No. 09-150

IN THE
Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

RICHARD PERRY BRYANT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Is a statement obtained as a result of police interrogation testimonial, for the purposes of the Confrontation Clause, where the declarant provides solely a narrative of past events and makes no plea for police assistance to meet a current threat, under circumstances where the alleged perpetrator is at large and/or the declarant has suffered an injury?

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STATEMENT OF THE CASE

The Detroit Police received a call at around 3:25 a.m. on April 29, 2001, indicating that a man had been shot.[1] (J.A. 15, 33-34, 39, 42, 105). Five officers, two teams of two patrol officers and one ranking officer, arrived within moments of each other at the location, a gas station in Detroit. Upon arrival the officers saw Anthony Covington lying on the ground, outside of a vehicle. (J.A. 34). Each of the officers immediately went, individually or with their partners, to question Mr. Covington. All five officers subsequently testified as to out-of-court statements made to them by Anthony Covington.[2]

During the questioning, the officers asked Mr. Covington what happened to him. He responded that approximately 30 minutes prior to arrival of the police at the gas station, he was at a residence located six blocks away from the station. (J.A. 39, 60). He stated he was at the front door of that residence, speaking through the door to someone whose voice he believed was that of a man he referred to as "Rick." (J.A. 12-13, 34). Mr. Covington told the officers that a shot was fired through the door, striking him, and that he left the area after the shooting, driving himself to the gas station. (J.A. 40, 75-76, 102). He acknowledged that he did not

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1. The state court record does not disclose who made the call to the police, or the exact words used during that call.

2. The testimony of all five officers was presented during the retrial in this matter, after the initial trial resulted in a hung jury and the declaration of a mistrial, either through live testimony or through prior recorded testimony.

see "Rick," nor see who shot him, as the shot was fired through a solid wood door. (J.A. 22-23, 120). When asked if he knew "Rick's" last name, Mr. Covington replied that he did not. (J.A. 114-115). He stated that he knew "Rick" was at times referred to as "Buster." (J.A. 127). He gave the police a description of "Rick" as a black male, approximately 40 years old, five foot seven, and 140 pounds. (J.A. 103). Subsequent police investigation resulted in a description of Richard Bryant as being 30 years old, five foot ten, and 180 pounds. (J.A. 93-94).

At no point did Mr. Covington relate the content of any conversation he was having with "Rick" prior to when the shot was fired. (J.A. 23-24). He told one of the officers that he had been shot in the back while in front of the house. (J.A. 50).

The officers indicated that they could see that Mr. Covington had been shot, as he had blood on the front of his shirt. A couple of the officers asked him briefly about his wound or his medical condition, or asked him to lift his shirt so they could see the wound. (J.A. 19, 57). At one point when Mr. Covington indicated he needed medical assistance, one of the officers assured him that an EMS unit had been dispatched and would be arriving momentarily. (J.A. 21, 56-57). The EMS unit arrived at the gas station a few minutes after the officers, and transported Mr. Covington to a hospital. (J.A. 41). He arrived at the hospital at approximately 4:00 a.m., and died at 9:40 a.m. that morning after undergoing surgery. (T, 11/25/02, 142).

All five of the officers acknowledged that they went immediately to Mr. Covington once they arrived at the

gas station and began asking him what happened to him. (J.A. 17-18, 47, 109, 131). None of the officers indicated that he drew his weapon, looked around the area of the station, or immediately interviewed any employees of the station or bystanders. Officer Michael McCallister acknowledged that he did not investigate the area to see if any shooter was presently there, and did not know if his partner, Officer Joseph Stuglin, had done so. (J.A. 83). Officer Stuglin testified that he did have some general concern that a shooter might be present, but did not relate any actions that either he or any of the other officers took to check the area. (J.A. 136). The ranking officer at the scene, Sgt. Jeffery Wenturine, did not testify to ordering any of his subordinate officers to search the area or question other witnesses. After the EMS ambulance transported Mr. Covington to the hospital, the officers went to the location Mr. Covington indicated was the scene of the shooting. (J.A. 103).

At Mr. Bryant's preliminary examination, over a defense objection, the examining judge admitted evidence of Mr. Covington's statements as an excited utterance under Michigan Rule of Evidence 803(2). (J.A. 12). Prior to the initial trial, defense counsel for Mr. Bryant moved for the trial judge to reverse that earlier ruling. (J.A. 26-28). The prosecutor stated for the record that if the trial judge ruled the statements inadmissible "then we won't have a trial here," but the prosecution would seek to appeal that ruling. (J.A. 31). The trial judge upheld the ruling that the out-of-court statements by Mr. Covington were admissible as excited utterances. (J.A. 70-71).

The initial trial in the case resulted in a hung jury, and a declaration of a mistrial. The remainder of the evidence at the retrial is briefly summarized below.

Mr. Covington was a cocaine addict who used Mr. Bryant as one of his sources for cocaine, according to the testimony of Mr. Covington's brother, Paul Mitchell. Mr. Bryant's residence was down the street from Mr. Covington's and Mr. Mitchell's residence. Mr. Mitchell believed the transactions between Mr. Covington and Mr. Bryant took place at the rear door of the Bryant residence. (T, 11/26/02, 6-7).

