to gauge any immediate danger and respond as necessary. Unless *all* hearsay is "testimonial," the victim's oral statements to police in this case must be admissible.

1. On February 26, 2003, at 10:55 p.m., Peru Police Department Officers Jason Mooney and Rod Richardson responded to a dispatch concerning a domestic disturbance at 590 East Fifth Street, the home of Hershel and Amy Hammon. J.A. 81. When the officers arrived at the Hammon home, Officer Mooney found Amy on the front porch of her house. *Id.* To Officer Mooney, Amy appeared "[t]imid" and "frightened." J.A. 13, 81. Officer Mooney

asked Amy "if there was a problem and if anything was going on," and Amy answered "'No,'" that "nothing was the matter'" and "that everything was okay." J.A. 14, 81.

From Amy's "somewhat frightened" demeanor, however, Officer Mooney sensed a need to do more. *See* J.A. 13-15, 25, 81. At that point, Officer Mooney "didn't feel safe leaving the premises when we were responding to a call of a fight due to her state of frighteness. I didn't know if someone had told her to tell them everything was okay and that everything actually wasn't." J.A. 25. So, Officer Mooney next asked Amy whether he could enter her house to "check things out" and "make sure . . . that everything was okay." J.A. 14. Amy consented. *Id.*

Entering the house, Officer Mooney noticed immediately that the Hammon living room was in disarray. J.A. 15. In a corner of the room lay shattered glass from what had been the front panel of a gas heater. J.A. 16. Flames from the heater flickered in the open. *Id.* There were children in the home. J.A. 26.

Spotting Hershel in the kitchen, Officer Mooney asked him "if everything was okay" and "[i]f he and his wife had been in an argument." J.A. 16, 32. Hershel admitted that he and Amy had argued but claimed that "everything was fine now and it never became physical." J.A. 16. Officer Mooney returned to Amy, who was now in the living room, leaving Officer Richardson with Hershel in the kitchen. J.A. 17.

Officer Mooney's trial examination provides the best account of what happened when he left the kitchen:

Q Where did you proceed after that?

A I proceeded to enter the living room where Amy was located to speak with her.

Q And what did she tell you at that time?

BY MR. SPAHR: Objection, hearsay.

BY THE COURT: I'll show it as a continuing objection.

A 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 verbal, excuse me, 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 . . .

BY MR. SPAHR: Objection as to the physical aspects of this matter, it's all hearsay.

Q Are you reporting what she told you?

A Yes.
***
Q What did . . . what did she tell you in regards to the physicality of the altercation?

A 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.
> ***
> **Q** Did you observe any injuries to Mrs. Hammon?
>
> **A** No.
>
> **Q** Did she indicate to you that she has any injuries or pain?
>
> **A** She was, while speaking to her she was rubbing her . . .
>
> **BY MR. SPAHR**: Again, renew my objection to any statements attributed to her.
>
> **BY THE COURT**: We'll show it as a continuing objection.
>
> **A** While speaking to her she began rubbing her right eyebrow, above her right eyebrow and she informed me that that was where her head was shoved into the glass and it was hurting her at that time.

J.A. 15-21.

Officer Mooney also testified that Hershel tried at least twice to enter the living room, and that each time Amy became quiet, "almost afraid to speak." J.A. 32. The transcript relates no additional prompting of Amy's oral statements to Officer Mooney.

2. Amy completed a battery affidavit recounting what she had already told Officer Mooney, and the officers arrested Hershel, who was prosecuted for Class A misdemeanor domestic battery. J.A. 2-3. Hershel was found guilty after a bench trial. J.A. 40-41. Despite the prose-

cutor's subpoena, Amy was not present at the trial. J.A. 7. Over Hershel's continuing hearsay objections, the trial court admitted Officer Mooney's recitation of Amy's oral disclosures at her home that February night, concluding that they constituted "excited utterances." J.A. 11-13. It also admitted her battery affidavit as a "present sense impression." J.A. 19-20. The trial court sentenced Hershel to one year in jail, with all but 20 days suspended. J.A. 47.

3. Hershel appealed his conviction, claiming the trial court erred when it admitted Amy's affidavit and Officer Mooney's testimony recounting Amy's oral statements. J.A. 66-67. After briefing, but before decision, *Crawford v. Washington*, 541 U.S. 36 (2004), held that out-of-court testimonial statements are inadmissible under the Confrontation Clause absent declarant unavailability and a prior opportunity for cross-examination.

The Indiana Court of Appeals upheld the trial court's decision to admit Officer Mooney's testimony concerning Amy's oral statements (though it did not address the admissibility of the affidavit), concluding those statements were not "testimonial" under *Crawford*. J.A. 75-77. The court observed that "the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement." J.A. 75. Amy's oral statement to Officer Mooney, the court observed, "was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council." J.A. 75-76

Notably, the Court of Appeals understood the colloquial meaning of "interrogation" to be (1) "'questioning formally or officially,'" *see* J.A. 76 (quoting *The American Heritage College Dictionary* 711 (3d ed. 2000)), with (2) "a connotation of an at least slightly adversarial setting" where authorities question "'thoroughly and relentlessly to verify

facts . . . .'" J.A. 76-77 (quoting *Roget's Thesaurus II* 556 (Exp. ed. 1988)). Accordingly, Officer Mooney's encounter with Amy did not "fit within a lay conception of police 'interrogation,' bolstered by television, as encompassing an 'interview' in a room at the stationhouse" or "bear the hallmarks of an improper 'inquisitorial practice.'" J.A. 77 (citing *Crawford*, 541 U.S. at 51).

4. Hershel sought discretionary review in the Indiana Supreme Court, which granted his request. J.A. 83-84. Like the Court of Appeals, the Indiana Supreme Court affirmed the trial court unanimously, agreeing that Amy's oral statements to Officer Mooney qualified as excited utterances under Indiana Rule of Evidence 803(2) and were not "testimonial" under *Crawford*. J.A. 87, 104. The court also ruled Amy's battery affidavit inadmissible under *Crawford*, but that its admission was harmless error. J.A. 104-06.

Particularly in light of the concern in *Crawford* with the "'[i]nvolvement of government officials in the production of testimony with an eye toward trial,'" *see* J.A. 101 (quoting *Crawford*, 541 U.S. at 56 n.7), the court held that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." J.A. 100. In this evaluation, "the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement 'testimonial.'" *Id.* Under this standard, according to the court, "responses to initial inquiries by officers arriving at a scene are typically not testimonial." J.A. 102.

The court explained that this "'use in legal proceedings'" inquiry is consistent with the "formal testimonial situations" described in *Crawford*, including "police interrogations." J.A. 101. From examples recited in *Crawford*, the court inferred that the term "'police 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." J.A. 102. The court reasoned that a first-responding officer's initial inquiries would not likely be an "interrogation," nor would any responses thereto likely be motivated by a desire to preserve evidence for a trial. *See id.*

Applying these principles, the court held that "the undisputed facts" of this case show that Amy's exchange with Officer Mooney "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." J.A. 104. In other words, because Officer Mooney was "responding to a reported emergency," he "was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene." *Id.* For her part, Amy was merely imparting "basic facts" without suggesting that she wanted her utterances "to be preserved or otherwise used against her husband at trial." *Id.* Accordingly, the court deemed Amy's oral statement not testimonial. *Id.*

SUMMARY OF THE ARGUMENT

The judgment permitting use at trial of Amy Hammon's oral statements to Officer Mooney should be affirmed, but for reasons other than those articulated by the decision below. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court acknowledged that distinctions exist between "testimonial" statements and other extrajudicial statements. However, analyzing whether a statement is "testimonial" based on the expectations of either the questioner or the declarant, as suggested by the Indiana Supreme Court, has no connection to the text or history of the Confrontation Clause. A coherent definition of "testi-monial" statements must

instead respect the differences between the practices that gave rise to the Confrontation Clause and modern police public-safety functions, which in no way resemble those civil-law abuses.

