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 *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

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## BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*

*Amicus curiae* National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 state and local affiliate organizations numbering 28,000 members in 50 states.[1] *Amicus curiae* Public Defender Service for the District of Columbia represents indigent criminal defendants. *Amici* participated in this case at the certiorari stage, sub-

[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

mitting briefs that urged this Court to grant review both in this case and in *Davis v. Washington*, Docket No. 05-5224.

Central to our role as criminal defense lawyers, *amici* assist "accused" persons in exercising their Sixth Amendment right to "be confronted with the witnesses against" them. U.S. Const. amend. VI. In many cases handled by *amici,* the right to confrontation still serves its traditional function of ensuring the adversarial mode of a criminal trial, where witnesses testify in open court, before the trier-of-fact, subject to cross-examination. But *amici* have too often been required to represent defendants in cases like Mr. Hammon's and Mr. Davis'—cases in which the government's proof consists of nothing more than the recitation of accusatory post-incident statements made by an absent witness to a police officer or a 911 operator. From a criminal defense perspective, such "witnessless" prosecutions[2] present grave dangers: They allow the accuser to level charges from somewhere other than the open courtroom, thereby escaping public scrutiny; defense counsel is never permitted to perform her most valuable function for her client—cross-examination of witnesses face-to-face in open court before the fact-finder; and the fact-finder is prevented from serving as the real arbiter of the reliability of the accusations.

Because such "witnessless" prosecutions were generally forbidden in the United States for almost two hundred years under the commonly accepted understanding of the right to confrontation, and because they gained some measure of approbation only in the wake of this Court's decision in *Ohio*

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[2] Such prosecutions are also known as "victimless" or "evidence-based" prosecutions. But because there are, in fact, alleged victims in these cases (whether they appear at trial or not), and because all cases are "evidence-based," *amici* use the term "witnessless" in order to reflect the essence of these prosecutions, which is their lack of percipient witnesses at trial.

*v. Roberts,* 448 U.S. 56 (1980), *amici* are the first generation of American defense lawyers to have experience representing their clients under such adverse conditions. Based on our knowledge of the inherent problems with these trials, *amici* urge this Court to continue down the path already charted in *Crawford v. Washington*, 541 U.S. 36 (2004), by reviving the common-law understanding of the Sixth Amendment and thereby ensuring that in-court confrontation of percipient witnesses is again the norm. *Amici* believe that the only way to accomplish this goal is to adopt a bright-line definition of "testimonial" statements protected by the Confrontation Clause that, at the very least, specifically requires confrontation at trial for all accusatory statements made to known government agents. *Amici* support Mr. Hammon and Mr. Davis in hopes that this Court will use their cases to adopt such a rule.

## STATEMENT OF THE CASE

Hershel Hammon's conviction for domestic battery rests entirely on the testimony of Peru, Indiana police officer Jason Mooney, who witnessed none of the pertinent events that precipitated the charges. *See* Petitioner's Cert. Petition at 2-3. Even so, Officer Mooney was the prosecution's star witness because he was able to relay at trial the information he had obtained by questioning Mr. Hammon's accuser (Amy Hammon) during his investigation of the incident. *Id. Amici* adopt Petitioner's statement of the case.

## SUMMARY OF ARGUMENT

*Amici* urge this Court to adopt a bright-line definition of "testimonial" statements protected by the Confrontation Clause that, at the very least, requires confrontation at trial for all accusatory statements made to known government agents. In every case, such statements look like testimony, sound like testimony, function as testimony at trial, and accordingly lie at the heart of the confrontation guarantee. A categorical rule

ensuring the presentation of these core testimonial statements through face-to-face testimony, before the trier-of-fact, subject to cross-examination, will best fulfill the Court's stated mission in *Crawford* of reviving the original purpose of the Confrontation Clause: to permanently ensure an adversarial mode of criminal trials. To be sure, this bright-line test does not purport to define the universe of "testimonial" statements. But for the large group of core statements that fall within its ambit—such as those in both *Hammon* and *Davis v. Washington*—it will establish an easily administered rule that clearly defines for courts and counsel alike when in-court confrontation of witnesses is required. Adopting such a test will eliminate the great bulk of lower court confusion over what constitutes a "testimonial" statement in the post-*Crawford* era.

The categorical rule *amici* propose will destroy the vestiges of *Ohio v. Roberts,* which can be seen in some courts' post-*Crawford* decisions—both in their over-willingness to excuse confrontation of witnesses who made "excited" "emergency" or "preliminary" testimonial statements, and in their reliance upon subjective, unpredictable, multi-factored tests in an effort to discern what is testimonial. *Amici's* rule will also negate any perverse incentives for the government to abridge or alter otherwise sound investigative procedures so as to end-run confrontation requirements. And *amici's* rule will withstand the ever-present pressure from the government to curtail confrontation—pressure which is part of the natural dynamic of our adversarial system—thus providing effective protection against future confrontation abuses.

Finally, there is no downside to *amici's* categorical rule—at least no downside that would have mattered to the Framers. The government should be able to prosecute all of its cases, even its domestic violence cases, within the adversarial mode of criminal trial that the Sixth Amendment requires. Indeed,

any conviction contingent on evading the Sixth Amendment confrontation guarantee is not a conviction the Framers would have valued.

## ARGUMENT

### THIS COURT SHOULD ADOPT A CATEGORICAL DEFINITION OF "TESTIMONIAL" STATEMENTS THAT, AT THE VERY LEAST, REQUIRES CONFRONTATION AT TRIAL FOR ALL ACCUSATORY STATEMENTS MADE TO KNOWN GOVERNMENT AGENTS.

#### A. *Amici's* Rule Reflects The Original Purpose Of The Confrontation Clause, Reaffirmed in *Crawford v. Washington*, To Permanently Ensure An Adversarial Mode of Criminal Trials.

