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 OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether statements to investigating police officers accusing someone of a crime and describing the offense after it has been completed fall outside the scope of the Confrontation Clause merely because the suspect remains at large or the declarant has been injured.

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 States, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study in the field of

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, and its counsel made such a contribution.

criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and to ensure that criminal proceedings are conducted in a proper and fair manner.

NACDL has a keen interest in this case. A defining hallmark of the common-law criminal trial was vigorous adversarial testing through cross-examination. To this day, cross-examination remains a singularly effective means of exposing bias, uncovering error, and unmasking fabrication. To preserve that prized feature of common-law procedure, the Framers guaranteed every citizen accused of a crime the right "to be confronted with the witnesses against him." U.S. Const. amend. VI.

Over the past century, that right was seriously eroded by the proliferation of hearsay exceptions. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court sought to reinvigorate the right. The degree to which it will succeed, however, depends critically on how courts define the class of "testimonial" statements to which that decision applies. Given NACDL's mission to ensure fairness in criminal trials by preserving defendants' traditional means to contest the charges against them, NACDL has a substantial interest in that question.

SUMMARY OF ARGUMENT

Half an hour after he was shot, Anthony Covington told investigating police officers who had shot him and recounted the events leading up to the shooting. The court below properly held those accusations testimonial. Covington made the statements "to enable the police to identify, locate, and apprehend the perpetrator." Pet. App. 16A. Those are paradigmatic testimonial state-

ments. None of the State's contrary arguments withstands scrutiny.

I. The State contends that the statements were insufficiently "formal." This Court should now make clear, however, that a statement's testimonial status depends on its evidentiary purpose—*i.e.*, on whether the statement, objectively viewed, was made to provide evidence in a criminal investigation or prosecution. Formality matters only to the extent it sheds light on that purpose.

II.A. The State also insists that the fact the suspect was still at large constituted an "emergency" that rendered the accusations non-testimonial. But that theory is impossible to square with framing-era law. Arrest warrant applications were routinely made when a dangerous offender was on the loose, yet they were inadmissible on confrontation grounds. Moreover, the great political trials like Raleigh's and Fenwick's involved emergencies no less pressing than the one here.

II.B. Nor did Covington's need for medical care render his statements non-testimonial. His accusations went far beyond any medically relevant matters to such things as the shooter's identity and the preceding events. He provided that information to assist a police investigation, not to seek medical care.

III. Finally, *amici*'s suggestion that the statements should be admitted as "excited utterances" or "*res gestae*" lacks merit. Those hearsay exceptions did not exist at the framing, and the doctrines that emerged in the nineteenth century would not have applied here.

ARGUMENT

I. A Statement's Testimonial Status Should Depend on Its Evidentiary Purpose, Not Its Formality

Crawford interpreted the Confrontation Clause to impose strict limits on the admission of "testimonial" statements against criminal defendants. *Crawford* v. *Wash-*

ington, 541 U.S. 36, 68 (2004). The Court noted three possible definitions for that class of statements. Two focused on evidentiary purpose, while the third focused on formality. Compare *id.* at 51 ("'similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"); and *id.* at 52 ("'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"); with *id.* at 52 ("'formalized testimonial materials'"). The Court found it unnecessary to select among them because the statements at issue qualified under any definition. See *id.* at 52. This Court's more recent cases have likewise considered both evidentiary purpose and formality without definitively resolving the relationship between the standards. See pp. 13-15, *infra*.

In this case, the State urges the Court to deem Covington's accusations non-testimonial because they were not sufficiently formal. The case thus presents an opportunity for the Court to clarify the relevance of formality. For the reasons below, the Court should hold that a statement's testimonial status depends on its evidentiary purpose—*i.e.*, on whether the statement, objectively viewed, was made to provide evidence in a criminal investigation or prosecution. Formality should be relevant only to the extent it sheds light on that purpose.