I. The State advocates the following general rule: Extrajudicial statements are "testimonial" only when they resemble the forms of testimony that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause. This "resemblance test" sweeps within the meaning of "testimonial" statements all of the forms of extrajudicial statements that characterized the inquisitorial trials of the civil-law practices, the specialty and prerogative court practices, and Marian-statute practices. The modern "testimonial" statements with most resemblance to those historical abuses include affidavits, deposition transcripts, prior-hearing and trial transcripts, grand-jury testimony, and responses to police interrogation. *See Crawford*, 541 U.S. at 68.

The text of the Clause supports the resemblance test. The entire inquiry into the meaning of "testimonial" statements arises because *Crawford* ruled that the key word from the Confrontation Clause is "witnesses," which means "one who bears testimony." *Id.* at 51. According to early nineteenth-century dictionaries, "testimony," in turn, refers to "solemn" statements, including "affirmations." *Id.* These terms underscore the formalities attendant to "testimonial" statements at the time of the Founding.

As *Crawford* recognized, the formal qualities of the historical inquisitorial abuses are unmistakable. *See id*. at 50. Sir Walter Raleigh was convicted based on transcripts of Lord Cobham's coerced private examination before the Privy Council. The inquisitorial procedures of the civil-law system emphasized trial by secret, often coercive, interrogatories. Trial by affidavit, deposition, and confessions coerced in

secret also permeated the Crown's specialty and prerogative courts, most notoriously the Star Chamber. And under the Marian statutes, justices of the peace interrogated witnesses in private looking for inculpatory testimony and certified the resulting "pretrial depositions" for trial.

Crawford also acknowledged that this history supports treating the results of "interrogations"—understood colloquially—as "testimonial" statements. *Id.* at 53 n.4. Both historically and colloquially, "interrogations" are characterized by formal, coercive, tactically structured police questioning. The broader and more technical understanding of "interrogation" that applies under the Fifth Amendment does not work here because there is no risk that a declarant will unknowingly waive confrontation rights. When police interrogate, they embark on distinctive, highly purposeful strategies for extracting incriminating statements, much like the justices of the peace. Questioning that accompanies incidental or emergency police encounters with witnesses has never been understood as "interrogation."

The Court's Confrontation Clause precedents are consistent with this focus on the formalities that necessarily accompany "testimonial" statements. *Crawford* itself deemed a statement to be testimonial because it occurred at the stationhouse, under the protection of *Miranda* warnings, and was "knowingly given in response to structured police questioning." *Id.* at 53 n.4, 65. Other cases precluding admission of extrajudicial statements under the Clause concerned testimony from prior trials or hearings or custodial interrogations by police or their agents.

II. The State also advocates the following corollary to the "resemblance test": "Testimonial" statements do not include statements made in response to police actions or questions reasonably related to an objectively reasonable concern for the immediate safety of any persons or property.

This "immediate-safety" rule makes sense in light of the historical context of the Confrontation Clause. The Founding generation did not suffer abuses at the hands of government agencies charged with protecting public safety. The Sixth Amendment, rather, was targeted at trial-by-inquisition and the practices of the justices of the peace under the Marian statutes. When police are reasonably asking questions in order to protect persons or property, their actions in no way resemble the historical abuses leading to trial by secret deposition.

It is important to bear in mind that the immediate-safety rule may apply even where a particular attack has subsided. In such circumstances the police often will need to learn additional information to understand whether individuals need medical care and whether an immediate safety threat remains. Particularly in domestic-violence cases, the immediate safety of the victim may remain in jeopardy even after an attack subsides, and the police will need to know what happened to understand whether to offer shelter or other assistance.

III. The text and history that support the resemblance and immediate-safety tests provide no grounds for Petitioner's argument that "testimonial" hearsay is that which "accuses" or that which a reasonable declarant should reasonably anticipate may be used in an investigation or trial.

Petitioner candidly acknowledges that, to rule his way, the Court must add "accusations to known police officers" to the list of "testimonial" statements identified in *Crawford*, but he provides no reasons why the Court should do so. *See* Pet. Br. 20. In fact, Petitioner disclaims any connection between his "accusation" test and the history of the Confrontation Clause. He argues instead for inquiring whether a statement "performs the *function* of testimony," *i.e.*, whether it "transmits information for use in investigation

or prosecution of crime." Pet. Br. 12-13. This test—unsupported as it is by constitutional text and history—would sweep within the ambit of "testimonial" statements nearly *all* hearsay, an outcome that *Crawford* has already rejected. *Crawford*, 541 U.S. at 51-52.

As for Petitioner's apparently alternative "reasonable-anticipation" argument, it too bears no relationship to the history and text of the Confrontation Clause. Petitioner attempts to obviate this problem by recasting the Confrontation Clause as simply an American version of an absolute ancient tradition rather than a response to particular historical abuses. But such a predicate is not only historically agnostic, it also would seem to negate *any* limit to the notion of "testimonial statements." Ultimately, Petitioner's entire argument depends on overriding *Crawford*'s holding that the Confrontation Clause is concerned with a "specific type" of hearsay. *Id.* at 51.

IV. The circumstances surrounding domestic-violence cases such as this are especially distinguishable from the civil-law inquisitorial abuses. Unlike the practices under the Marian statutes and in the prerogative and specialty courts, where the Crown prevented cross-examination of witnesses, in domestic-violence cases it is typically the defendants themselves who are responsible for the victim's absence from trial. The victim may refuse to testify because of overt threats from the defendant, or simply because she wishes to continue a relationship with the defendant. Either way, the defendant would be able to cross-examine the victim simply by calling her to the stand. Accordingly, regardless of how the Court defines "testimonial statement," prosecutors should be able to use victims' crime-scene statements to carry their burdens as long as they fulfill their compulsory-process obligations to secure witnesses called by the defense.

Furthermore, if the Court concludes—as it should not—that the subjective motivations of declarants do matter, it should bear in mind statistics showing that victims of domestic violence often initially deny their abuse, later recant their stories of abuse, and ultimately refuse to testify at trial. This data suggests that victims of domestic violence who overcome the odds and actually tell the police about their plight are typically motivated by a need for safety, not a desire for justice.

V. Under the resemblance test and its immediate-safety corollary, Amy Hammon's oral statements to Officer Mooney were not "testimonial," even though her affidavit was. When Amy Hammon told Officer Mooney that her husband had beaten her, she was in her living room, not in a formal or coercive setting. The police were there not to examine witnesses in search of evidence against a previously charged suspect, but to provide emergency assistance. Amy Hammon initially denied there was a problem, but she was obviously frightened and Officer Mooney took more action because he was concerned for her safety. The transcript does not show any further questioning, but even if some minimal questioning did occur, there is no evidence of any sort of "interrogation." Furthermore, when Officer Mooney approached Amy Hammon for the second time, he had evidence indicating some type of immediate threat, but he needed to learn more to confirm and address that threat. Amy Hammon's oral statements were therefore not "testimonial."

ARGUMENT

I. "Testimonial" Statements Arise from Inquisitorial Practices, Not Emergency Assistance

In *Crawford v. Washington*, 541 U.S. 36, 42-43, 51 (2004), the Court ruled that, while all "testimony" is subject

to the right to confront the declarant under the Sixth Amendment, *not* all extrajudicial statements are "testimonial." *Crawford* disclaimed creation of a comprehensive definition of "testimonial," but the Court was clear that limits do exist. "The constitutional text, like the history underlying the common-law right of confrontation thus reflects an especially acute concern with a specific type of out-of-court statement." *Crawford*, 541 U.S. at 51. "Testimonial" is defined by the Constitution's text and, at least equally significant, by reference to the historical abuses that prompted adoption of the Confrontation Clause.

Consonant with these holdings, the State proposes the following rule: *A statement is "testimonial" only when it resembles the forms of testimony that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause*. Under this rule, the term "testimonial" would apply, as stated in *Crawford*, to affidavits as well as "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68; *see also id.* at 53 n.4 (stating that "interrogation" is meant in its "colloquial" rather than "technical legal" sense).

Equally important, however, is the following corollary of this "resemblance" test: "*Testimonial" statements do not include statements in response to actions or questions reasonably related to an objectively reasonable concern for the immediate safety of any persons or property*. Excluding such statements from being "testimonial" statements makes sense because the Confrontation Clause was not crafted in response to any historical abuses resembling modern-day public-safety functions of the police.