*Amici* advocate a categorical rule that requires confrontation for all accusatory statements to known government agents because such a rule best reflects the original purpose of the Confrontation Clause. As this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), made clear, when the Framers of the Constitution drafted the Confrontation Clause of the Sixth Amendment, they chose what they wanted a criminal trial to look like. Rejecting the continental mode of judicial inquisition and trial by dossier, the Framers embraced the English and early American common-law practice of requiring witnesses to testify in court, under oath, in the presence of the defendant and the fact-finder, and subject to cross-examination. *Crawford*, 541 U.S. at 43 (in contrast to the civil law, "the common-law tradition is one of live testimony in court subject to adversarial testing"); *id.* at 50 ("the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure"); *id.*

at 54 (Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law").[3]

The method of criminal trial endorsed by the Framers and reaffirmed by *Crawford* not only seeks to ensure that convictions be based on reliable evidence, but also mandates that reliability be established in one way and one way only—through the crucible of adversarial testing. *Crawford*, 541 U.S. at 61-62 ("[The Confrontation Clause] is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination . . . . [and] thus reflects a judgment, not only about the desirability of reliable evidence . . . , but about how reliability can best be determined."); *see also id.* at 69 ("the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation").

Equally important, pursuant to this adversarial method of conducting a trial, (1) the defendant is assured the opportunity to meet his accuser "face to face," *Crawford*, 541 U.S. at 43-44; *see also id.* at 57 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)); (2) the public is assured transparency of process, *see Lee v. Illinois*, 476 U.S. 530, 540 (1986) (The Confrontation Clause "promote[s] to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial"); Sir William Blackstone, 3 *Commentaries on the Laws of England* *373 (1765-69 ed.) (http://www.yale.edu/lawweb/avalon/blackstone/bk3ch23.htm) (approving the "open examination of witnesses viva voce, in the presence of all mankind" as opposed to private, secret examinations), and (3) the fact-finder is

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[3] Because testimonial dying declarations appear to have been admitted at trial without confrontation at common law, *see Crawford*, 541 U.S. at 56 n.6, *amici's* categorical rule may also be subject to this limited exception.

assured first-hand access to the evidence presented.[4] *See id.* at *374 ("[B]y this method of examination and this only, the . . . [fact-finder has] an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing.").

Assuredly, this adversarial method of trial has its costs. The right to confrontation, like other Sixth Amendment guarantees (*e.g.,* the right to counsel, the right to compulsory process) and due process protections (*e.g.,* the standard of proof beyond a reasonable doubt), makes it more difficult for the government to obtain convictions. But that is the balance the Framers struck, with the expectation that the government could work effectively within this adversarial system and that any burden on the government would be more than offset by the dividends in the fairness, justice, and public trust this system would promote. *See* Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule. Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bulletin 99, 121 (1972) ("*the function of the Confrontation Clause . . . was to place the risk of absence of reliable evidence of guilt or innocence upon the state rather than the defendant*") (emphasis in original).

In the context of the adversarial method of conducting criminal trials that the Framers adopted and this Court reaffirmed in *Crawford*, accusatory statements to known government agents are clearly identifiable as core "testimonial" statements. For a number of reasons, an accuser who makes his statements to a responding police officer or a 911 operator operates every bit as much as a "witness against" the accused

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[4] Indeed, because the right to cross-examination did not fully develop until defendants were granted the right to counsel, *see* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 82-83, 92 (1995), these other attributes of confrontation initially took precedence over the right to cross-examination.

within the meaning of the Sixth Amendment as an accuser who takes the stand in court.

First, a direct accusation to the police sets the machinery of our criminal justice system in motion toward the ultimate end of securing a conviction. It is always the responsibility of a law enforcement agent to collect and preserve evidence for prosecutorial use. Thus, when a witness makes an accusatory statement to a known government agent, he or she is inviting a government response—a response that always includes the possibility that the accused will be deprived of liberty, whether or not the witness is consciously aware of this fact, and whether or not this is the witness' primary purpose. Indeed, this is particularly true in the domestic violence context because many states have mandatory arrest laws and "no drop" policies.[5]

Second, given their status as direct evidence of guilt, criminal accusations to police or a 911 operator are the very statements that the government will seek to rely upon to establish guilt at trial.

Third, and relatedly, these are the statements—direct, inculpatory narratives by someone who purports to have personal knowledge of the crime—that the defendant will most need to probe and challenge in order to mount a defense.

Finally, and for the same reasons, these are the very statements that the fact-finder will weigh most heavily in deliberating to reach a verdict.

In short, accusatory statements to known government agents look like testimony, sound like testimony, and are treated as testimony at trial. As such they should be given

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[5] *See* Friedman, Richard D. & Bridget McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171, 1184, 1188 (2002); Angela Corsilles, Note, *No-Drop Policies In the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853 (1994); *see e.g.*, D.C. Code § 16-1031; Wash. Rev. Code §§ 10.31.100(2) & 26.50.110(2).

"testimonial" status under the Sixth Amendment. This is the only way to realize the aim of the Framers, reaffirmed by this Court in *Crawford*, to promote an adversarial mode of criminal trial where testimony is presented in court, under oath, in the presence of the defendant and the fact-finder, and subject to cross-examination.

### B. *Amici's* Rule Will Fulfill The Promise Of *Crawford v. Washington* By Fully Eradicating The Vestiges Of *Ohio v. Roberts*.

The Court's decision in *Crawford* promised to eradicate the amorphous, ad hoc confrontation exemption, established under *Ohio v. Roberts,* for "testimonial" statements subjectively deemed "reliable" by a judge. Adoption of *amici's* categorical rule requiring confrontation for accusatory statements to known government agents is a necessary step in fulfilling that promise.

As this Court recognized in *Crawford*, the *Ohio v. Roberts* rule frustrated the object of the Confrontation Clause to provide a categorical guarantee of an adversarial mode of trial by allowing confrontation to be dispensed with upon a simple showing of reliability. *Crawford*, 541 U.S. at 60-62. To make matters worse, this reliability standard contained no uniform, objective measures. *Id.* at 61, 63. Courts could find that out-of-court statements were reliable because, in the court's subjective opinion, they had indicia of trustworthiness. Alternatively, courts could use hearsay exceptions as a proxy for assessing reliability, a practice which imposed no practical limits on courts' discretion. These hearsay exceptions were so malleable and expansive that, if a court subjectively believed an out-of-court statement to be trustworthy, it was likely that a hearsay exception could be made to apply.