Mr. Mitchell testified that Mr. Covington told him he had given a coat to Mr. Bryant as collateral in exchange for cocaine, and during the early evening of April 28th expressed to Mr. Mitchell his intent to retrieve his coat from Mr. Bryant in exchange for the money he owed for the drugs. (T, 11/26/02, 8-9, 12-13). Mr. Mitchell acknowledged that he has known Mr. Bryant for many years, including the five years that they were neighbors, that Mr. Bryant did go by the name "Rick" but that he had never heard Mr. Bryant referred to by any other name, and that Mr. Covington knew Mr. Bryant for three years and knew Mr. Bryant's first and last names. (T, 11/26/02, 11-12, 15).

When the police arrived at the house, they took a "tactical position" outside the house to watch the exits while they called for back-up assistance. (J.A. 140-141). Once the back-up arrived, the officers approached the house and begin to look for evidence. (J.A. 142). Upon their approach to the house, the officers observed some blood, a spent bullet, and eyeglasses on the back porch,

and what appeared to be a bullet hole in the rear door. They also found a wallet, which contained Mr. Covington's identification, on the premises. (T, 11/25/02, 157-158, 182).

The officers knocked at both the front and back doors in an attempt to gain entry into the residence, but no one answered. The officers secured the premises, making sure no one could enter or exit the residence, and sought a search warrant. (T, 11/25/02, 166-167, 185).

In prior recorded testimony that was read to the jury at the retrial, Chiquita Davis, Mr. Bryant's girlfriend, stated that on April 28th, she left Mr. Bryant's house around 4:00 p.m., returning at 10:00 p.m. When she got home Mr. Bryant was not there, and had not left any note as to where he had gone. (T, 9/4/02, 180-184). Ms. Davis fell asleep at approximately 11:00 p.m. She awoke around 5:00 a.m. when she heard the sounds of the police breaking a window as they were forcibly entering the house to execute the search warrant. (T, 9/4/02, 189). Ms. Davis did not hear any sounds of gunfire during the early morning hours of April 29th. (T, 9/4/02, 209-212). At the point she woke up that morning, she had not seen Mr. Bryant since the prior afternoon. According to the witness, Mr. Bryant's common practice was to come upstairs and wake her upon his arrival home. (T, 9/4/02, 214-215).

The officers searched the house, but did not find Mr. Bryant, any gun, any spent shell casings, any narcotics, nor any coat believed to belong to Mr. Covington. (T, 11/26/02, 58-59, 64-65).

Both parties stipulated that the hole in the rear door was measured to be 42 inches above the ground. (T, 11/26/02, 138). According to the medical examiner who conducted the autopsy, Mr. Covington's gunshot wound had a downward path, entered his chest at 47.25 inches from the ground, and exited his back at 44.75 inches from the ground. (T, 11/25/02, 137-138, 143-145).

Mr. Bryant was arrested in March, 2002, in San Bernardino, California, at which point he was extradited to Michigan. (T, 11/27/02, 13).

After two days of jury deliberations, the jury convicted Mr. Bryant of felony firearm, possession of firearm by a felon, and the lesser included offense of second-degree murder.

On direct appeal, the Michigan Court of Appeals affirmed the convictions, holding that admission of Mr. Covington's statements to the officers at the gas station did not violate the Sixth Amendment Confrontation Clause as they were not testimonial statements under this Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004). The Michigan Supreme Court subsequently remanded the case to the Michigan Court of Appeals for reconsideration in light of this Court's decision in *Davis v. Washington*, 547 U.S. 813 (2006). On remand, the Michigan Court of Appeals again affirmed the convictions, continuing to find that the statements were non-testimonial. On leave granted, the Michigan Supreme Court reversed the decision of the Court of Appeals, holding that the statements were testimonial under *Crawford* and *Davis*, and that Mr. Bryant's confrontation right was violated as he had no opportunity to cross-examine Mr. Covington.

SUMMARY OF ARGUMENT

The definition of a statement obtained through police interrogation of a witness as testimonial, for the purposes of the Sixth Amendment Confrontation Clause, depends on the substantive content of that statement. Viewed from the perspective of the witness, a testimonial statement is one that provides a narrative of past events. Petitioner proposes that statements instead be characterized in relation to the situation in which the interrogation occurred, either where the alleged perpetrator is not in custody or the witness has suffered an injury, with that inquiry divorced from consideration of the content of the statement. Acceptance of that position would be an unwarranted expansion of the "ongoing emergency" standard this Court established in *Davis v. Washington*, 547 U.S. 813 (2006), for defining testimonial versus nontestimonial statements.

An "ongoing" emergency exists only where the statement is part of the event itself, referring to an immediate threat of harm. Expanding the confines of the ongoing emergency standard will lead to inconsistent rulings in the lower courts, and admission into evidence of out-of-court statements, not subjected to cross-examination, that are obvious substitutes for live testimony. The *Davis* standard, which determines the character of statements that are the product of interrogation through review of the objective content and circumstances of each particular statement, correctly enforces the protections of the Confrontation Clause. This Court should reject Petitioner's efforts to dilute that protection.

The evaluation of whether a statement involves a call for help during an ongoing emergency is not comparable to whether exigent circumstances exist for Fourth or Fifth Amendment situations. The characterization of a statement as testimonial or nontestimonial is solely a question of use of the statement at trial under the Confrontation Clause, and not an issue concerning the regulation of police conduct. The fact that a statement obtained by the police qualifies as testimonial will not preclude police reliance on that statement in further investigation of the alleged offense, nor should it cause the police to modify or limit their subsequent behavior.