The "resemblance test" and its "immediate-safety" corollary protect against the "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68. They also ensure the closest possible fit

between "modern practices" and the historical practices targeted by the Framers before a statement will be deemed "testimonial." *See id.*; *cf. United States v. Patane*, 542 U.S. 630, 640-41 (2004) (plurality opinion). These principled, historically justified rules for what is "testimonial" exclude Amy Hammon's oral statements to Officer Mooney in her home shortly after he responded to an emergency dispatch. Therefore, the statements can be admitted without offending the Sixth Amendment.

A. The text of the Confrontation Clause limits which statements are "testimonial"

Crawford began its analysis with the plain text of the Confrontation Clause, which provides the right of a defendant to be "confronted with the witnesses against him." U.S. Const. amend. VI. From this text, the Court observed that it applies only to "witnesses," meaning those who "bear testimony." *See Crawford*, 541 U.S. at 51. Quoting Webster's early nineteenth-century understanding, the Court understood that "testimony" "is typically '[a] *solemn declaration or affirmation* made for the purpose of establishing or proving some fact.'" *Id.* at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 91 (Found. for Am. Christian Educ. 1989) (1828)) (emphasis added). Thus, "giving testimony" and "bearing witness" suggest solemn, formal settings and the statements derived therefrom.

Webster, it bears observing, also defined "solemn" using several markers of formality, such as "marked with pomp and sanctity; attended with religious rites" and "impressing or adapted to impress seriousness." 2 Webster, *supra*, at 75. Webster understood that "declaration," *see* 1 Webster, *supra*, at 56, meant a statement of fact in any context, but that "affirmation" suggested something more, implying at the very least a "[c]onfirmation" or "ratification" of an assertion

by another. *See id.* at 5. Then, as now, "affirmation" also bore a highly formal and direct connection to legal proceedings, as in "[a] solemn declaration made under the penalties of perjury, by persons who conscientiously decline taking an oath; which affirmation is in law equivalent to testimony given under oath." *Id*.

Thus, in relying on Webster, *Crawford* effectively linked the textual use of "witness," meaning "one who gives testimony," to statements given in formal settings that impress the seriousness of the statement, often under oath or with other religious rites, and perhaps confirming or ratifying the suggestion of another. *See Crawford*, 541 U.S. at 51.

B. The Framers sought to prevent the historical abuse of conducting trials by using statements procured through formal extrajudicial examinations with no opportunity for cross-examination

Crawford's historical overview shows that the right of confrontation developed in response to specific procedural abuses arising from trial by affidavits and depositions. It also confirms that the Confrontation Clause does not codify the law of hearsay as it existed at the time at the founding. Rather, the Clause responds to the Founder's reaction to systemic procedural abuses.

The most frequently cited historical predicate for the Confrontation Clause, of course, is the 1603 trial of Sir Walter Raleigh, who, tried by a written record of coerced formal Privy Council examinations of Lord Cobham and others, demanded that the court "'[c]all my accuser before my face,'" but was refused. *Crawford*, 541 U.S. at 44 (quoting *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603)). Even beyond Raleigh, however, each of *Crawford*'s historical vignettes shows that the abuses giving rise to the Confrontation Clause involved formal, deliberate, carefully

crafted processes for producing witness statements, not only with an eye toward trial, but also with an eye toward excluding the declarant from that trial. *See Crawford*, 541 U.S. at 43-47.

It is not necessary to recount *Crawford*'s entire historical overview, but some additional details concerning the civil-law practices, the English Crown's specialty and prerogative courts, and practices under the Marian statutes underscore the limited contours of "testimonial" statements as originally understood.

1. The continental civil-law practices

As explained in *Crawford*, the continental civil-law practices for admitting testimony at trial were exactly what the Framers sought to avoid with the Confrontation Clause. *See Crawford*, 541 U.S. at 50. The civil-law system was based on inquisition rather than accusation and permitted judges or their designated representatives to undertake examinations of witnesses and to read the resulting testimony to the trial court. 5 William S. Holdsworth, *A History of English Law* 170-75 (1927). In this "*inquisitionsprozess*," there was no opportunity for a criminal defendant to cross-examine the witness at the pretrial examination or at the trial. *See* John H. Langbein, *Prosecuting Crime in the Renaissance* 233-34 (1974); *see also* Holdsworth, *supra*, at 170-75.

This civil-law history further establishes a highly formal set of procedures for producing testimony.

> In the inquisitorial system used on the Continent, accusation and prosecution rested with the court; there was no definite accuser and the charges were neither formally specified nor revealed to the accused. The inquisitorial system's emphasis on

> secrecy continued throughout the proceedings. The names of witnesses against the accused were not revealed; the accused was tried by secret interrogatories, often obtained through the use of torture, and even the final sentence was not publicized.

Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 569 n.50 (1992) (citing 5 Holdsworth, *A History of English Law* 170-75 (2d ed. 1937)).

2. Pre-Marian specialty and prerogative courts

The separate development of the English common law and its right of confrontation notwithstanding, specialty courts in England used deposition evidence in procedures more akin to those developed according to the civil-law model.

a. By the time of Richard II, for example, the use of deposition testimony in the trials in the Court of Admiralty was regular. *See* 30 Wright & Graham, *Federal Practice and Procedure: Evidence* § 6342, at 202-23 (1997); *see also*, Langbein, *Prosecuting Crime*, *supra*, at 81. In vice-admiralty procedure, the examination process was quite formal, using interrogations or examinations in private before the judge. *See Records of the Vice-Admiralty Court of Rhode Island 1716-1752* 93 (Dorothy S. Towle ed., 1936). An early nineteenth-century treatise described the procedure of the admiralty courts as follows: "The witnesses are to be secretly and separately examined, not in the presence of the parties or other witnesses. Their depositions, after being read over to them article by article, and then asked whether there be anything which they wish to alter or amend, are then

to be signed by the witness . . . ." Arthur Browne, *A Compendious View of the Civil Law* 421 (2d ed. 1802).

As noted in *Crawford*, admiralty practice has special significance for the Confrontation Clause, for in 1765 the Sugar Act and Stamp Act further extended the reach of admiralty jurisdiction over the colonists. *See Crawford*, 541 U.S. at 47-48; *see also* Berger, 76 Minn. L. Rev. at 579; Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 Tex. Tech L. Rev. 67, 71 (1969); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 396 (1959). The Stamp Act was repealed in 1766 following public outcry and numerous riots. *See* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revoluation* 3 (1960). However, just a year later, the passage of the Townshend Acts continued colonial subjugation to the admiralty courts. *See id*. at 97-100. Furthermore, directly after the Stamp Act was repealed, Parliament passed a resolution that all traitors would be taken to England to be tried, thereby ensuring that all testimony would be given by deposition rather than in open court. *See* Larkin, 1 Tex. Tech L. Rev. at 71-72.

In sum, the admiralty process, which perhaps most directly provided the rationale for the Confrontation Clause, employed trial by secret, formal examinations of witnesses.

b. Meanwhile, the Privy Council, a prerogative court that also reached back to Richard II, began to act as a pseudo-court to actualize the whims of the monarch by the time of the Tudors and Stuarts. *See* Albert Venn Dicey, *The Privy Council* 25, 68-75, 94-105, 112-14 (1887). Summonses to appear before the Council "were made instruments of extortion" and were handed down in instances where the public courts were unable to reach a guilty verdict. *See id.* at 68-69, 71, 113-14.

The Privy Council reached its juridical nadir during the late sixteenth century with the development of the Court of the Star Chamber, which was often used to try elite offenders who common-law juries might be afraid to convict. *See* Dicey, *supra*, at 94-105; *see also* 30 Wright & Graham: *Federal Practice and Procedure: Evidence* § 6342, at 219-20 (1997); James Fitzjames Stephen, *A History of the Criminal Law of England* 169 (Burt Franklin 1964) (1883). The Star Chamber "could dispense with ordinary procedure in extraordinary cases, using interrogations designed to trap the accused into a confession." *See* Berger, 76 Minn. L. Rev. at 569-70 (citing Leonard W. Levy, *Origins of the Fifth Amendment* 182 (1968)).