A. Confrontation Disputes Historically Involved Formal, Sworn Testimony Because Other Legal Doctrines Made It Unnecessary To Address Confrontation Issues Outside That Context

Formality played an important role at common law, but as a *requirement* of admissibility, not a factor whose absence improved admissibility. Testimony had to be given in a solemn, formal manner, and the principal attribute of formality the law insisted upon was an oath. As Gilbert put it: "[I]n a Court of Justice, * * * all

Things [a]re determined under the Solemnities of an Oath * * * ." Geoffrey Gilbert, *The Law of Evidence* 108 (1754); see also 2 William Hawkins, *A Treatise of the Pleas of the Crown* 434 (1721) ("Evidence for the King must in all Cases be upon Oath * * * .").

A corollary was the rule against hearsay. Sworn testimony that someone else had made an unsworn statement was no better than the unsworn statement itself. See Gilbert (1754), *supra*, at 107-08. Framing-era law was thus clear: "Hearsay is no Evidence." *Id.* at 107. And the most common justification was that out-of-court statements lacked the "Solemnities of an Oath." See *id.* at 107-08; 2 Hawkins (1721), *supra*, at 431; 2 Matthew Bacon, *A New Abridgment of the Law* 313 (1736); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 292 (1755); Henry Bathurst, *The Theory of Evidence* 111 (1761); Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 289-90 (1772).[2] The hearsay rule was thus directed to unsworn, out-of-court statements, and it excluded such statements because they lacked the requisite formality.

By contrast, confrontation rhetoric ("confront," "face to face," "presence," etc.) was almost invariably invoked in the context of formal, sworn testimony. Blackstone and Hale extolled the "confronting of adverse witnesses" as an advantage of common-law over civil-law trial procedure. 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768); see Matthew Hale, *The History and Analysis of the Common Law of England* 252, 258 (1713). Treason statutes required witnesses to testify under oath against the defendant "face to face" at his

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[2] Some framing-era treatises also justified the rule against hearsay on a second ground: that hearsay deprived the defendant of an opportunity to cross-examine the declarant. See 2 Hawkins (1721), *supra*, at 431; 2 Bacon, *supra*, at 313; 1 Burn (1755), *supra*, at 292.

arraignment. *E.g.*, 13 Eliz., c. 1, § 9 (1571); 13 Car. 2, c. 1, § 5 (1661). Defendants in high-profile trials such as *Fenwick's Case* objected to testimony sworn in their absence because "our constitution is, that the person shall see his accuser." 13 How. St. Tr. 537, 592 (H.C. 1696) (Shower). Hawkins cited that case for the point that "in Cases of Life no Evidence is to be given against a Prisoner but in his Presence." 2 Hawkins (1721), *supra*, at 428 & n.a (citing 4 *A Compleat Collection of State-Tryals* 232, 277, 310 (Salmon ed., 1719)). And the admissibility of sworn Marian depositions came to depend on whether "the prisoner [was] present." *E.g.*, Thomas Peake, *A Compendium of the Law of Evidence* 40-41 (1801); see Kry, *Confrontation Under the Marian Statutes*, 72 Brook. L. Rev. 493 (2007). Those sources involved *sworn* testimony—evidence that met the common-law requirements of formality.[3]

That historical focus does not prove that unsworn, informal testimony was unobjectionable on confrontation grounds. Rather, the absence of formality would simply have rendered confrontation a moot point. Such statements were clearly inadmissible for lack of formality, so there was no need to consider whether they violated confrontation principles too. As the late Chief Justice put it: "Without an oath, one usually did not get to the second step of whether confrontation was required." *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in judgment). Unsworn hearsay was "no Evidence," Gilbert (1754), *supra*, at 107, so principles governing how "evidence" must be given were largely pretermitted.

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[3] One glaring exception is *Raleigh's Case*: Raleigh repeatedly objected on confrontation grounds even though Cobham's examination was unsworn. See 2 How. St. Tr. 1, 15-16, 19, 23 (1603); *id.* at 16 (examination "never subscribed nor avouched"—*i.e.*, unsigned and unsworn); *Crawford*, 541 U.S. at 52 & n.3.