Neither the fact that an alleged perpetrator of the offense is not in police custody at the time of the statement nor the fact that a declarant has been injured in the event creates a conclusive presumption that any statement obtained by the police under those circumstances is nontestimonial. This Court in *Davis* recognized that a statement which begins as nontestimonial, occurring during the criminal event as a call for police assistance to intercede in that event, can evolve into a testimonial statement if the event ends and the criminal behavior ceases, even if the perpetrator has not been taken into custody. The possibility that criminal behavior may recur in the future does not alter the character of a narrative of past events. Where the declarant does not express any imminent danger or fear of ongoing criminal conduct by the perpetrator, but instead confines the statement to a description of prior conduct, and no ongoing offense is evident from the objective circumstances of the interrogation, the statement is testimonial.

The existence of an injury to the witness similarly does not by definition create an "ongoing emergency" for the purposes of the Confrontation Clause. A statement that details past events is not primarily intended by the declarant as a call for medical assistance from an investigating police officer.

Definition of an "ongoing emergency" as criminal behavior occurring contemporaneously with the statement is consistent with the limitation on the admissibility of statements which existed under the res gestae doctrine at common law. Where a statement is part of an event, phrased in the present tense in relation to events occurring concurrently with the statement, that statement is not analogous to trial testimony. Witnesses do not go into court and declare an emergency, seeking immediate help. A narrative of past events is an obvious substitution for live testimony, and inherently testimonial.

The Michigan Supreme Court correctly held that the declarant's statement in this case was testimonial, and inadmissible in the absence of any opportunity for Mr. Bryant to cross-examine Mr. Covington. The statement referred only to events that had concluded 30 minutes prior to the interrogation, at a location away from where the statement was obtained. Mr. Covington never expressed a present fear or indicated that any immediate danger existed at the time and place of the statement. There was no objective evidence in the case that ongoing criminal conduct was occurring at the gas station, or that the alleged perpetrator was or had ever been at that location. Mr. Covington did not call for the police to intervene to stop on ongoing situation, but

instead confined his statements to a description of events that had already concluded in order to provide evidence the police could use in a potential prosecution. The conduct of the officers who conducted the interrogation objectively showed that they did not believe that they or Mr. Covington were in any imminent danger. The statement obtained in this case was the core of testimony that Mr. Covington likely would have given had he survived and testified at a trial. That statement was testimonial under the *Davis* standard, and was properly held inadmissible under the Sixth Amendment.

ARGUMENT

A statement obtained as a result of police interrogation is testimonial, for the purposes of the Confrontation Clause, where the declarant provides solely a narrative of past events and makes no plea for police assistance to meet a current threat, under circumstances where the alleged perpetrator is at large and/or the declarant has suffered an injury.

> And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Davis v. Washington, 547 U.S. at 822, fn. 1.

In *Davis*, *supra*, this Court established standards for when out-of-court statements from a non-testifying declarant in response to police interrogation are subject to the Confrontation Clause requirement of the Sixth Amendment.[3] The Court wrote:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

In *Davis*, this Court correctly defined the term "ongoing emergency" to be limited to situations where the witness faces an immediate threat of harm and is seeking police intervention to negate that threat. The

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3. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Amend VI.

determination of whether an "ongoing emergency" existed at the time of the statement must be conducted from the perspective of the witness, with primary focus on the content of the statement. Where a declarant recognizes the existence of an imminent threat and seeks the immediate assistance of the police, that declarant is not acting as would a witness giving testimony at a trial. If the declarant instead is providing a description of past events, the statement is a clear substitute for trial testimony, and must be subject to the requirement of an opportunity for confrontation. The *Davis* standard strikes the proper balance between these two situations, and provides a basis for consistent and predictable decisions in the lower courts.

In arguing to this Court for an expansive definition of the term "ongoing emergency," Petitioner seeks to shift the focus from an objective review of the content and circumstances of the declarant's statements to a subjective analysis of the intent of the interrogator's questioning. Petitioner proposes that this Court, contrary to both the language and the rulings in *Davis* and its companion case of *Hammon v. Indiana*, create a window of unspecified duration during which all statements obtained by the police are conclusively presumed to be non-testimonial, regardless of the actual content or objective circumstances of those statements. Acceptance of Petitioner's position would unjustifiably extend the test for an "ongoing emergency" far beyond this Court's explanation and application of that term in *Davis*.

Petitioner asserts that the "primary purpose" test should be redefined to mean that any time the police speak to a declarant when the perpetrator of the alleged crime has not yet been taken into custody and/or the declarant has been physically injured there is an "ongoing" emergency as of the time of the statement, and any statement obtained will by definition be nontestimonial. Neither the fact that the suspect is not in police custody at the time of the statement nor the existence of an injury to the declarant automatically creates an "ongoing" emergency exempting any statement obtained as a result of interrogation from the requirements of the Sixth Amendment. Petitioner's arguments misconstrue both this Court's decision in *Davis* and *Hammon*, and the fundamental nature of testimonial statements.

The first words of Petitioner's own statement of the issue presented in this case demonstrates the misplaced focus of the prosecution's position. When Petitioner writes that "Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial . . ."[4] they fail to recognize that it is the statement by the declarant, and not the questions asked by the police, that must be evaluated for its status as testimonial or nontestimonial. It is the lack of any opportunity to cross-examine the declarant as to the credibility and reliability of the statement that is at the core of the Confrontation Clause issue. For that reason, the proper perspective in analyzing the character of the statement is from the point of view of the declarant – is the statement a cry for help during an ongoing offense, or a statement intended by the declarant to provide evidence to the police concerning a prior, completed crime?