> In Star Chamber proceedings, the accused could be committed to prison indefinitely pending trial. He was required to swear the oath ex officio that he would answer all questions truthfully, both orally and in writing—even though he was ordinarily not informed of the charges against him, nor allowed counsel. After swearing the oath, and without counsel, the defendant was confronted with interrogatories based on information furnished through the secret examinations.

Id. at 570 n.51 (citing Levy, *supra*, at 182-84). Any inconsistencies between the accused's answers and the interrogatories were used, sometimes aided by torture, to force confessions. *See id.* at 570 n.51 (citing Holdsworth, 2d ed., *supra*, at 178-88); *see also* Stephen, *supra*, at 176 (noting that the Star Chamber "proceeded by bill and answer, and administered interrogations to the accused party, whom they examined under oath."); Dicey, *supra*, at 114-15 (observing that the Star Chamber was the only court that employed torture).

In the prerogative courts, "testimonial" statements were highly formal, coerced, and taken in secret with no intention that the witness would ever be produced at trial.

3. Practices under the Marian Bail and Committal Statutes

Parliament enacted the Marian Bail and Committal Statutes of 1555 in order to facilitate the production of evidence and impose more regularity into the process of criminal prosecutions. *See* Langbein, *Prosecuting Crime*, *supra*, at 24, 34-35. The Marian Committal Statute required that the justices of the peace "take examination of said Prisoner, and information of those that bring him, of the fact and circumstances [of the crime], and the same, or as much thereof as shall be material to prove the felony, shall be put in writing" following which "said examination the said Justices shall certify at the next general Gaol Deliver to be holden within the limits of their Commission." 2 & 3 Phil. & M. c. 10 (1555). These certified documents became known as "pretrial depositions." John H. Langbein, *Origins of Adversary Criminal Trial* 41 (2003).

More specifically, the justice-of-the-peace manuals instructed that the witness be interrogated under oath (although some justices took sworn testimony while others did not). *See*, *e.g.*, Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 555-59 (2005) (noting that the witness was present before the justice of the peace in "a modestly formal setting, likely the [justice's] 'parlor.'"). The justices were only required to record that portion of the witness' statement that proved the guilt of the accused. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1060-61 (1994). Those portions (and only those portions) were then presented at the accused's trial. *See id.*

The justices of the peace could also bind the witness over for the accused's trial by requiring a bond. *See id.*; *see also* 2 & 3 Phil. & M. c. 10 § 2 (1555). The government would often introduce the certified transcript of the examination. *See* Langbein, 92 Mich. L. Rev. at 1060 ("The emphasis on testimony against the accused was deliberate. The [justice of the peace] was not . . . meant to gather evidence impartially. The Marian system was designed to collect only prosecution evidence."); *see also United States v. Gecas*, 120 F.3d 1419, 1442-45 (11th Cir. 1997).

Over the next century, courts increasingly used certified Marian preliminary examinations at trial, and criminal proceedings assumed a more inquisitorial quality. *See* Berger, 76 Minn. L. Rev. at 569. In fact, in 1848, Parliament enacted a statute that codified the right to be present during witness examinations and depositions, but it protected only individuals who had *already* been charged with indictable crimes. 11 & 12 Vict., c. 42, § XVII (1848). The Act thus presupposed that the abuses to be addressed occurred through formal procedure, not happenstance encounters. *See id.*

* * * *

History shows that the abuses that worried the Framers arose from statements given in deliberate, structured, solemn, and highly coercive settings. *See also* 3 William Blackstone, *Commentaries on the Law of England* 373-74 (1768) (recognizing that jury-trial and confrontation rights arose in response to civil-law abuses, such as trial by deposition). Through the Confrontation Clause, the Framers meant to enshrine rights against trial by these well-defined inquisitorial practices. As a matter of history, statements cannot be "testimonial" if they do not arise from circumstances resembling these.

C. Historically and colloquially, "interrogation" means coercive questioning that is easily recognizable as such

Based on the history of the Confrontation Clause, *Crawford* swept within the definition of "testimonial" any "[s]tatements taken by police officers in the course of interrogations." *Crawford*, 541 U.S. at 52. Statements given during "interrogations" are "testimonial" because "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England." *Id.* at 52. Those historical examinations were characterized at the very least by formal process, the singular purpose of generating inculpatory and unimpeachable evidence, and by coercion and torture. *See* Part I.B, *supra*.

The Court did not define "interrogation" precisely but noted that it was using "'interrogation' in its colloquial, rather than any technical legal, sense" and observed that Sylvia Crawford's statement, given while she was in custody and a suspect herself, qualified as "testimonial" because it was "knowingly given in response to structured police questioning." *See Crawford*, 541 U.S. at 53 n.4. Under both historical and contemporary understandings, it is exactly such "structure" in a coercive environment that differentiates "interrogations" from other interactions with the police. *See also State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (deeming statements by a victim upon running into a police station not to be testimonial because "she was not responding to *tactically structured police questioning* as in *Crawford*, but was instead seeking safety and aid") (emphasis added).

1. A "colloquial" under-standing of "interrogation" implies purposeful, considered, and even coercive efforts to draw from a witness information that would be helpful to an ongoing investigation. It is highly instructive that, when

disclaiming a "technical legal" meaning of interrogation, *Crawford* contrasted *Rhode Island v. Innis*, 446 U.S. 291 (1980), which held that "inter-rogation" for *Miranda* purposes includes both "express questioning" and "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 300-01; *see also Crawford*, 541 U.S. at 53 n.4.

Innis adopted this particularly broad notion of "interrogation" because "the *Miranda* safeguards were designed to vest a suspect in custody with an *added measure* of protection against coercive police practices." *Innis*, 446 U.S. at 301 (emphasis added). That is, broadly defining "interrogation" for *Miranda* warnings provides greater protection against unwitting waivers of Fifth Amendment rights. There is no comparable need to protect against unwitting waivers in the Confrontation Clause context and, therefore, a similarly expansive application of "inter-rogation" is not justified here.

2. It is also relatively clear that when police refer to "interrogation," they mean questioning that is tactical, structured, purposeful and manipulative, if not coercive. Just to scratch the surface, the Reid Technique, one of the leading police-interrogation strategies, distinguishes between "interviews" and "interrogations," noting that "interviews" may take place in "a variety of environments," including "a person's home or office, in the back seat of a squad car, or on a street corner." Fred E. Inbau, *et al.*, *Criminal Interrogation and Confessions* 6 (4th ed. 2005). On the contrary, "interrogations" should be conducted by specially trained personnel and not the "arresting officer" who may lack special training. *See id.* at 65. Moreover, the interrogation should occur in a sound-proofed room, with the interrogator sitting near and maintaining eye contact with the

witness. *See id.* at 57-64. By the same token, when scholar Saul Kassin trains his critical eye on abusive police interrogations, rather than concentrating on informal or highly fluid contacts between police and citizens, he conducts experiments to test the effects of tactics like those used in the Reid Technique. *See*, *e.g.*, Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & Hum. Behav. 233, 234-35 (1991).

Policy debates concerning interrogations also tend to focus on what happens in highly structured environments. For example, a recent movement to require additional safeguards against police coercion has focused on videotaping interrogations. *See*, *e.g.*, DeWayne Wickham, *Film All Police Interrogations*, USA Today, Sep. 24, 2002, at 13A. This approach obviously assumes that "interrogations" occur in a controlled environment rather than through incidental or emergency encounters.

The Indiana Court of Appeals observed below that "interrogation," colloquially understood, does not include *all* police questioning, but only that which occurs "'formally or officially'" or at least "'thoroughly and relentlessly.'" J.A. 76-77 (quoting *The American Heritage College Dictionary* 711 (2000); *Roget's Thesaurus II* 556 (Exp. ed. 1988)). The Court of Appeals even noted how the "lay" understanding of "interrogation" as stationhouse drama derives from television shows. J.A. 77. And, indeed, the television drama NYPD Blue, which "tends to treat the interrogation as the dramatic focus" portrays "interrogations" as carefully staged, merciless jailhouse psychological manipulation, sometimes accompanied by physical violence. Susan Bandes & Jack Beermann, *Lawyering Up*, 2 Green Bag 2d 5, 6-10 (1998). Even editorial cartoonists frequently target large audiences with caricatures of "good-cop, bad-cop" interrogation routines featuring suspects seated in uncomfortable chairs with

bare light bulbs shining in their faces. *See* CartoonStock *available at* http://www. cartoonstock.com/directory/i/interrogation.asp (last visited Jan. 30, 2006).