This was especially true with respect to the modern[6] hearsay exceptions for "excited utterances" and "spontaneous declarations." The temporal boundaries of these exceptions were elastic (generally expanding to encompass the after-the fact narrative statements the prosecution needed to prove its case so long as some showing of emotional upset or spontaneity could be made). Moreover, there was no need for the prosecution to prove witness unavailability in order to obtain the benefit of these exceptions. *See* Fed. R. Evid. 803(4); *White v. Illinois*, 502 U.S. 346 (1992). Thus, these exceptions could be and were applied to encompass a wider and wider number of unconfronted criminal accusations. *See Davis* Cert. Petition at 21-23 (citing examples).

*Crawford* sent a clear message that *Ohio v. Roberts'* culture of permissive confrontation exceptions was no longer acceptable by reaffirming that the right to confrontation is a "categorical" "procedural" guarantee, 541 U.S. 61, 67-68, founded on the common-law right to confrontation, *id.* at 43, 54, 68. A number of courts have received this message,[7]

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[6] Apart from the narrowly construed exception for statements that were part of the "res gestae"—*i.e.*, statements that were made contemporaneously with the incident at issue and were part of the incident in some way—no exception for "excited" or "spontaneous" statements existed at common law or at the time the Sixth Amendment was drafted. *See Crawford*, 541 U.S. at 58 n. 8 (doubting the existence at common law of any exception for spontaneous declarations); 3 John Henry Wigmore, *Evidence* §§ 1746-50 at 2248-60 (1904 ed.) (advocating recognition of this previously nonexistent exception); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 577 (2005) (current conception of "excited" declarations "is much more expansive" than when this exception first emerged; "only a few of the statements currently received under it would likely meet [its] more limited historical antecedent").

[7] *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 555-56 (8th Cir. 2005); *United States v. Summers*, 414 F.3d 1287, 1300-03 (10th Cir. 2005); *United States v. Solomon*, 399 F.3d 1231, 1237 (10th Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 674-75 (6th Cir. 2004); *Jenkins v.*

recognizing that *Crawford* has "fundamentally alter[ed] nearly a quarter century of confrontation clause jurisprudence." *State v. Grace*, 111 P.3d 28, 35 (Haw. App.), *cert. denied,* 113 P.3d 799 (Ha. 2005).

But some courts, like those below and in *Davis*, have struggled to limit *Crawford*, construing it as a narrow ruling that, like *Ohio v. Roberts*, permits routine departures from the adversarial mode of criminal justice. Part of the lower court confusion may be excused as an inevitable result of the fact that *Crawford* itself did not involve a statement by a classic "accuser." Sylvia Crawford had provided police with an ambiguous, muddled account of events that potentially inculpated her husband, although it did not purport on its face to do so. 541 U.S. at 39-40, 66-67. *Crawford* thus did not directly address the "testimonial" status of accusatory statements made after the completion of a crime, to known government agents. Even so, much of the lower court confusion is itself puzzling as the Court provided many indications that any definition of "testimonial" would necessarily include such accusations.[8]

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*State*, 604 S.E.2d 789, 605-06 (Ga. 2004); *Moody v. State*, 594 S.E.2d 350, 353-54 (Ga. 2004); *Brawner v. State*, 602 S.E.2d. 612, 613-15 (Ga. 2004); *In re E.H.*, 823 N.E.2d 1029, 1036-37 (Ill. App.), *appeal allowed*, 833 N.E.2d 2 (Ill. 2005); *State v. Snowden*, 867 A.2d 314, 322-29 (Md. 2005); *State v. Clark*, 598 S.E.2d 213, 219-220 (N.C. App.), *review denied,* 601 S.E.2d 866 (N.C. 2004); *State v. Hill*, 827 N.E.2d 351, 357-59 (Ohio App.), *appeal not allowed*, 833 N.E.2d 1250 (Ohio 2005); *Mason v. State*, 173 S.W.3d 105, 110-12 (Tex. App. 2005); *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004); *cf. State v. Branch*, 865 A.2d 673, 690, 692 (N.J. 2005) (analyzing this Court's "watershed decision in *Crawford*" and limiting excited utterance exception in order to "pay proper respect to the principles animating our Confrontation Clause jurisprudence").

[8] *See, e.g., id.* at 43-50, 54 n.5 (reaffirming that the Sixth Amendment promotes the adversarial system of criminal justice founded on the "common law tradition . . . of live testimony in court"); *id.* at 43-44, 51 (acknowledging historical and textual support for the right to confront

Of particular concern here, some courts have taken advantage of this Court's perceived failure to expressly resolve the testimonial character of accusations to known government agents, and have continued to permit the government to use these unconfronted statements in witnessless trials by invoking the nebulous hearsay exception for excited utterances. These are the same types of unconfronted out-of-court statements that, while inadmissible at common law, only became admissible through the "reliability-based," nonadversarial mode of conducting criminal trials under *Ohio v. Roberts* and the concomitant expansion of the hearsay exception for "excited utterances" and "spontaneous declarations." Indeed, with other hearsay statements previously admitted under *Ohio v. Roberts* now clearly off-limits under *Crawford*, *see* 541 U.S. at 68, the absence of an explicit condemnation of the reliance on "excited" "spontaneous" statements to circumvent confrontation has created an incentive for these courts and the prosecutors who appear before them to expand their reliance on this hearsay exception.[9]

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one's "accuser" and particularly dwelling on the injustice of Sir Walter Raleigh's trial where he was not permitted to face his "accuser"); *id.* at 53, 56 n.7, 66 (indicating that "the involvement of government officers in the production" of witness statements raises Sixth Amendment concerns and rejecting the proposition that investigating officers could be "neutral"); *id.* at 52 n. 3 (noting that, although unsworn testimony at common law was generally inadmissible because of its perceived unreliability, "there is no doubt" that the Framers would have considered the Sixth Amendment a bar to the admission of such testimony without confrontation); *id.* at 58 n.8 (observing that the accusatory spontaneous declarations to police in *White v. Illinois* were "testimonial" and that their admission was "arguably in tension" with the court's historical interpretation of the Confrontation Clause because they would not have been admitted in criminal trials at common law).