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4. Petitioner's Brief on the Merits, p. 6.

Davis did not hold that any "emergency," in the broadest definition of that term, would mandate a finding that statements obtained through police questioning were principally intended, regardless of the content of the statements, to assist the police in resolving that emergency. The Court qualified the term "emergency" with the requirement that it be "ongoing," and correctly applied that qualification, under the facts in *Davis* and *Hammon*, to conclude that the "ongoing emergency" is criminal conduct occurring contemporaneously with the statement.

A. Police conduct will not be impacted by a subsequent determination of whether a statement was testimonial under the Confrontation Clause.

Consideration of the proper definition of an "ongoing emergency" for Confrontation Clause purposes is not comparable to an analysis of exigent circumstances which may govern police behavior for Fourth or Fifth Amendment purposes. The fact that information received by police officers through a witness' narrative of past events may be relevant to a determination of the identity of an alleged perpetrator or further police investigation does not transform that narrative into a nontestimonial statement. Where the objective circumstances at the time of the statement show that the criminal event has ended, and there is no ongoing emergency that presents an immediate danger to the declarant or the police arising from continuing conduct by the perpetrator, any concern by the police that future criminal conduct might occur is subjective and conjectural. Certainly the police can and should, as they did in this case, use information received in a testimonial statement to further investigate an allegation and, if

appropriate, make an arrest. This Court recognized, however, that the Confrontation Clause issue raised by the admission of the statement is solely a matter of evidentiary use of that statement at trial, and not any restriction on police behavior:

> Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it so. * * * But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

547 U.S. at 832, n. 6.

The characterization of a statement obtained by the police during the questioning of a witness as either testimonial or nontestimonial will not influence an officer's decision on how to proceed. Where this Court has adopted hot pursuit or public safety exceptions to the warrant requirement,[5] or to the *Miranda* warnings requirement during a custodial interrogation,[6] those decisions instruct police officers on when they can take

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5. *Warden v. Hayden*, 387 U.S. 294 (1967); *United States v. Santana*, 427 U.S. 38 (1976).

6. *New York v. Quarles*, 467 U.S. 649 (1984).

immediate action in response to the exigency which does not jeopardize the admissibility of any evidence they obtain. Police officers in those situations must make an on-the-spot decision to conform their conduct to the nature and scope of the exigency.

In a Sixth Amendment situation, however, any issue as to the admissibility of the statement will not arise, if ever, until after the police conduct, if and when the declarant becomes unavailable for cross-examination:

> The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.

547 U.S. at 832, n. 6. Since officers who obtain a statement cannot know at that time whether the declarant will testify and be subject to cross-examination in the future, they have no basis on which to restrict or modify their further investigation of the allegation. The admissibility of the statement at trial will not depend on the conduct of the officers after eliciting the statement. There is no disincentive for them to rely upon the statement in their subsequent investigation. Officers will not decide against interviewing victims or witnesses out of a concern that the statements they obtain will subsequently be found inadmissible, on Confrontation Clause grounds, at trial.

The officers in this case acted properly and professionally in gathering evidence of an alleged criminal offense, and then acting on that evidence. The inadmissibility of evidence from a third party as to a

testimonial statement of an unavailable declarant is not premised on application of the exclusionary rule relevant to Fourth and Fifth Amendment violations, or on any claim of police misconduct. Instead, the evidence is inadmissible solely due to the absence of any opportunity to employ "the only indicium of reliability sufficient to satisfy constitutional demands * * * confrontation." *Crawford*, 541 U.S. at 69.

B. The fact that an alleged offender is not in police custody at the time the statement is obtained does not, standing alone, render the statement nontestimonial.

Statements obtained as a result of interrogation are not characterized as testimonial only if they are given at a time when the alleged perpetrator is in the physical custody or control of the police. If the perpetrator is at large, but the objective circumstances show that there is no immediate or contemporaneous threat to the declarant, no ongoing emergency exists at the point the statement is elicited. In *Davis*, this Court recognized that a statement can be testimonial despite the fact the perpetrator has yet to be located or arrested. Conjecture over the possibility of future harm cannot transform the content of a statement in which the declarant speaks only of past events.

Crawford v. Washington, *supra*, held the Sixth Amendment right to confrontation is violated where an out-of-court testimonial statement is admitted into evidence, even if that statement otherwise falls within a firmly rooted hearsay exception under state law, if the accused has not had an opportunity to cross-examine

the declarant. The Court distinguished, for the purposes of the Sixth Amendment guarantee, a "testimonial" statement from a more casual statement made to a friend or stranger:

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."

541 U.S. at 51. (Citation omitted). The Court held that "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 541 U.S. at 52-53.

In applying the intent of the framers to the facts in *Crawford*, the Court held the state court erred in holding the evidence admissible even though it fit within a firmly established exception:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. * * * Where testimonial statements are at issue, the only indicium of

> reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

541 U.S. at 68-69. (Footnote omitted).

In *Davis*, the Court contrasted two differing factual situations involving statements made by witnesses to police officers or law enforcement officials. In the *Davis* case, the statements were made during a 911 call to an emergency operator. Those statements related to a domestic violence situation that was actively occurring at the time the 911 call was initiated. In the companion case, *Hammon v. Indiana*, the statements at issue were made to police officers who were investigating a domestic violence situation. These statements were made to officers when they arrived at the scene, and after the complainant was separated from her husband (the defendant in the subsequent prosecution) and questioned by an officer as to what had occurred at the house prior to the arrival of the police.