The broader legal context supports the conclusion that informality rendered confrontation principles moot, not inapplicable. As already explained, a fundamental tenet was that testimony had to be given under the "Solemnities of an Oath." Gilbert (1754), *supra*, at 108; pp. 4-5, *supra*. Given that organizing principle of common-law evidence, no one would have thought statements that differed from sworn testimony only in that they *lacked* necessary formality should have a privileged evidentiary status. The informality could only have made the evidence *more* objectionable, not less.

The formality of an oath was required in many contexts. Marian depositions of accusing witnesses were admissible only if sworn. See 2 Hawkins (1721), *supra*, at 429; 2 Matthew Hale, *The History of the Pleas of the Crown* 52, 284 (1736). Formerly, child witnesses were sometimes allowed to testify without oath, but that exception was eliminated before the framing. See *King* v. *Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202 (1779) (reported 1789/1815); 4 William Blackstone, *Commentaries on the Laws of England* 214 (9th ed. 1783). Early English law may actually have prohibited defendants from swearing their witnesses, but that rule was abolished too. See 2 Hawkins (1721), *supra*, at 434. The clear trend was thus to insist on, not dispense with, formality.

While the oath was the most important formality, others were required too. The Marian statutes explicitly mandated that examinations be "put in writing." 1 & 2 Phil. & M., c. 13, § 1 (1554); 2 & 3 Phil. & M., c. 10, § 1 (1555); see 2 Hale (1736), *supra*, at 284; 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 79 (1816) ("absolutely necessary"). And, at least under pre-framing authority, they had to be "subscribed"—*i.e.*, signed. See 2 Hawkins (1721), *supra*, at 429; 1 Burn (1755), *supra*, at 287-88; but see *King* v. *Flemming*, 2 Leach 854, 855, 168 Eng. Rep. 526, 526-27 (1799). Such formalities

were not required of the defendant's *own* examination, but only because a defendant's own statements—even oral ones—were always admissible against him. See *King* v. *Lambe*, 2 Leach 552, 554-60, 168 Eng. Rep. 379, 379-83 (1791) (reported 1800).

As authorities explained, formality could only help a statement's admissibility. *Lambe* observed:

> [S]urely, if what a man says, though not reduced into writing, may be given in evidence against him, *a fortiori* what he says, when reduced into writing, is admissible; for the fact confessed being rendered less doubtful by being reduced into writing, it is of course [e]ntitled to greater credit; and it would be absurd to say, that an instrument is invalidated by a circumstance from which it derives additional strength and authenticity: and for this reason it is clear, that the present confession having been taken by a magistrate under a judicial examination, can be no objection to receiving it in evidence, *for it gains still greater credit in proportion to the solemnity under which it was made*.

2 Leach at 555, 168 Eng. Rep. at 380 (emphasis added); see also 1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 274 (1824) (stating in a discussion of civil cases that, where unsworn statements would fall into a hearsay exception, a sworn *ex parte* deposition containing them would be admissible "*à fortiori*").

Given that legal context, it would have been highly anomalous to exempt statements from confrontation requirements solely for lack of formality. The dearth of direct evidence of the confrontation right's application to informal statements is thus plainly better explained on the ground that informality rendered confrontation principles moot—not inapplicable.

B. The Evidentiary-Purpose Standard Is More Consistent With Framing-Era Law Than the Formality Standard

That dearth of direct evidence, coupled with the modern erosion of the hearsay rule, makes it necessary to estimate "what the Framers might have intended had [hearsay] been liberally admitted as substantive evidence like it is today." *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in judgment). This Court's duty is to make that "estimation as accurate as possible." *Id.* at 52-53 n.3 (majority opinion). The "evidentiary purpose" standard provides a reasonably accurate estimate. The "formality" standard does not.