[9] *See* Whitney Baugh, *Why the Sky Didn't Fall: Using Judicial Creativity to Circumvent* Crawford v. Washington, 38 Loyola L.A.L.Rev. 1835, 1869 (2005) (observing that "[a]lthough much of the *Crawford* opinion arguably supports an expansive interpretation of testimonial,

*Hammon* and *Davis* are part of this contingent. Purporting to rely on *Crawford*, they allow the admission without confrontation of accusatory statements to known government agents, so long as those statements were made while the declarant was in what could be (loosely) characterized as an "excited" state and within some more-restricted-but-as-yet-undefined temporal boundary that is defined either by an "emergency situation," or by the "preliminary" nature of the investigation conducted. *Hammon v. State*, 829 N.E.2d 444, 453, 457-58 (Ind. 2005); *State v. Davis*, 111 P.3d 844, 849-51 (Wash. 2005).

The response to *Crawford* by the Indiana and Washington Supreme Courts demonstrates why *amici's* proposed cate-

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many courts have found ways to circumvent the decision"); *see also id. at* 1853-60 (documenting reliance on hearsay exception for excited utterances in furtherance of this end); Celeste E. Byrom, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409, 428 (2005) ("[T]he prosecutor should argue that *Crawford's* rule does not apply to excited utterances because (1) *Crawford* does not expressly overrule *White v. Illinios*, and (2) by definition, an excited utterance cannot be 'testimonial.'"); Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid*, 38 Prosecutor 14, 16-17 (Dec. 2004) (www.ndaa-apri.org/publications/ndaa/toc_prosecutor.html) (using broadest formulation of testimonial in *Crawford* to argue that statements that look like excited utterances cannot be testimonial); Wendy Murphy, *New Strategies for Effective Child Abuse Prosecutions After Crawford,* 23 ABA Child Law Practice 129 (Oct. 2004) (http://www.abanet.org/child/database/abuseandneglect/Crawford.htm) (urging law enforcement to "develop protocols for identifying and recording excited utterances" on the assumption that obtaining victims' statements while they are still under the influence of startling events is sufficient to "get around *Crawford*"); Casey Gwinn, *Evidence Based Prosecution in the Aftermath of* Crawford v. Washington, Notice (Newsletter of the National Center on Domestic and Sexual Violence: www.ncdsv.org) (Fall 2004) at 1 ("[t]he key advocacy issue for evidence-based prosecution initiatives will be to establish that most hearsay evidence is not 'testimonial' under the concepts discussed in *Crawford.*")

gorical rule is needed. Clearly these courts, still under the sway of *Ohio v. Roberts*, misunderstand the purpose of the confrontation guarantee—*i.e.*, to promote a mode of criminal trial where confrontation is the norm. They misguidedly look to the timing of the statement and the emotional state of the speaker—two of the same factors courts looked to under *Ohio v. Roberts*—to determine if confrontation is required. But *amici's* rule recognizes that the precise timing of a post-incident accusation to a known government agent and the accuser's emotional state are immaterial in a system that values and promotes adversarial testing.

*Any* such accusation, even a hasty "excited" one made during a "preliminary" investigation (1) sets the machinery of our criminal justice system in motion toward the ultimate end of securing a conviction, (2) is used by the fact-finder in the same way to assess guilt and may serve as the sole or a critical basis for the fact-finder's decision to deprive the accused of his liberty, and (3) is subject to the same sorts of defects—error, incompleteness, or hidden bias—that the defense can only address through subjecting these accusations to the rigors of adversarial testing.

Indeed, the importance of subjecting hasty, unsworn, and often minimally documented accusations to the rigors of confrontation is, if anything, even greater. These "excited" accusations often will be the product of incomplete investigation in the first place and thus are particularly susceptible to error, lack of clarity, bias, and even malicious falsehood.[10]

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[10] *See e.g., United States v. Wilmore*, 381 F.3d 868, 869 (9th Cir. 2004) (911 caller falsely accused husband of robbing abortion clinic because she feared he would sell a Christmas gift for their children to get money for drugs); *United States v. Washington*, 263 F. Supp. 2d 413, 420 (D. Conn. 2003) (failure to disclose to defense that 911 caller had prior conviction for making a false report and was known to be a "persistent" liar); *Evans v. State*, 838 So.2d 1090, 1093 (Fla. 2002) (two witnesses who had "experienced several events startling enough to cause nervous excitement"

The contrary rule, where the right to confrontation is only triggered by statements made after the passage of time, upon reflection by the accuser and careful questioning by government agents—"turns logic on its head." Richard D. Friedman, *Grappling with the Meaning of Testimonial*, 71 Brooklyn L. Rev. 241, 248 (2005).

By the same token, *amici's* rule ensures that trial counsel is able to perform her constitutionally mandated function to probe and challenge these accusatory statements. When the accuser does not appear in court and the accuser's statements are presented second-hand, counsel is disabled in her efforts to mount a defense. The police officer relating the accuser's account will likely know and/or remember only those facts about the accuser and the accuser's statement that are recorded, possibly selectively, in the officer's notes. The officer will not be in a position to acknowledge on cross-examination, for example, any gaps in the accuser's knowledge, any impediments to the accuser's perception of events, or any biases the accuser holds against the defendant. And

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initially gave police false description of the shooter); *State v. Brown*, 903 P.2d 459, 463-64 (Wash. 1995) (911 call erroneously admitted as excited utterance, given caller's testimony that she had decided to fabricate portion of her story before making telephone call); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (failure to disclose to defense that key eyewitness had admitted that claim to 911 operator that robber had stuck a gun in his face—which was admitted as excited utterance—was false); *People v. Ramirez*, 2004 WL 136402 (Mich. App.), *appeal denied*, 685 N.W.2d 671 (Mich. 2004) (initial "excited" statement by mugging victim to police that defendant had a gun was incorrect); *People v. Simpson*, 656 N.Y.S.2d 765, 767 (N.Y. App. 1997) (911 caller lied in order to get the police to respond more quickly to her home); *Keller v. State*, 431 S.E.2d 411, 411-12 (Ga. App. 1993) (false report of robbery both in a 911 call and to responding police officers); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1197 (describing phenomenon in domestic violence cases of "the race to the phone by abusers who have been through the system and who know that they will be in a much better position if they are the first to call" the police for assistance).

even if counsel could present other extrinsic evidence that undermined or mitigated the accuser's statement, this cannot substitute for the one challenge that is unavailable—eliciting such favorable evidence from the accuser him or herself. Pursuant to *amici's* rule, however, the defendant is given the opportunity to challenge precisely those statements that will be most critical to the trier-of-fact's determination of guilt—accusatory statements by people who purport to be percipient witnesses, made to known government agents.