This Court compared the objective circumstances of these two statements. The Court's articulation of its rulings demonstrates that the content of a statement is critical to the determination of whether that statement is testimonial, and thus subject to the *Crawford* constitutional requirements.

The *Davis* majority held that the initial statements made to the 911 operator in Davis were nontestimonial. They were made during and referred to an ongoing emergency – the alleged assault by Mr. Davis on the declarant. The Court held the primary purpose of the

interrogation was to allow the police to immediately intercede to alleviate that emergency. The statement made to the investigating officer in Hammon was held to be testimonial, and inadmissible even if it qualified under Indiana evidentiary law as an excited utterance. That statement was made after the emergency situation – the alleged assault by Mr. Hammon on his wife – had ended. The primary purpose of that police questioning was to gather evidence for a possible future prosecution. This Court noted that statements, whether written or oral, made to police officers who are investigating a past crime clearly meet the test of "testimonial" statements:

> When we said in *Crawford*, *supra*, at 53, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"

547 U.S. at 826.

Considering the factual situation in *Hammon*, this Court held it was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." 547 U.S. at 829. This Court noted that the declarant had been separated from the defendant by the police, that there were no ongoing violent acts at the point the police arrived and spoke to the declarant, and that the declarant made no assertion of any immediate threat of harm. While the Court recognized that the interrogation in *Hammon*, occurring in the complainant's living room, was less formal than the *Mirandized* custodial interrogation at a police station which occurred in *Crawford*, that factual difference did not predetermine the primary purpose of the interrogation:

> It is true that the *Crawford* interrogation was more formal. * * * While these features certainly strengthened the statements' testimonial aspect – made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events – none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigation."

547 U.S. at 830.

This Court held in *Davis* that statements made to investigating police officers are sufficiently solemn and formal, for the purposes of the Confrontation Clause, because the witness should be aware that giving a false

statement to the police is itself criminal. 547 U.S. at 826-827. "It imports sufficient formality, in our view, that lies to such officers are criminal offenses." 547 U.S. at 830, n. 5.

The fact that the statements at issue in *Hammon* were taken at or near the alleged crime scene, by initial responders to that scene, did not implicitly render them nontestimonial:

> But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial.

547 U.S. at 832.

Petitioner's assertion that having an alleged dangerous perpetrator at large will constitute an "ongoing" emergency, defining the responses to all initial inquiries as nontestimonial, cannot be squared with the holdings in *Davis*. This Court expressly rejected the similar position taken by the Indiana Supreme Court in *Hammon* that "virtually all 'initial inquiries' at the crime scene will not be testimonial.'" 547 U.S. at 832.

This Court's discussion of the objective circumstances in *Davis* is enlightening on this point. In *Davis*, as in this case, the alleged perpetrator was not in police custody or under police control when the statement was obtained. This Court noted that it was

only the initial portion of the 911 call from the declarant that was at issue in the case. 547 U.S. at 829. In that initial portion, the declarant (Ms. McCottry) identified Mr. Davis as the person who was in the process of assaulting her. 547 U.S. at 817. The Court held that initial portion of the 911 call was a cry for help that the police intercede in that ongoing emergency:

> In *Davis*, McCottry was speaking about event as they were actually happening, rather than "describing past events." . . . Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat.

547 U.S. at 827. (Citation omitted).

But this Court went on to recognize that part way through the 911 call, Ms. McCottry informed the operator that Mr. Davis had ceased assaulting her and had driven away from the scene. 547 U.S. at 818. At that point of the call, the operator asked a series of questions to Ms. McCottry, focusing on the prior events and the identification of Mr. Davis, and advised the declarant that the police would be coming to speak to her after they first went to "check the area for him." *Id.* at 818.

While finding that the initial statements during the call, occurring while the alleged assault was in progress, were nontestimonial, this Court wrote "it could be readily maintained" that the later statements, occurring after Mr. Davis left the scene, were testimonial. 547 U.S. at 828. The Court recognized that a statement which

begins as a nontestimonial call for assistance during a current, ongoing emergency can evolve into a testimonial statement concerning past events if that emergency ends during the statement. Specifically under the facts of the case, this Court noted the emergency "appears to have ended (when Davis drove away from the premises)." *Id.* at 828. The Court wrote that where the status of a statement changes in the midst of the statement, given a change in the objective circumstances, trial judges will be able to "recognize the point at which, for Sixth Amendment purposes, statements in response to interrogation become testimonial." *Id.* at 829. See *New York v. Quarles*, 467 U.S. 649, 658-659 (1984). Based on that recognition, trial judges can redact or edit statements so that only those portions which qualify as nontestimonial are admitted before a jury if the declarant has not been subject to cross-examination.