1. Both standards cover the sworn *ex parte* testimony for which we have direct evidence of original meaning. But the formality standard excludes all other statements—even those that differ from sworn testimony only in that they lack the formality the common law required. The broader legal landscape makes clear that the Framers would have viewed such statements as inferior to sworn testimony. See pp. 4-8, *supra*. It is irrational to assume they would have exempted such statements from confrontation requirements *because* of that additional defect. Common-law formality requirements may have deprived us of much direct evidence of the confrontation principle's application to informal, unsworn testimony, but "there is no doubt what its application would have been." Cf. *Crawford*, 541 U.S. at 52-53 n.3.

That the Framers did not entrench common-law formality requirements in the Sixth Amendment does not mean they thought those requirements unimportant. As Madison explained, the Bill of Rights sought to protect "all those essential rights, *which have been thought in danger*." Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), in 11 *The Papers of James Madison* 415, 416 (Rutland *et al.* eds., 1977) (emphasis

added). It was natural for the Framers to entrench a confrontation right when faced with competing civil-law regimes organized around *ex parte* testimony. See 3 Blackstone (1768), *supra*, at 373; Hale (1713), *supra*, at 252, 258. By contrast, no real-world legal regime was based on unsworn hearsay. Further, controversies over aspects of the confrontation right persisted throughout the eighteenth century.[4] But the last high-profile trial based on *unsworn* testimony may have been almost 200 years old. See p. 6 n.3, *supra*.

The Framers thus most likely entrenched the confrontation right, but not the formality requirement, because the former seemed more in need of protection. Of course, that does not mean courts should read a formality requirement into the Constitution. But it supports the inference that the Framers would not have exempted from confrontation requirements statements that differ from sworn testimony only in that they lack formality.

Two arguments are typically invoked to support the formality standard, but neither is ultimately persuasive.

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[4] By far, the most significant framing-era source of "testimonial" evidence was committal depositions taken under the Marian statutes and their state equivalents. Those examinations were normally taken in the prisoner's presence and thus did not ordinarily infringe confrontation rights. See Kry, *supra*, at 512-27. Even so, there was debate throughout the eighteenth century over whether they would be admissible if not so taken. Contrast *Fenwick's Case*, 13 How. St. Tr. at 596 (Sloane), with *id.* at 602 (Musgrave); see *King* v. *Westbeer*, 1 Leach 12, 12, 168 Eng. Rep. 108, 109 (1739) (reported 1789); Thomas Wood, *An Institute of the Laws of England* 671 (9th ed. 1763); 1 John Morgan, *Essays upon the Law of Evidence, New Trials, Special Verdicts, Trials at Bar, and Repleaders* 431 (1789); contrast *King* v. *Eriswell*, 3 T.R. 707, 713-14, 100 Eng. Rep. 815, 819 (K.B. 1790) (Buller, J.), with *id.* at 710 n.(c), 100 Eng. Rep. at 817 n.(c) (reporter's note 1797); Kry, *supra*, at 495-97 & nn.11-13, 512-27, 530-41. Marian coroners' depositions, while less common, raised confrontation issues of their own. See Kry, *supra*, at 546-47.

One is that, because confrontation objections were historically made in the context of formal testimony, the Clause's coverage should be so limited. See, *e.g.*, *White* v. *Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part). As already explained, however, the historical focus is ambiguous because it is also consistent with another hypothesis: that common-law formality requirements made it unnecessary to reach confrontation issues outside the context of formal testimony. That does not mean the Framers would have exempted informal statements had they had occasion to consider the matter.

The second argument is dictionary-based. *Webster's* defined "testimony" (and by extension "witness") as "[a] *solemn* declaration or affirmation made for the purpose of establishing or proving some fact. Such affirmation in judicial proceedings, may be verbal or written, but must be under oath." 2 Noah Webster, *An American Dictionary of the English Language* (1828) (emphasis added). Webster's reference to solemnity was entirely natural given that his purpose in writing a dictionary definition was to *describe* testimony, and testimony is normally solemn because that is how the law requires it to be given. (Hence also the second sentence's reference to an oath.) But it reads too much into a dictionary definition to assume the Framers would have exempted *ex parte* testimony from the Confrontation Clause merely because it had the *additional* defect of informality.