*Amici's* categorical rule eradicates the vestiges of *Ohio v. Roberts* not only by protecting the full scope and purpose of the confrontation guarantee, but also by establishing an efficient, easily administered rule that clearly defines for courts and counsel alike when confrontation is required. Post-*Crawford*, some lower courts have relied on "fact determinative case-by-case analys[e]s," reminiscent of *Ohio v. Roberts*, to determine what is "testimonial." *See* Baugh, 38 Loy. L.A. L. Rev. at 1866-69 (defending this mode of analysis even though it has led to contradictory holdings); *Amici's* Brief in support of *Davis* Petition for a Writ of Certiorari, at 15-17 nn.10-16 (documenting the complex, multi-variable fact-finding by lower courts in their efforts to identify "testimonial" statements); *see also Crawford*, 451 U.S. 61, 63 (criticizing the unpredictability of the amorphous *Ohio v. Roberts* reliability test). This method needlessly expends judicial resources, leads to inconsistent results, and makes it very difficult for practitioners to predict when confrontation is required. *Id.* at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design").

Pursuant to *amici's* simple, categorical rule, massive judicial resources are not devoted to what should be easily-identifiable heartland testimonial statements, and practitioners are given clear notice. Upon a simple determination that a statement is (1) accusatory and (2) made to known government agents, the need for confrontation is established. Thus time and energy are preserved, confusion is avoided, and the

right to confrontation is more fully protected by treating a whole group of heartland "testimonial" statements as such.

### C. *Amici's* Rule Negates Any Perverse Incentives For Law Enforcement To Divert Its Energy From Investigation To The Creation of "Unconfrontable" Statements.

In destroying the vestiges of *Ohio v. Roberts*, *amici's* categorical rule also negates the perverse incentives for law enforcement that have arisen in the wake of some courts' post-*Crawford* willingness to admit unconfronted "excited" accusations to government agents in "preliminary" investigations. Exempting such statements from confrontation presumes that police officers are not already wearing their crime-fighter's hats when they arrive at a crime scene and that they are neutral for some "preliminary" period of time. But as *Crawford* recognizes, and as real world experience confirms, this is a fiction; there are no "neutral" government investigators. 541 U.S. at 66. The police are always, as they should be,[11] poised to collect evidence and pass it on for prosecutorial use. By denying this reality and interpreting the confrontation guarantee through a fictional lens of police neutrality, decisions like *Hammon* and *Davis* predictably motivate the government to modify the way it pursues its investigations and to create protocols for the police that

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[11] To be clear, *amici* support thorough police investigation; *amici* oppose, however, the attempt to circumvent in-court confrontation by using the fruits of this investigation as a substitute for in-court testimony. *See* Brooks Holland, *Testimonial Statements Under* Crawford: *What Makes Testimonial Statements Testimonial?* 71 Brook. L. Rev. 281, 293 (2005) (explaining that the governmental "abuse" *Crawford* seeks to prevent does not occur at the time of evidence collection, but "when the prosecution usurp[s] the fact-finding process at trial . . . by presenting an unchallengeable narrative that already ha[s] shaped and guided the fact-finding process leading to trial and, certainly w[ill] at trial as well").

encourage hasty, cursory examinations so as to shield accusations from the adversarial scrutiny.

If decisions like *Hammon* and *Davis* are allowed to stand, protocols like the "Sample *Crawford* Predicate Questions" published by the American Prosecutor's Research Institute—the research wing of the National District Attorneys Association—are only a harbinger of what is to come. These questions were drafted precisely for the purpose of enlisting the assistance of police to "overcome a challenge to the introduction of . . . excited utterance statements. . . made by a victim . . . to a police officer." *See* Cindy Dyer, *Sample* Crawford *Predicate Questions*, 1 The Voice 8-9 (Nov. 2004) (http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf). The questions direct police:

(1) to establish the "excited" demeanor of the declarant, ("Describe the victim's emotional condition," "What did you observe that led you to believe she was upset or excited? (E.g., trembling, shaking, crying, looking over shoulder, talking fast, breathless, etc.)");

(2) to preserve the informality of the statement, ("Describe the circumstances under which she made these statements (E.g., she was standing in the yard or in her living room, middle of the night, wearing her nightgown . . . .)," "Did you Mirandize her," "Were the statements sworn"); and

(3) to avoid the appearance that the statements were the product of "interrogation," ("Were the statements taken during 'the course of an interrogation,'" "did the victim make any statements to you that were not in response to any questions," and, if questions were asked, "what was the purpose of your questions," and "were your questions to her an interrogation or merely part of your initial investigation");

*see also* Wendy N. Davis, *Hearsay, Gone tomorrow?* 90 ABA Journal 22, 24 (Sept. 2004) (After *Crawford* was

announced, prosecutors offices "immediate[ly]" began "instructing officers to take notes of the victim's demeanor at the scene . . . to prove that the statement was an excited utterance and not the product of interrogation").

Under the *Hammon/Davis* paradigm, trials would effectively be shifted from the courtroom to the crime scene, and police officers would assume the role of prosecutor, judge, and jury. The success of a growing number of prosecutions would hinge on the conduct of the police during their "preliminary" investigation and their ability to characterize statements made in this timeframe as "excited" or "spontaneous." The police would have to quickly decide who at the crime scene is telling the truth, and then would have to make sure that they do not do or say anything—*e.g.*, calm a witness down to get a more coherent story, ask follow-up questions, or probe inconsistencies or gaps in a witness' story—that are sound investigative practices but that might preclude the admission of the witness' unconfronted statements at trial.