The point is that "interrogation" in its "colloquial sense" is closely associated with both police custody and easily discernible, yet often highly sophisticated and manipulative, police tactics and techniques. Such interrogation may foster more effective investigation, but it may also enable the abuses targeted by lawyers and scholars and portrayed by the media. *See* Kassin & McNall, 15 L. & Hum. Behav. at 234-35. Such widespread attention to this type of interrogation surely is not a fluke. It no doubt relates back to the historical fears and abuses that underlie the Fifth and Sixth Amendments—sophisticated and coercive police production of evidence that occurs in a setting specifically designed for covert activity and for overcoming witness independence. *Id.*

Accordingly, while technical police custody may not always be part of an "interrogation," there must be some measure of objectively discernible, coercive, tactically structured police questioning. Otherwise, the Court will risk extending Confrontation Clause protections to a whole range of incidental or emergency police contacts with citizens that lie well beyond the abuses the Framers sought to prevent. As the Indiana Court of Appeals ruled below, "[w]hatever else police 'interrogation' might be," it is not "preliminary investigatory questions asked at the scene of a crime shortly after it has occurred." J.A. 77.

D. The Court's Confrontation Clause precedents confirm that "testimonial" statements are derived from formal inquisitorial practices

Decisions by this Court excluding evidence based on Confrontation Clause objections support the notion that

"testimonial" statements are statements given in circumstances that parallel the inquisitorial practices that the Framers deemed offensive. In *Crawford* itself, the "testimonial" statement was "knowingly given in response to structured police questioning." *Crawford*, 541 U.S. at 53 n.4. Specifically, Sylvia Crawford's statement occurred at the stationhouse several hours after the alleged crime, after she had been read her *Miranda* rights, and "[i]n response to often leading questions from police detectives." *Id.* at 65. The Court expressly recognized that these circumstances modeled the very civil-law trial-by-inquisition that the Confrontation Clause was intended to prevent. *Id.* at 52.

Crawford also catalogued several cases where statements falling within the Clause's protections were actual prior trial or preliminary hearing testimony, both of which obviously bear hallmarks of the formal statements the Framers sought to exclude from trial absent witness unavailability and a prior opportunity for cross-examination. *See Crawford*, 541 U.S. at 57 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972); *California v. Green*, 399 U.S. 149, 165-68 (1970); *Barber v. Page*, 390 U.S. 719, 722-25 (1968); *Roberts v. Russell*, 392 U.S. 293, 294-95 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965); *Pointer v. Texas*, 380 U.S. 400, 406-08 (1965); *Motes v. United States*, 178 U.S. 458, 470-71 (1900); *Kirby v. United States*, 174 U.S. 47, 55-61 (1899); *Mattox v. United States*, 156 U.S. 237 (1895)).

In addition, several cases have forbidden the admission of statements resulting from custodial police interrogations. *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 121 (1999) (excluding statements where the police questioned the accomplice multiple times and told him that unless he "broke 'family ties'" he might be dragged into "a life sentence"); *see also Cruz v. New York*, 481 U.S. 186 (1987); *Lee v. Illinois*, 476 U.S. 530 (1986); *Parker v. Randolph*, 442 U.S. 62 (1979); *Bruton v. United States*, 391 U.S. 123 (1968) (all

barring use of a confession resulting from custodial interrogation against a codefendant). These are classic examples of tactically structured, formal police questioning, *i.e.*, "interrogation."

Also illustrative are *Idaho v. Wright*, 497 U.S. 805 (1990), and *Dutton v. Evans*, 400 U.S. 74, 87 (1970). In *Wright*, the Court rejected using statements of a child in police custody responding to a physician's questions about alleged sexual abuse. *See Wright*, 497 U.S. at 809, 826-27. The physician was essentially an agent of the police engaged in a custodial interrogation. In *Dutton*, the Court approved using a prisoner's jailhouse accusatory statement to another prisoner where there was no "confession made in the coercive atmosphere of official interrogation" and no "use by the prosecution of a paper transcript." *See Dutton*, 400 U.S. at 87 (plurality opinion). These cases underscore the need, at the very least, for an interrogation or a transcribed statement for an utterance to be "testimonial."

II. Statements to Officers Whose Actions or Questions Reasonably Relate to the Immediate Safety of Persons or Property Are Not "Testimonial"

The resemblance test, as noted above, gives rise to the corollary proposition that when police actions or questions reasonably relate to an objectively reasonable concern for the immediate safety of a victim, an officer, the public, or property, any statements resulting therefrom are not "testimonial." This "immediate-safety" rule, like the resemblance test itself, is consistent with Confrontation Clause history and practical to apply.

1. The immediate-safety rule follows from Confrontation Clause history. The Framers were simply not concerned about excluding statements to emergency responders from trial. As the modern police force did not

exist prior to the nineteenth century, there was no occasion for the Framers to consider whether the dangers inherent in trials-by-affidavit arose in circumstances where immediate public safety was at issue. The Privy Council's investigators were not dispatched to interrupt crimes in progress, catch fleeing suspects, or calm domestic disputes; they were commanded to produce evidence to convict particular defendants. *See* Dicey, *supra*, at 102-03. They were not trained to defuse highly volatile situations or to secure disaster scenes. Instead, they were trained to interview witnesses in very deliberate, coercive, and manipulative ways. *See id.* at 103-05.

By contrast, modern police often must work amidst chaos and great ongoing danger to themselves and to others. In such circumstances, they are far more concerned about protecting the innocent (including themselves) than prosecuting the guilty. Where police are reasonably acting to prevent immediate harm, they are unlikely to be engaged in the sort of coercive and manipulative evidence-producing tactics that prompted the Confrontation Clause. When police ask questions geared toward procuring information that can help them uncover and address immediate threats, any incriminating statements they hear will merely be incidental and not crafted or manipulated to fit a predetermined narrative. Where an officer can reasonably perceive a risk of immediate harm, accurate information from others is critical to an effective response.

2. The Court's prior Confrontation Clause holdings do not undermine the immediate-safety rule. In *Wright*, the Court required a child rape victim's statements to a physician to be excluded, but those statements were given in response to questions posed after the child was in protective police custody and more than a day after the sexual assault being investigated. *See Wright*, 497 U.S. at 809-10. Accordingly,

the questions could not reasonably be justified by a concern for the child's immediate safety.

Crawford described *White v. Illinois*, 502 U.S. 346, 349-51 (1992), which approved trial use of a "spontaneous declaration" to a police officer, as "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proferred statement is testimonial." *Crawford*, 541 U.S. at 58 n.8. Hearsay-exception analysis aside, however, whether the child's statement to police in *White* was "testimonial" depends on several facts. The officer's conversation with the child, which lasted more than three hours before the child was transported to the hospital, occurred after the assailant had fled the scene and after the child's mother was present and aware of the attack. *White*, 502 U.S. at 349-50. These facts suggest no reasonable immediate-safety concerns. Yet other facts, such as whether any relationship existed between the child and the assailant and whether any householders were involved in the assault, could influence a reasonable officer's immediate actions. Thus, affirming here would not necessarily dictate any particular result in *White*.

3. That is not to say that the immediate-safety rule is necessarily inapplicable simply because a particular attack has subsided. First, officers or other first-responders may not be able to discern without asking questions whether an attack or other incident has actually subsided, or if it has, what medical attention or other public-safety precautions may yet be necessary. Second, just because a particular assault may have concluded, that does not necessarily mean that the immediate safety of the victims, even those who do not need medical attention, is secure.

Consider, for example, *Stancil v. United States*, 866 A.2d 799 (D.C. 2005), *reh'g granted and judgment vacated*, 878 A.2d 1186 (D.C. 2005), which drew an unnecessary,

arbitrary line for defining "testimonial" even as it ruled that statements while police are "securing the scene" are not testimonial. *See id.* 813-14. The court divided an emergency domestic-violence call into two stages divided by the moment when police "first secured the scene." *See id.* at 814. Statements *after* that moment were "testimonial." *See id.* at 814-15. This rule properly acknowledges that statements concerning immediate safety are not "testimonial," but as a purely temporal rule, it misses the mark. Even when a scene is "secure," police often must learn more to protect persons or property. They may need to know whether other assailants or other weapons still pose a danger. Or, perhaps most important for domestic-violence cases, they may need to learn what happened so they can, if necessary, provide assistance to prevent further attacks. An officer who arrives at a domestic-battery scene and then departs without either the assailant or the victim may leave the victim at imminent risk of suffering another beating.