Although the Court in *Davis* was not asked to determine whether the later portions of the 911 call, after Mr. Davis left the scene, were testimonial, application of that discussion to this Petitioner's asserted test for an "ongoing emergency" is instructive. Petitioner argues that where an allegedly assaultive perpetrator is not in custody at the time the statement is obtained, that perpetrator by definition presents a sufficient threat to the future safety of the declarant and/or the investigating officers to constitute an "ongoing emergency" for Sixth Amendment purposes. That argument is directly contrary to this Court's language in *Davis*. In that case, the alleged perpetrator was at large during the entire 911 call. While Ms. McCottry told the operator that Mr. Davis had driven

away from the scene, the possibility clearly existed that he could have returned to the scene and renewed the assault before the police could arrive to protect her, that he could have returned and attacked the police once they arrived, or he could have threatened bystanders or other persons. Under Petitioner's proposed definition of "ongoing emergencies," every portion of the 911 call would have been nontestimonial on the grounds that Mr. Davis constituted a threat of future harm as long as he was at large. This Court's discussion in *Davis* must be construed as implicitly rejecting that interpretation of the test, and instead recognizing that an "ongoing emergency" is confined to actual criminal behavior or threats that are occurring at the time of the statement, and not to the potential of future events.

In *Davis*, the accused asserted that Ms. McCottry, in the initial portion of the 911 call, was in the role of a testimonial witness under English common law. This Court rejected that argument, citing the opinion in *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779). In *Brasier*, a young rape victim related the circumstances of the offense to her mother "immediately" upon returning home. 547 U.S. at 828. This Court wrote that this decision would have supported Mr. Davis' argument only if the statement instead had been the girl's cry for help while being chased by the offender, but under the facts of the case "by the time the victim got home, her story was an account of past events." 547 U.S. at 828. The statement at issue in *Brasier* was given to the declarant's mother shortly after the alleged offense, while the offender was at large. The potential that the offender posed a risk of future harm to the declarant or others did not transform what was otherwise a

testimonial statement to one primarily relevant to resolving an ongoing emergency. The *Brasier* opinion supports the rulings this Court made in *Davis*, the Michigan Supreme Court made in this case, and the rulings of other courts interpreting the *Davis* standard[7] that nontestimonial statements are those made concurrently with the events which comprise the offense, and not those describing those events made after the events have ended.

In this case, the out-of-court statements of Anthony Covington met the *Crawford* and *Davis* tests for testimonial statements, as they were made with a primary purpose of providing evidence relevant to past criminal behavior. The statements that he had been shot 30 minutes prior to the questioning, at an address six blocks away, and that "Rick" was the person who shot him, were direct responses by Mr. Covington to police questions meant to compile evidence of a completed crime. At no point in his statements did Mr. Covington express any present fear of an additional assault, ask the police to intervene to prevent any future offense, or allege that "Rick" presented a current threat to any other person. The trial court record reveals no exigent circumstances, nor any immediate danger to Mr. Covington, when the police arrived at the gas station and questioned the declarant. Mr. Covington was no longer at the scene of the shooting, and the police saw

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7. See *Hayward v. State*, 24 So. 3d 17 (Fla. 2009); *State ex rel J.A.*, 195 N.J. 324; 949 A.2d 970 (2008); *State v. Lewis*, 235 S.W. 3d 136 (Tenn., 2007); *State v. Kirby*, 280 Conn. 361; 908 A. 2d 506 (2006); *State v. Mechling*, 633 S.E. 2d 311 (W. Vir., 2006); *Raile v. People*, 148 P. 3d 126 (Colo., 2006).

no indication of any ongoing violent acts. Mr. Covington's statements to the police were not made in order to enable the police to immediately intercede and stop a crime as it was occurring, but rather were answers that were limited to providing evidence as to the identity of the offender and the circumstances of a past incident. The statements were directly comparable to the statements at issue in *Hammon*, within the scope of the term "testimonial." The absence of confrontation rendered these out-of-court statements constitutionally inadmissible. *Crawford*, *supra*; *Davis*, *supra*.

In *Hammon*, this Court noted that when the police arrived at the scene, there "was no emergency in progress" as the police did not witness any violent or assaultive acts, nor even any harsh words between Ms. Hammon and her husband. 547 U.S. at 829. In this case, when the officers arrived at the gas station, there similarly was no criminal conduct occurring. No shots were being fired, no one was seen in possession of a firearm, nor were any witnesses seen cowering in fear or running from the scene. The Michigan Supreme Court correctly concluded that the objective circumstances showed that there was no ongoing criminal event at the gas station. There was no evidence presented that the police were informed or believed that the shooting took place at the gas station. The record is undisputed that upon arrival at the gas station, none of the five officers took any affirmative steps to question the bystanders as to whether the perpetrator of the reported shooting was present at the scene, made any search of the immediate area, nor pulled their weapons. Sgt. Wenturine, the supervising officer on the scene, never ordered any of his subordinate officers to

investigate if they and/or Mr. Covington were then in danger from a shooter while he was questioning Mr. Covington. Although two of the officers did testify to a general concern that the perpetrator might be in the area, neither did anything to either confirm or dispel that apprehension. Instead, all five officers, collectively and individually, went immediately to Mr. Covington to question him about what had happened to him.

Contrary to Petitioner's and *amici*'s unsupported assumptions, none of the officers posed any questions to Mr. Covington about whether "Rick" was then present at the gas station, had ever been at the gas station, or about "Rick's" current location or intent. Mr. Covington's responses to the officers' questions never asserted that he was in immediate fear or danger from "Rick" continuing an assault on him, nor referenced "Rick's" whereabouts or conduct subsequent to the shooting. Nothing about the direct or circumstantial evidence of the objective circumstances of his responses supports a conclusion that either Mr. Covington or the police believed that the criminal event was "ongoing" at the time of the statements.