Thus if *Hammon* and *Davis* are allowed to stand, the Court can expect to see many more cases like *Jimenez v. State*, 2004 WL 1832719 (Cal. App. Aug. 17, 2004), *cert. denied, Jimenez v. California*, 125 S. Ct. 1713 (2005). Mr. Jimenez was tried while *Ohio v. Roberts* was still the law but his conviction for robbery was affirmed under *Crawford* by the California appellate court. This conviction rested on the account of an accuser (a man dressed as a woman) whom police had encountered by happenstance in a part of Los Angeles known for prostitution. *Id.* at *2. Upon seeing police, the accuser announced that he had been robbed. The accuser subsequently identified Mr. Jimenez as one of the culprits, provided the police with a false name, address, and phone number, and was never heard from again by the judicial system. *Id.* at *2, 8, 9. Despite the suspicious circumstances of the accusations, the accuser's disappearance, and his demonstrable false statements to police, the

government pressed forward with the charges in a trial where the sole testimony implicating Mr. Jimenez in this crime consisted of police officers recounting the "excited" criminal accusations of the anonymous accuser. *Id.* at *8-9.

Mr. Jimenez's trial thus provided him with no opportunity to question his accuser about why he had provided police with false identifying information, whether his accusation had been prompted by a desire to divert police attention from his own illegal activities, and whether he had been in any real position to make a positive, reliable identification of Mr. Jimenez as a culprit in any robbery. As a consequence of Mr. Jimenez's inability to question the accuser, the jury was presented with a woefully incomplete view of the evidence. None of this troubled the appellate court, which upheld Mr. Jimenez's conviction while acknowledging the trial court's assessment that the accuser had likely given the police false identifying information *precisely* to avoid being called as a witness and being impeached. *Id.* at *9. Apparently, it was enough that the police investigating the case had deemed this anonymous accuser to be a credible complainant.

A rule where the police are responsible for, in effect, trying cases at the scene of the crime will only distract the police from doing their real job. Police have an important role to play in the criminal justice process—fully investigating reports of crime and gathering the information needed for the prosecution of these crimes. It is asking too much of law enforcement officers also to demand that they alter their investigative techniques, *not* so as to get the most probative evidence for the prosecution, but so as to get the most "unconfrontable" evidence—*i.e.*, evidence that will assist the prosecution to subvert the adversarial process at trial. It is simply not the function of the Confrontation Clause to give the police "leeway to carefully assess the scene" or impact in any way a determination by the police "whether the victim needs immediate protection." *But see* Leonard Post, *All Eyes*

*Are On The High Court Over* 'Crawford' *Issues*, Nat'l L. J. (Oct. 27, 2005) (http://www.law.com/jsp/article.jsp?id=1130332860463) (Indiana Solicitor General argues that Confrontation Clause should be interpreted in this fashion). The Confrontation Clause is supposed to be a trial right, not an extra rule of police investigative procedure.

*Amici's* categorical rule would ensure that this burden is not imposed on police. Under a rule that requires subjecting all accusatory statements to known government agents to adversarial scrutiny in the courtroom, the police will know that they cannot affect whether the defendant is permitted to confront at trial the witnesses they interview at the scene. The police will then remain free to conduct a full investigation without any concern about how the case is later prosecuted. This, and not a rule that exempts from confrontation statements that can be characterized as the products of "preliminary" examination or "excited" utterances, is the only way to ensure that the Confrontation Clause does not in any way impede police investigation or efforts to assure witness safety.

### D. *Amici's* Rule Will Withstand The Ever-Present Pressure From The Government To Curtail Confrontation, Thus Providing Effective Protection Against Future Confrontation Abuses.

It is part of the natural dynamic of our adversarial system that the government will always seek to evade confrontation when given license to do so. Confrontation always has real dangers for the government because a testifying witness might, while on the stand and subject to cross-examination, provide additional details that muddle a previously clear account, reveal bias, or materially diverge from or even disavow the out-of-court statement. *See, e.g.*, Luisa Bigornia, *Alternatives to Traditional Prosecution of Spousal Abuse*, 11 J. Contemp. Legal Issues 57, 59 (2000) (San Diego prosecutor acknowledges "prosecution may be more successful

without the victim" because victim may appear "less credible" to the jury on the stand). It is generally the safer and easier course to present the jury with a pristine out-of-court statement containing the critical information necessary to sustain a prosecution. This method requires no civilian witness preparation; the government can be confident that the statement will not change or be contradicted; and it is unlikely that any hidden biases of the witness will be revealed at trial.

Apart from its other failings, *see supra*, a great weakness of *Ohio v. Roberts* was that it could not withstand the natural, ever-present pressure from the government to curtail the right to confrontation and shield its witnesses from the rigors of the adversarial system. Indeed, *Ohio v. Roberts* set up a test for confrontation that was particularly susceptible to these pressures. The amorphous "reliability" standard left an enormous amount of unbounded discretion to trial courts whose natural confidence in their ability to distinguish unreliable from reliable evidence rendered this analysis susceptible to broad expansion. Likewise, *Ohio v. Roberts*' directive that hearsay exceptions should be used as a proxy for assessing reliability failed to provide any real limits—these hearsay exceptions were malleable and could easily be manipulated to encompass whatever evidence was necessary to the prosecution's case.

Expansive, ad hoc judicial determinations of reliability—either under a hearsay exception or under a subjective determination by the court that there were particularized guarantees of trustworthiness—gave the government broad leeway to make strategic decisions to use out-of-court statements in lieu of live witness testimony whenever it saw fit to do so, including cases where the witness might prove uncooperative or be subjected to a difficult cross-examination. In other words, the government could avoid confrontation in cases where the witness' presence on the stand would have been

more harmful than helpful to the government's case.[12] *See, e.g.,* Corsilles, 63 Fordham L. Rev. at 860 (In San Diego prosecutor's office in 1990's, policy was not to compel presence of reluctant witnesses if prosecution had 911 tape or other evidence to establish guilt).

The categorical rule that *amici* seek is immune to the pressures that, in our adversarial system, the government will always bring to bear against the right of confrontation. The rule establishes unambiguous, firm boundaries for a core group of testimonial statements—accusatory statements to known government agents. In so doing, it provides clear guidelines both for trial courts to follow when assessing the need for confrontation and for appellate courts to apply when reviewing whether the right to confrontation was satisfied.