4. One of the benefits of the immediate-safety test is that it does not require courts to inquire into the actual state of mind of either the declarant or the police officer. Such a subjective approach, to be sure, was embraced by the Indiana Supreme Court in the decision below. *See* J.A. 100-03. But as the Petitioner has ably demonstrated, subjective tests of any stripe pose great risks of inconsistent or unfair treatment. *See* Pet. Br. 18-21.

If the "primary purposes" of government officials were paramount, defendants who are similarly situated with respect to objectively verifiable facts may well receive different treatment based not on their own states of mind, but on states of mind of those they cannot control—the officers who investigated their cases. The Court has sought to avoid such "incongruous result[s]" in other contexts where, as here, no reason exists to incorporate officers' subjective motivations into constitutional analysis. *See, e.g.*, *United*

States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (holding that officers' drug-detection motive did not invalidate an otherwise proper boat seizure conducted pursuant to a suspicionless maritime document-inspection program). The immediate-safety test relieves any burden to analyze the subjective motivations of declarants or officers.

* * * *

As the Indiana Supreme Court recognized, it is highly likely that initial crime-scene declarations will relate to immediate-safety concerns, even if a particular crime is over or if the threat has, purely as a matter of fact, passed. *See* J.A. 93, 95. When arriving on the scene, police and other responders quite reasonably do not know whether a danger still exists, and their first job is to secure and assess the scene. *See* J.A. 104. At the same time, however, not all statements to first-responders necessarily demand the same treatment. Where an officer's questions go beyond what is reasonably related to immediate safety and begin to look more like a witness interrogation, the immediate-safety rule will not apply, regardless of the officer's state of mind. Like the resemblance rule itself, the immediate-safety rule is sound as a matter of constitutional text, history, and policy.

III. Neither a Statement's Content Nor a Declarant's Expectations Has Any Connection to Defining "Testimonial" under the Confrontation Clause

Petitioner offers two tests for determining whether a statement is "testimonial." First, according to Petitioner, "[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." Pet. Br. 10. Second, Petitioner posits that "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." Pet. Br. 18 (emphasis original). The relationship between these two tests is not entirely clear. What is clear, however, is that neither has anything to do with the text or history of the Confrontation Clause nor with the rationale underlying *Crawford*.

A. Whether a statement "accuses" has no relationship to whether it is "testimonial"

Petitioner candidly acknowledges that *Crawford* in no way mentioned or implicitly included accusations to police officers as such among various types of statements that are "testimonial." In fact, Petitioner blithely offers that "[i]n this case, the Court merely needs to add 'accusations made to known police officers' to that list." Pet. Br. 20.

However, Petitioner provides no textual or historical support for this suggestion. In fact, Petitioner essentially disclaims any argument from history, stating that, just because the Confrontation Clause was a response to particular abuses related to the "'civil-law mode of criminal procedure'" that "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." Pet. Br. 11 n.7 (quoting *Crawford*, 541 U.S. at 50). Translation: Petitioner's theory of which statements are "testimonial" has no relationship to the historical abuses the Framers sought to prevent.

Nor does Petitioner's argument have any footing in constitutional text. Notwithstanding any shorthand references to "accusers" in other cases, the Confrontation Clause does not protect the right to confront "accusers," it protects the right to confront "witnesses." *See* U.S. Const. amend. VI. In fact, the Clause's use of the term "witnesses" is the only reason to embark on a search for "testimonial"

statements covered by the Clause. *See Crawford*, 541 U.S. at 51-52.

In this vein, *Crawford* observed that the Framers were principally concerned not about the content of any particular statements, but about the "*[i]nvolvement of government officers* in the production of testimony with an eye toward trial." *Crawford*, 541 U.S. at 56 n.7 (emphasis added). Accordingly, whether a statement includes an "accusation" is irrelevant. The Framers presumably would have objected to using *any* coerced affidavit at trial without benefit of confrontation, even if it did not directly accuse the defendant. The Court retreated from *Ohio v. Roberts*, 448 U.S. 56 (1980), precisely to avoid rendering the Confrontation Clause "powerless to prevent even the most flagrant *inquisitorial practices*." *Crawford*, 541 U.S. at 51 (emphasis added).

Petitioner attempts to compensate for these textual and historical deficiencies by abnegating the very notion that the Confrontation Clause responds to a particular history, positing without support that the Clause requires exclusion of a variety of extrajudicial statements that have no relation to historical abuses. *See* Pet. Br. 12. In addition, Petitioner worries that adherence to the Clause's historical meaning would simply prompt avoidance of the "*characteristics* of trial testimony." *Id*. It is not entirely clear what this means, but if it is meant to suggest that adherence to history would simply prompt authorities and declarants to avoid civil-law inquisitorial practices, the State confesses that such avoidance should, indeed, be the principal result of enforcing the Confrontation Clause.

As an alternative to arguing from history, Petitioner asserts, again without any support, that "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." Pet. Br. 12. This consideration, in turn, depends on "whether the statement performs the *function* of testimony." *Id.* Yet Petitioner disclaims any need to offer a "detailed or precise exegesis of what that function is." *Id.* Instead, he offers a "serviceable, shorthand" description: The "function of testimony" is fulfilled "if the statement transmits information for use in investigation or prosecution of crime." Pet. Br. 12-13.

Given the overwhelming breadth of this "shorthand" description, a "detailed or precise" explanation indeed seems unnecessary because pretty much *any* statement useful at trial could be described as "information for use in investigation or prosecution of crime." Pet. Br. 13. What remains unclear, however, is why Petitioner finds it necessary to say that it "appears plain" that an "accusation . . . lies at the heart" of the matter. Pet. Br. 13. It would be far clearer for Petitioner simply to say that *all* hearsay, except perhaps co-conspirator statements, is "testimonial." Again, however, *Crawford* rejected this notion. *See Crawford*, 541 U.S. at 51-52.

While ignoring history when crafting his "accusation" test, Petitioner turns to history when he argues that there is no "excited utterance" exception to his proposed test. Pet. Br. 21. During the course of that discussion, Petitioner cites *R. v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), as supporting his "accusation" test. *Brasier* pardoned a man convicted of assaulting a child based on the testimony of her mother and another woman relating the child's accusatory statements to them. *Id.* at 202-03. Petitioner argues that *Brasier* turned on the rule that "no testimony whatever can be legally received except upon oath," which in turn proves that all extrajudicial accusations are "testimonial." *Id.* at 202

(quoted at Pet. Br. 27). For several reasons, *Brasier* cannot support the weight Petitioner places on it.

First, as described more fully in the *amicus curiae* brief of the States of Illinois *et al.*, *Brasier* was based on the rules regarding a child's competency to testify, not any determination regarding the "testimonial" nature of the statements. Indeed, contemporaneous treatises cited *Brasier* for the proposition that "recent" accounts of incidents are generally admissible. Ill. Br. 7, 13. Second, the Court has already made it clear that the Confrontation Clause was not intended to constitutionalize the hearsay laws at the time of the Founding. *See, e.g.*, *California v. Green*, 399 U.S. 149, 155-56 (1970). The admissibility *vel non* of particular evidence based on common-law hearsay rules is largely beside the point. And to the extent common-law hearsay rules are relevant, *see Crawford*, 541 U.S. at 56 & n.6 (noting possible Confrontation Clause exception for testimonial dying declarations based on common-law hearsay exception), the *amicus curiae* brief of Illinois *et al.* shows there is substantial evidence that Founding-era common law permitted a hearsay exception for "excited utterances" (including "accusatory" statements). Ill. Br. 6-14.

In the end, the notion of "testimonial" statements must have a limiting principle, but Petitioner's "accusation" test provides none. Moreover, that test has no connection to any constitutional history or text and ultimately derives from the view that no limiting principle exists. It should therefore be rejected.