This Court's test from *Davis* requires that the "primary" purpose of the specific interrogation be viewed in the context of the objective circumstances. That standard recognizes an interrogation can have multiple purposes, but that the role of a reviewing court, under the objective facts of each case, is to determine which of those purposes was primary. Had Mr. Covington believed that he was in danger of a renewed assault by "Rick," he would have expressed that fear and need for immediate assistance to the officers, as Ms. McCottry

did when she first spoke to the operator in *Davis*. Had the police in this case considered the primary purpose of questioning Mr. Covington to be, as Petitioner asserts, to enable them to meet an ongoing emergency, it is inconceivable that not one of these officers would have asked Mr. Covington if "Rick" was present at the gas station or about the perpetrator's current location or plans. To the contrary, the objective circumstances fully support the Michigan Supreme Court's conclusion that the officers were not told nor did they suspect that they or Mr. Covington were in any immediate danger, or that there were any criminal acts ongoing at the gas station. The "primary" purpose of the repeated questioning was to discover what happened to the declarant during the past events, in order to develop that evidence for use in potential prosecution of the assailant. The fact that the officers learned information during the questioning that assisted them in investigating the offense and attempting to locate the perpetrator did not create an ongoing emergency where none in fact existed:

> Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it so.

547 U.S. at 832, n. 6.

Petitioner and *amici* supporting Petitioner's argument seek to "make it so" by arguing for a conclusive presumption that an ongoing emergency exists whenever the police initially respond to the report

of a serious or violent crime. Petitioner does not suggest any limits on the duration of the period during which all police interrogations will produce, regardless of their content, nontestimonial statements. Inconsistent and unpredictable results will flow from the lack of any definitive limitation on how long this purported "ongoing" emergency lasts. The Michigan Supreme Court correctly observed that acceptance of Petitioner's argument could mean that all statements taken by the police prior to the apprehension of the suspect would be nontestimonial. This Court in *Davis* rejected that broad a definition of an ongoing emergency. Where, as here, the totality of the declarant's statements were confined to the circumstances of past, completed events, did not reference any current situation involving the alleged suspect, and the police conduct reflected that they did not fear for the immediate safety of themselves or the declarant, these objective circumstances show that the statement was a testimonial narrative describing a prior crime.

C. The medical emergency to the declarant did not fall within the Davis definition of an ongoing emergency.

Petitioner alternatively asserts that the existence of an injury to a declarant sufficiently constitutes an "ongoing emergency" within the confines of the *Davis* decision. Nothing in the *Davis* opinion supports an expansion of the term to a medical or health situation rather than an ongoing criminal event. While it cannot be disputed that a serious or life-threatening injury creates a medical emergency for a victim, the *Davis*

Court did not base its decision on the presence or absence of any injury to the declarant. To the contrary, the Court noted that in her statement, Ms. Hammon told the police that during the prior assault her husband had thrown her down and shoved her head into broken glass, and had punched her twice in the chest. 547 U.S. at 821. This Court did not conclude that her statement was nontestimonial because the police may have discovered that she was injured during the assault, or received information relevant to medical care. The "emergency" crucial to the determination of the admissibility of the statement was the criminal conduct at issue, and whether it was occurring as the statement was being made (ongoing) or had already ceased. Other emergencies, either medical situations or the potential of new events in the future, do not change the character of a narrative of past events. Had this Court concluded that the existence of an injury, standing alone, was sufficient to render nontestimonial any statement made by the injured declarant in response to police interrogation concerning the cause of the injury, it is likely the Court would have applied or discussed that conclusion in relation to the likelihood that Ms. McCottry and/or Ms. Hammon were injured during the domestic assaults.

The record of this case reflects that the primary purpose was to provide evidence of past events rather than intercede in a current medical situation. At no point did Mr. Covington ask the officers to treat or assess his injury. The officers asked few questions of Mr. Covington concerning that injury, and did not render any medical assistance or basic first aid. While it is unlikely that they were insensitive to his wound, they knew that expert

medical care had already been dispatched to the gas station and would arrive within moments. These officers were not on the scene to provide medical assistance to an injured man. They were there to investigate and gather evidence of a reported crime. Their questions to Mr. Covington concerning where and when he had been shot, and the circumstances of that shooting, were not intended to provide information that they would then use to decide on the degree of medical care he required.

These officers did not "assess a party's injuries to determine whether immediate medical attention is necessary and whether additional assistance will be needed from paramedics." Petitioner's Brief at 14. They knew paramedics would soon arrive and would be significantly more qualified to assess and treat Mr. Covington's medical situation. In the short amount of time they had prior to the arrival of the EMS unit, all five officers sought to obtain as much information as they could from Mr. Covington about the past events, anticipating that he would soon be transported to a hospital. Under the *Davis* standard, their primary purpose in questioning Mr. Covington, on these objective and specific facts, was to "establish or prove past events potentially relevant to later criminal prosecution."

D. A definition of nontestimonial statements for purposes of the Confrontation Clause as those made during and part of the events at issue is consistent with the common law doctrine of res gestae statements.