Moreover, *amici's* rule completely decouples the right to confrontation from malleable hearsay rules. There is no focus on the absent accuser's emotional state or motivations, or the timing of the accuser's statements—considerations that courts relied on under *Ohio v. Roberts* to determine if an out-of-court statement was admissible pursuant to a hearsay exception and considerations that some courts have found equally relevant post-*Crawford*. Rather, the accusatory nature of the statement and the identity of the listener as a known government agent—two easily identifiable factors—trigger the right to confrontation.

The government will continue to push against the confrontation right, as is natural in our adversarial system. But with a clear, firm rule in place, the right to confrontation will

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[12] Defense counsel had little recourse in the face of these tactics, because the prosecution could easily prevent the defense from calling the accuser as a witness by raising the specter of perjury charges. *See Jones v. United States*, 829 A.2d 464, 467 (D.C. 2003) (Schwelb, J. concurring) (noting that this practice is "apparently routine" in the District of Columbia).

be protected whenever the government seeks to introduce accusatory statements that are made to known government agents—*i.e.*, statements that lie at the core of the confrontation guarantee.

### E. *Amici's* Rule Will Not Impede The Government From Obtaining Legitimate Convictions.

As reviewed above, the categorical rule *amici* seek has a number of benefits: (1) it best reflects the original purpose of the Confrontation Clause, revived by *Crawford*, to promote and preserve the adversarial mode of criminal trial, (2) it ensures confrontation for precisely those statements the government will rely upon most heavily, and hence the statements that the defendant will most need to challenge and the statements that the fact-finder will find most material to its assessment of guilt, (3) it establishes a clear rule that, in contrast to *Roberts* and many lower-court, post-*Crawford* analyses of "testimonial," is easily, efficiently, and predictably applied, (4) it negates any perverse incentives that encourage police to alter or abridge their investigative procedures to gather "unconfrontable" statements, and (5) it is immune to the ever-present pressure from the government to shield its witnesses from the rigors of the adversarial system.

Against these benefits, there is no compelling downside, at least no downside that would have mattered to the Framers. The general assertion that the government will have greater difficulty obtaining convictions if it is forced to produce its witnesses in court and allow them to be subjected to cross-examination cannot survive scrutiny. It assumes that the government is entitled to convictions in all of these cases, regardless of the procedures by which these convictions are obtained. It is indistinguishable from Justice Warburton's justification to Sir Walter Raleigh for refusing to allow him to confront Lord Cobham—namely that "many horse stealers should escape if they may not be condemned without witnesses." 1 Criminal Trials 421 (Jardine, ed. 1850). The

Framers clearly rejected this approach to criminal justice, as did this Court in *Crawford*. Our Constitution does not permit the government to "dispens[e] with a jury trial because the defendant is obviously guilty." *Crawford*, 541 U.S at 62. Rather, the only way the government may legitimately establish guilt and obtain a conviction is to subject its case to adversarial testing in open court before the defendant and the trier-of-fact.

Likewise, the specific argument that domestic violence cases are different—that the adversarial mode of criminal trials should be dispensed with in this special context because of the high rate of complainants who refuse to cooperate with the prosecution—fails. To begin with, the argument cannot be cabined. If there is any lesson to be learned from the past abuses of the confrontation right, it is that exemptions from the adversarial system have a tendency to expand well beyond their original, intended boundaries. Under *Ohio v. Roberts*, the willingness to dispense with confrontation was evident in every sort of case, no matter the seriousness of the charge or the paucity of other evidence.[13] There is no reason to believe that a "necessity" exception solely for domestic

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[13] For example, trials without meaningful confrontation were conducted in prosecutions for murder, *State v. Siler*, 2003 WL 22429053 (Ohio App. 2003), *cert. granted and judgment vacated in light of Crawford v. Washington by Siler v. Ohio*, 125 S. Ct. 671 (2004) (No. 04-6765); *Garrett v. State*, 1999 WL 542577 (Tex. App. 1999); criminally negligent homicide, *State v. Kester*, 2001 WL 884155 (Del. Super. Ct. July 31, 2001); robbery, *Jimenez v. State*, 2004 WL 1832719; *State v. Alvarez*, 107 P.3d 350 (Ariz. App. 2005), *review granted in part* (Nov. 29, 2005); sexual assault, *State v. King*, 121 P.3d 234 (Colo. App.), *cert. denied*, 2005 WL 3073374 (Colo. Oct. 17, 2005); burglary, *State v. Anderson*, 2005 WL 171441 (Tenn. App.), *appeal granted* (June 20, 2005); arson, *State v. Ballos*, 602 N.W.2d 117 (Wis. App. 1999); carjacking, *People v. Herrera*, 2005 WL 2249772 (Cal. App.), *review denied*, (Nov. 30, 2005); possession of fire arm, *United States v. Joy*, 192 F.3d 761 (7th Cir. 1999), *Lopez v. State*, 888 So.2d 693 (Fla. App. 2004).

violence cases would be more rigorously enforced. There are any number of individual cases outside of the domestic violence context where the government encounters witnesses who may be unwilling to come to court because of asserted or inferred concerns about intimidation, coercion, and safety. And yet in those cases the government proceeds, using protective orders and other witness protection mechanisms that are equally available in the domestic violence context. If an exception based on the inherent difficulties of bringing witnesses to court is carved out for domestic violence cases, it would invariably expand—as confrontation abuses have a documented tendency to do—to encompass these cases as well.[14]

More importantly, the premise of this argument—that domestic violence cases cannot be prosecuted unless the confrontation guarantee is discarded—is fundamentally flawed. State governments became dependent on witnessless prosecutions in domestic violence cases, not because it was the only way to try these cases, but because it was an *easier* way that was perfectly legitimate under *Ohio v. Roberts'* non-adversarial mode of conducting criminal trials. This approach relied heavily on any accusations made to a responding police officer or 911 operator that could be characterized as excited utterances.[15] Indeed, with the expectation that the accusers in

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[14] Nor would there be any insurance against the expansion of this exception to excuse witness absenteeism for other causes: *e.g.*, lack of interest, fear of or aversion to the police, job commitments, and, last but not least, the desire to avoid committing perjury by adhering in court to earlier false statements provided to police.