B. Whether a reasonable declarant would have understood the statement to be available for prosecution has no Confrontation Clause roots

Perhaps sensing that the "information for use" and "accusation" tests overreach in light of *Crawford*, Petitioner

urges the Court to inquire, apparently as an alternative, whether a reasonable declarant would have anticipated that the statement would be used at trial. *See* Pet. Br. 18. But this test, too, provides no real limits and has no connection to constitutional text or history.

Petitioner's "reasonable-anticipation" argument is largely a response to the Indiana Supreme Court's reliance on the apparent subjective motivations of Amy Hammon and Officer Mooney. *See* J.A. 100-03. To be absolutely clear on the matter, however, the State concedes that the Indiana Supreme Court's dual consideration of the *subjective motivations* of the officer and the declarant was not the proper test. As discussed in greater detail in Part I.B, *supra*, it was not the motivations of the civil-law authorities or declarants that prompted the Confrontation Clause so much as the nature of the practices employed for producing evidence. *See Crawford*, 541 U.S. at 50-51. Furthermore, as Petitioner argues, subjective-motivation tests are difficult to administer and can lead to incongruous results in similar cases. *See* Pet. Br. 18-21.

In terms of its relationship to the history and purpose of the Confrontation Clause, however, Petitioner's "reasonable-anticipation" argument fares no better than the subjective-motivation inquiries. As with his initial argument that all accusations to known police officers are "testimonial," Petitioner cites no authority for the proposition that a statement is testimonial just because a reasonable declarant would have anticipated its use at trial. It is certainly true that the abuses giving rise to the Confrontation Clause arose in circumstances where the declarant would have known that the statement was going to be used at trial. *See Crawford*, 541 U.S. at 52 (citing affidavits, prior testimony, depositions, and responses to custodial examinations or interrogations as the abuses that prompted the Confrontation Clause). But that does not mean that the Framers drafted the Clause to target

such knowledge or anticipation on the part of declarants. Rather, they drafted it to target abusive tactics by government authorities irrespective of the declarant's viewpoint.

Indeed, far from citing any constitutional history to support this argument, Petitioner once again dismisses the notion that the history of the Confrontation Clause has any role in discerning its proper application. In particular, Petitioner argues that the existence of police and prosecutors is utterly inconsequential because the "right to confront adverse witnesses predates" such officials by more than 2,000 years, with the Confrontation Clause itself predating the modern police force by close to a century. *See* Pet. Br. 16. Examining the role of such officials, he says, "ignores the fundamental nature of the accused's right, which is to be confronted with the *witnesses* against him." *Id.* Accordingly, the Confrontation Clause is not to be understood in light of its historical purpose, but solely as the American manifestation of an absolute, ancient tradition that, as described by Petitioner, apparently prohibits admission of *any* hearsay evidence at trial against a criminal defendant. *See* Pet. Br. 15-17 (describing several unprompted extrajudicial statements that the Clause should prohibit from being used at trial).

This argument not only ignores the historical investigatory role of other officials (such as justices of the peace), but it also leads to the conclusion that "witnesses" must refer to *everyone* whose statements, regardless of context, are offered at trial. In other words, if the Confrontation Clause admits of no historical understanding, no legitimate basis exists for distinguishing among extrajudicial statements in search of statements that are "testimonial." The objective viewpoint of the declarant has no better claim to relevance than, say, the subjective motivation of the officer.

Nor does it help Petitioner that "[t]he 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." Pet. Br. 17. This may be true, but it does not follow that "it is not essential that [a statement] be received by a government officer" to be testimonial. *Id.* In fact, the role of government officials in procuring extrajudicial statements was critical to the advent of the Confrontation Clause. *See* Part I.B, *supra*.

It also does not logically follow that "the critical perspective" must be that of the declarant, or that there is necessarily any critical perspective at all. Pet. Br. 17. Petitioner adverts to the Sixth Amendment's text on this point, but that text provides a right to confront "witnesses," not "witnesses who reasonably should anticipate that the statement may be used at trial." *See id.* Petitioner must, but does not, provide some other rationale for applying the "reasonable-anticipation" rule.

Ultimately, Petitioner's reliance on what a reasonable declarant would have anticipated is yet another meaningless, unjustified pretension of limits. In truth, it would deem nearly *all* statements to police officers or other government agents to be "testimonial," because how could a reasonable person *not* anticipate that such statements could be used at trial? Apparently, Petitioner's objective in proposing this test is not to provide a principled limit on the scope of "testimonial" statements to authorities, but to *expand* the scope of "testimonial" statements to include some, or all, statements to individuals who are not government agents. *See* Pet. Br. 17. Thus, as with the "accusation" test, the "reasonable-anticipation" test derives largely from the premise that *all* extrajudicial statements introduced at trial are "testimonial." The Court rejected this premise in *Crawford* and it should reject Petitioner's arguments here as well.

IV. The Confrontation Clause Should Not Bar Using Initial Victim Statements in Typical Domestic-Violence Trials

Domestic-violence cases inherently present what may be, with the possible exception of child-abuse cases, a unique combination of circumstances that simultaneously obstruct, yet intensify the need for, successful criminal prosecutions: low victim cooperation and high same-victim recidivism. *See* Tom Lininger, *Prosecuting Batterers after Crawford*, 91 Va. L. Rev. 747, 768-71 (2005); *see also* Bureau of Justice Statistics, *Preventing Domestic Violence Against Women* (1986) (noting that during a six-month period following an episode of domestic violence, 32% of women are victimized again). Frequently, the victims of domestic violence are deeply conflicted about their plight and refuse to testify at trial. *See* Lininger, 91 Va. L. Rev. at 769-71. Yet without successful prosecution, these victims are likely to be battered again. *See* Am. Med. Ass'n, *Diagnostic and Treatment Guidelines on Domestic Violence* 6 (1992), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/386/domesticviolence.pdf (stating that 47% of husbands who batter their wives do so three or more times per year).

To obtain convictions against domestic abusers and thereby stop the cycle of violence for many victims, prosecutors have come to rely on the testimony of emergency first-responders (including police) who testify as to what they were told by the victim at the scene of an emergency dispatch. *See* Lininger, 91 Va. L. Rev. at 771. Several characteristics of domestic-violence cases should, consonant with the history and purposes of the Confrontation Clause, permit such prosecutions to continue.

A. In domestic-violence cases, it is typically the defendant, not the State, that keeps the victim from testifying at trial

History shows that the rights of confrontation and compulsory process arose from the Crown's practices of developing evidence for criminal prosecutions in secret and then shielding that evidence from attack. *See* Pollitt, 8 J. Pub. L. at 381 (1959) (confrontation clause); *see generally* Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 71-108 (1974-75). Modern domestic-violence cases, however, have no founding-era analogue, and if they present any risk of tyranny, it is at the hands of defendants, not the State.

In domestic-violence cases, defendants typically have ample contact with the victim, at least in circumstances where the victim refuses to cooperate with the prosecution. *See* Lininger, 91 Va. L. Rev. at 770 (noting that generally domestic-violence victims attempt to leave their abusers several times before they are successful and that the most dangerous time for the victim is when she ends the relationship). In fact, it is implicitly the defendant's influence over the victim, rather than the State's, that keeps the victim from testifying. *See* Lininger, 91 Va. L. Rev. at 769-71. Often the abuser will expressly threaten further violence if the victim testifies. *See id.* at 769 ("One study found that batterers threaten retaliatory violence in as many as half of all cases, and 30 percent of batterers actually assault their victims during the predisposition phase of prosecution."). And even where no overt intimidation occurs, if the victim continues an intimate relationship with the abuser, that relationship will naturally discourage the victim's cooperation with the prosecution. *See id.* at 769-71.

Indeed, it is highly disingenuous for domestic-violence defendants to complain about any lack of ability to cross-

examine their accusers. In this case, for example, the prosecution subpoenaed Amy Hammon, but she refused to attend the trial, presumably because she wished to continue being married to Petitioner and did not want to see him convicted of a crime. *See* J.A. 63-65, 82-83 (noting that the victim did not wish to have a no-contact order after the conviction). Rather than force an uncooperative victim to take the stand and either condemn her husband or perjure herself— while reliving the trauma of her abuse—the prosecution relied on Officer Mooney to relate Amy Hammon's oral description of events. *See* J.A. 8-35.