The decisions in *Davis* and *Hammon* are consistent with the "res gestae" doctrine of admissible statements which has been discussed in both English and United States common law decisions, including the ruling in *Brasier*, *supra*. See Fisher, *What Happened – And What Is Happening – To The Confrontation Clause*, 15 J. L. Poly. 587 (2007). Under this doctrine, a statement made during the event itself was deemed to be part of the event, and therefore admissible, but a statement made after the cessation of the event which described or related that prior event was held inadmissible as falling outside of the res gestae of the offense. See also Friedman and McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171 (2002).

For example, in *People v. Wong Ark*, 30 P. 1115 (1892), the California Supreme Court held that a statement made to a police officer by the victim of a shooting only moments after the event, identifying the defendant as the person who fired the shot, was inadmissible at trial since the victim died as a result of the shooting and never testified in person. The Court held that "narrative[s] of past events, made after the events are closed," are not part of the res gestae, and the statement was inadmissible, even though the assailant escaped the scene of the shooting, because "[t]he declaration was not the fact talking through the party, but the party's talk about the facts." 30 P. at 1115-1116.

This Court's holdings in *Davis* and *Hammon* are in harmony with the res gestae doctrine, which relies on the temporal circumstances of the statement. Ms. McCottry's initial statements to the 911 operator were made during the actual assault itself, and were thus part of the res gestae. Ms. Hammon's statement was made after the event had concluded, and was a narrative of past events rather than part of the incident itself. In this case, it is undisputed that the shooting of Mr. Covington did not occur at the gas station, where the statement was obtained, and had concluded approximately 30 minutes prior to the police questioning of the declarant.

This definition of an "ongoing emergency," consistent with the res gestae theory, explains the significance the Michigan Supreme Court gave to the substantive content and verb tense of the statement and police questions in this case. Petitioner asserts that "focusing myopically on whether the interrogation or statements use the past or present tense" is an incorrect means of determining the primary purpose of the interrogation.[8] Viewed in context to the history of the res gestae doctrine and this Court's decision in *Davis*, analysis of the content is essential to determine whether the statement is part of the event or a description of past events. Here, where all five of the officers who questioned Mr. Covington acknowledged that his statements in response to their questions referred only to what happened to him 30 minutes earlier, at a location six blocks away, his statements were a narrative of events that had concluded, and not a cry for assistance for the

8. Petitioner's Brief on the Merits, p. 13.

police to intercede in events that were occurring concurrently with the interrogation. The statements were not part of the event. This Court in *Davis* made this point explicit when it noted the difference between the questions posed to Amy Hammon and those initially asked by the 911 operator of Ms. McCottry:

> When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime – which is, of course, precisely what the officer should have done.

547 U.S. at 830.

Where an out-of-court statement is the functional equivalent to in-court testimony, and where it would have been anticipated at the time the statement was made that the substance of the statement would be relevant evidence in a criminal prosecution, the statement can only be admitted at a trial, if the declarant later proves unavailable, where the Sixth Amendment right to confrontation has been satisfied. In this case, the statement given by Mr. Covington in response to the police questions was the core of the testimony he presumably would have given at trial had he survived his wound:

> Both statements [the statements at issue in *Crawford* and *Hammon*, supra] deliberately

> recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitution for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.

547 U.S. at 830. Similarly, the *Davis* Court noted that the statement in *Crawford*, as well as the evidence at issue in *United States v. Inadi*, 475 U.S. 387 (1986); *Raleigh's Case*, 2 How. St. Tr. 1 (1603); and *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791), "aligned perfectly with their courtroom analogues." 547 U.S. at 828.

Where a statement is nontestimonial in that it is part of the events as they are happening, the statement does not match up with any anticipated testimony if the declarant later appears at a trial. Ms. McCottry's statement to the 911 operator that Mr. Davis was assaulting her would not have been repeated at trial, as no assault would have been occurring during the trial. "[N]o 'witness' goes into court to proclaim an emergency and seek help." 547 U.S. at 828. No portion of the statement Mr. Covington gave to the officers in this case compares to the initial statements of Ms. McCottry in *Davis*. His statement was an "obvious substitution" for live testimony, and inherently testimonial.

E. Mr. Bryant was prejudiced by the lack of opportunity to confront Mr. Covington's statements to the police.

The circumstances of the case show, as they did in *Crawford*, why confrontation would have been crucial in the case. Mr. Covington alleged to the police that he could recognize "Rick's" voice through the door, and thus assumed "Rick" shot him, but was unable to provide the police with a last name or a physical description of "Rick" which matched Mr. Bryant. Mr. Covington's brother testified that the declarant knew Mr. Bryant's full name, and thus should have readily been able to provide the police his last name and an accurate description if the "Rick" Mr. Covington referred to in his statements was in fact Mr. Bryant. Cross-examination would have delved deeply into these ambiguities in the statements, and could have revealed that Mr. Covington was referring to a different "Rick" than Richard Bryant. Given the weaknesses of the prosecution's circumstantial evidence, the lack of any opportunity for the defense to cross-examine the declarant as to the reliability of his purported identification of Mr. Bryant as the offender created prejudicial error of constitutional dimension.

The admission of the out-of-court statements of Mr. Covington violated Mr. Bryant's Sixth Amendment right to confrontation. The statements were testimonial in nature, and were never subjected to the "only indicium of reliability sufficient to satisfy" the demands of the Constitution – the right of cross-examination. The Michigan Supreme Court correctly interpreted and applied this Court's rulings in *Crawford* and *Davis*. This Court should affirm that decision.

CONCLUSION

Respondent asks this Court to affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

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