[15] *See, e.g.*, American Prosecutor's Research Institute, *Creative Prosecution* (www.ndaa-apri.org/apri/programs/vawa/creative_prosecution.html) ("Prosecutors all over the country are learning ways to go forward on domestic violence cases without the cooperation of the victim"; advocating an "evidence-based prosecution" using 911 tapes and "exceptions to the hearsay rule," including "excited utterances" and "present sense impressions"); American Prosecutor's Research Institute, *Non-Participating Vic-*

these cases might never come to court and that such evidence might serve as the sole foundation for the prosecution's case under the *Ohio v. Roberts* regime, police officers were trained to "recognize" and record "excited" utterances by people reporting incidences of domestic abuse.[16]

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*tim* (www.ndaa-apri.org/apri/programs/vawa/nonparticipating_victim.html) (advocating prosecution of domestic violence cases by looking for excited utterances which not only "establish the elements of the crime . . . [but] also serve to breath[e] life into an otherwise faceless victim"); Andrew King-Ries, *The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 301 (2005) ("Since the mid-1990's, prosecutors have pursued 'victimless' prosecutions' . . . . based largely on the admission of hearsay statements that a victim makes to 911 operators, police officers" or other first responders); Kenneth L. Wainstein, Comment, Legal Times, Dec. 20 2004 (acknowledgement by United States Attorney for the District of Columbia that, as soon as "innovative prosecutors . . . realized that the rules of evidence permitted prosecution without the [domestic violence] victim's cooperation, through the use of the victim's 'excited utterances' made on a 911 call or to the police," prosecutors began to routinely seek convictions based solely or primarily on such accusatory out-of-court statements).

[16] *See, e.g., People v. Ruiz*, 2004 WL 2383676, *9 (Cal. App. Oct. 26, 2004), *review granted,* (Jan. 19, 2005) (acknowledging that Californian police "officers have been trained to be vigilant in recording complete statements of the encounters and to record the witnesses' statements in their reports so that the statements may later support a victimless prosecution"); *see also Responding to Domestic Violence, Model Policy Number Two for Florida Law Enforcement* (Nov. 1999) (training police officers to recognize excited utterances and other hearsay exceptions so that they know which statements that they take at the scene will make it into evidence at a criminal trial); Denver Domestic Violence Task Force, *Domestic Violence Policy Manual* (Jan. 1999) (directing officers to take statements from parties and nonvictim witnesses and to make sure to record demeanor); Metropolitan Police Department, District of Columbia, *General Order 304.11 for Intrafamily Offenses* (Jan. 1998) (directing officers to document all information gathered at the scene in an event report and specifically directing officers to "note and document the victim's condition and demeanor"); New York State Office for the Prevention of Domestic Violence, *Observations, Statement and Reports: A Law Enforcement Checklist* (describing the purpose of the checklist "to aid in evidence gathering and to ensure that essential information is obtained at

In the wake of *Crawford*, the "hearsay exceptions and courtroom procedures designed during the [*Ohio v.*] *Roberts* era to conform to then-existing constitutional interpretations are suddenly misaligned with the new constitutional terrain." Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768 (2005). But this is not a legitimate argument for preserving in domestic violence cases the nonadversarial mode of criminal trials that arose under *Ohio v. Roberts*. To the contrary, it is clear evidence that state procedures need to be reformed to work effectively within the adversarial model rather than seeking to escape it. *See id.* at 818-19 (arguing that there are two ways to conduct domestic violence prosecutions in the wake of *Crawford*: "[O]ne is to engage in the intellectually dishonest exercise of labeling most statements by victims to police as 'nontestimonial'" and the other is to embrace evidentiary and procedural reform).

As in all criminal cases, one of the most effective ways to reduce witness absenteeism and recantation rates is to provide witnesses with better support systems. Of course, it requires more work to keep a witness informed about the progress of the case, prepare the witness to testify, and to provide the witness with supporting services. But such mechanisms are a proven, time-honored way of ensuring that even reluctant witnesses remain cooperative. *See* Krischer, 38 Prosecutor at 47-48 ("A properly supported victim, connected to services and counseling, is more likely to be cooperative than not, and a cooperative victim, willing and able to testify, makes *Crawford* a moot point."); Gwinn, Notice at 5 (suggesting "*Crawford* should push more communities toward greater comprehensiveness in services for victims" because when victims are provided with a network of support and advocacy services, they are less likely to drop charges or recant);

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the time of a preliminary investigation," and directing police to "record any spontaneous statements made by the victim," "describe the victim's emotional condition," and "if possible [to] tape record statements").

Lininger, 91 Va. L. Rev. at 815 ("Relocation of victims to shelters or hotels at the government's expense is another option that deserves more attention in domestic violence cases," and "legislatures should provide adequate funding for victim's advocates . . . who give support to victims, inform them of resources for their protection and monitor the defendants' compliance with pre-trial orders").

In addition to improved witness support, commentators have suggested a variety of potential avenues for reform to be explored by the states in the wake of *Crawford*, including (1) expanding hearsay rules so that, if a witness does take the stand and diverges from her initial account of abuse, prior out-of-court statements can be more liberally admitted for their truth, *see* Lininger, 91 Va. L. Rev. at 797-811; and (2) liberalizing the admission of expert testimony to explain why domestic violence victims might testify reluctantly or inconsistently with prior accusatory statements, *id.* at 812-13.

The point is not for this Court to suggest a comprehensive list of mechanisms the states could use to encourage witnesses to come to court and provide their testimony in a trial that fully comports with the confrontation guarantee. The point is merely to illustrate that such mechanisms exist, and that, even if the nonadversarial system for prosecuting domestic violence cases that arose under *Ohio v. Roberts* is closed off to them, state officials will still be able to set up a workable system of domestic violence prosecutions that conforms to the dictates of the Constitution.

## CONCLUSION

For the reasons set forth above, this Court should declare that all accusatory statements to known government agents are testimonial and, applying this categorical rule, should reverse Mr. Hammon's conviction.

Respectfully submitted,

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