At this point, if Petitioner believed himself to be innocent, he, unlike Sir Walter Raleigh, had options. Namely, *he* could have called Amy Hammon to the stand and could have invoked his Sixth Amendment right to compulsory process if she refused to testify. In that circumstance, the State's case would depend not on *sponsoring* Amy Hammon's testimony, but rather on simply *producing* her (to the extent required by the Compulsory Process Clause) so that Petitioner might cross-examine her.

In short, if a victim would be uncooperative (as so often happens in domestic-violence cases), then as long as the State satisfies its compulsory-process obligations, it should be able to use the victim's crime-scene statement to help carry its evidentiary burden, regardless of how the Court ultimately defines a "testimonial" statement in the Confrontation Clause context. *See Nelson v. O'Neil*, 402 U.S. 622, 629-30 (1971) (holding that confrontation rights were satisfied where a police officer testified that a codefendant had implicated the defendant and where the codefendant testified on his own behalf and was available for cross-examination); *see also Green*, 399 U.S. at 162 ("[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements

does not create a confrontation problem."); *cf. Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973) (holding that defendants are entitled to cross-examine even their own witnesses).

The Sixth Amendment provides tools for a defense, not the means for defendants to manipulate witnesses and then bluff their way to acquittal.

B. Victims of domestic violence are typically motivated by concerns for safety

Domestic-violence victims respond to abuse in many different ways, including complying with the abuser's demands, talking to the abuser, escaping from the abuser, soliciting help from friends, and calling the police. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1227-29 (1993). The victim may consider many factors in choosing how to respond, including the effectiveness for ending the violence and the likelihood that the violence might increase. *See id.* at 1228. Society commonly expects that an abuse victim should call the police. However, empirical data show that most domestic-violence victims do not call the police, and that even when the police are called, the outcome is not always positive. *See id.* at 1229. For these reasons, emergency first-responders may need to be more persistent with domestic-violence victims in order to determine if anyone has been injured, to assess whether any danger remains, and to gauge how to defuse the situation.

Thus, the Court should not be impressed by Petitioner's observation that Amy Hammon's first response to Officer Mooney was to deny that anything was the matter, or that Officer Mooney approached Amy a second time in order to understand the situation. *See* Pet. Br. 33-34. Repetitive,

even intensive, questioning of the victim in this context would in no way be reminiscent of the inquisitorial abuses that the Framers intended to prevent; rather, it would reasonably relate to securing the victim's immediate safety. Accordingly, initial victim statements in domestic-violence emergencies are even less likely to be "testimonial" than initial victim statements in other emergencies.

More or less, studies show that victims of domestic violence are prone to recant their initial stories or to refuse to cooperate after they initially provide information to the police. *See* Lininger, 91 Va. L. Rev. at 768. Refusals to cooperate or assist with prosecution are generally based on fear of retaliation, emotional attachment to the batterer, financial dependence, concern for children and family cohesion, and religious views of relationships. *See id.* at 769-71. The fact that victims often recant and "work against their supposed self-interest" demonstrates that "it is unlikely that the primary reason victims call for help is to generate incriminating evidence rather than to stop the current violence." *See* Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 325 (2005). Thus, in the event that the Court concludes—as it should not—that the declarant's subjective motivation for making a statement is relevant to whether that statement is "testimonial," it should bear in mind that when a battered spouse does make a report to the police, it is typically to get help, not to get justice.

V. Amy Hammon's Oral Statements to Officer Mooney Were Not "Testimonial"

The main test for determining if a statement is "testimonial" is the resemblance test. To be "testimonial," a statement must be given in formal circumstances bearing some resemblance to the abuses that gave rise to the Clause, including in response to an interrogation. The corollary, the

immediate-safety rule, is that where a statement responds to questioning that is reasonably related to an objectively reasonable concern for the immediate safety of persons or property, the statement is not "testimonial." These rules, like nearly every legal rule, may well lead to some difficult cases at the margins. This is not one of them.

1. When Amy Hammon told Officer Mooney that her husband had beaten her, she was in the living room of their home, not under oath in a courtroom, secluded in a stationhouse, or even meeting at a prearranged time in an office conference room with a court reporter. *See* J.A. 17. Officers Mooney and Richardson had been dispatched to the Hammon home not to investigate a known crime, but to provide emergency assistance, *see* J.A. 9-10, which is not the sort of magistrate activity that led to civil-law abuses. *See Crawford*, 541 U.S. at 51.

On the front porch of the house, Officer Mooney asked whether "there was a problem" and if "anything was going on." J.A. 14. Amy Hammon answered "No," but her body language told Officer Mooney a different story. *See* J.A. 14-15. Because Amy Hammon was so obviously frightened, and *because he was concerned for her safety*, Officer Mooney asked permission to enter the house, which she granted. *See* J.A. 14, 25.

After Mooney surveyed the house in disarray, Amy Hammon eventually offered her description of the day's attack, including being thrown to the ground and being beaten on the chest as well as having her face shoved into broken glass. *See* J.A. 17-18. Significantly, however, while the Indiana Supreme Court assumed that Officer Mooney asked Amy Hammon at least one more question after entering the Hammon home, J.A. 82, there is no evidence in the transcript that he did so. The transcript shows only that, upon entering the home, Officer Mooney (1) observed

disarray, including the broken glass, flaming heater, and children; (2) asked Petitioner if everything was okay and if he and Amy Hammon had argued; and then (3) "proceeded to the living room where Amy was located to speak with her." *See* J.A. 16-17. Amy Hammon's statement followed immediately. *See* J.A. 17. While it may seem reasonable to assume that Officer Mooney at that point would have again asked Amy Hammon what had occurred, the transcript does not support the notion that any extensive questioning took place.

2. To say the least, this is not evidence that in any way establishes a resemblance with civil-law inquisitorial abuses. The only documented questions that Officer Mooney asked of Amy Hammon (whether "there was a problem" and if "anything was going on") were not "tactically structured" to elicit incriminating details, and the response to it incriminated no one in any event. The Indiana Supreme Court accurately described the activities of Officers Mooney and Richardson as "assessing the scene," *see* J.A. 104, and history does not suggest that the Framers were concerned about voluntary witness disclosures to authorities at the scene of a crime. It shows they were concerned about employment of tactics from the Inquisition and the Star Chamber. *See Crawford*, 541 U.S. at 43-49. But Officers Mooney and Richardson did not play the Privy Council, and Amy Hammon was no Lord Cobham. She was just one more deeply conflicted victim of a domestic attack who reached out when help arrived.

3. Furthermore, Officer Mooney's actions pass the "immediate-safety" test: they reasonably related to Amy Hammon's immediate safety and that of her children. When Officer Mooney rejoined Amy Hammon in the living room, he did not yet know what had happened, or whether it was still happening. He did not know, for example, whether Amy Hammon or her children needed protection, whether

there were weapons or other adults in the house that could pose a danger, or an infinite variety of other facts relevant to the situation he had observed. When Officer Mooney approached Amy Hammon for the second time, in short, he had evidence from which he could reasonably infer that some type of immediate threat existed, and he needed information to know how best to address that threat. Amy Hammon's oral statements reasonably imparting that information are, therefore, not "testimonial."

4. Amy Hammon's affidavit, which the State concedes is testimonial, provides a useful contrast. First, the affidavit is the classic form of an extrajudicial sworn statement that the Framers sought to bar absent witness unavailability and a prior opportunity for cross-examination. In addition, while Amy Hammon's oral statements are not testimonial because of their relationship to Officer Mooney's need to assess an immediate threat of harm, the affidavit is of a wholly different character. Whatever else took place in the Hammon home that day, by the time Officer Mooney asked Amy Hammon to write down her story, he had assessed the threat, and an affidavit was not related to defusing it. After learning Amy Hammon's plight, Officer Mooney, for example, could have escorted her and her children to a shelter to escape immediate danger without procuring the affidavit. The affidavit was useful only for obtaining a criminal conviction, not for securing the immediate safety of those present. By this measure, Amy Hammon's affidavit was "testimonial," but her oral statement was not.

CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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