2. While the formality standard thus fits poorly with framing-era law, the evidentiary-purpose standard—*i.e.*, statements made for the purpose of providing evidence in a criminal investigation or prosecution[5]—is a reasonable

[5] For obvious practical reasons, this standard is typically phrased objectively—*i.e.*, what a reasonable person in the declarant's position would have intended rather than the declarant's subjective intent.

estimate of how the Framers would have applied confrontation principles to unsworn hearsay had they had occasion to do so. Because sworn testimony is essentially always given for an evidentiary purpose, the evidentiary-purpose standard—like the formality standard—covers the sworn testimony for which we have direct evidence of the confrontation principle's application. Unlike the formality standard, however, the evidentiary-purpose standard also covers statements that differ from *ex parte* sworn testimony only in that they lack the formality whose absence would have rendered them even more objectionable. It covers the sworn affidavits of the reviled civil-law regime and the unsworn accusations that would not have passed muster even in France.

Conversely, the evidentiary-purpose standard leaves untouched hearsay whose relationship to sworn testimony is less clear: business records, statements in furtherance of a conspiracy, off-hand comments to neighbors, and so on. One could argue—and it has been argued—that the Framers would have objected to those statements on confrontation grounds too. See Davies, *Not "The Framers' Design,"* 15 J.L. & Pol'y 349, 425-34 (2007).[6] But that inference is much weaker. Unsworn statements made for non-evidentiary purposes are qualitatively different from, not just inferior to, sworn testimony. A clerk making an entry in a business ledger is not acting as a "witness against" someone in any ordinary sense of the term.

See, *e.g.*, *Crawford*, 541 U.S. at 51-52; *Davis* v. *Washington*, 547 U.S. 813, 822 (2006).

[6] The linchpin of Professor Davies' argument is that, because the hearsay rule was justified in part on cross-examination grounds, see p. 5 n.2, *supra*, any violation of that rule also would have been seen as a violation of the confrontation right. See Davies, *supra*, at 425-34. That may be a possible inference, but it is not a necessary one.

Even under the evidentiary-purpose standard, formality may be relevant: It may shed light on the declarant's evidentiary intent. That a speaker was put on oath, for example, shows convincingly that his purpose was to provide evidence. But where that evidentiary intent is otherwise established, mere lack of formality should not render a statement non-testimonial. An accuser who purposefully provides evidence against a defendant in a criminal proceeding is a "witness against" him, and it defies common sense to suppose that the accusation's admissibility could be improved if, rather than being delivered under oath in all the formal trappings of a courtroom, it were phoned in unsworn to the court clerk while the declarant was having breakfast at a coffee shop.

C. This Court's Cases Support the Evidentiary-Purpose Standard

This Court's cases are consistent with the foregoing principles. *Crawford*, for example, held statements to an interrogating police officer testimonial under either an evidentiary-purpose or a formality standard. 541 U.S. at 51-52. It cited *Webster's* for the proposition that testimony is "typically" a solemn declaration, but did not hold that lack of formality would exempt statements where evidentiary purpose was otherwise apparent. See *id.* at 51. And it specifically rejected a limitation to *sworn* testimony, finding it "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." *Id.* at 52-53 & n.3. That observation is true of other attributes of formality as well.

Davis v. *Washington*, 547 U.S. 813 (2006), likewise focused on evidentiary purpose. The case's specific holding was that statements in response to interrogation are testimonial if made "to establish or prove past events potentially relevant to later criminal prosecution" but not if made "to enable police assistance to meet an ongoing

emergency." *Id.* at 822.[7] The Court thus allowed McCottry's 911 call because it was "a call for help against a bona fide physical threat" while excluding Amy Hammon's statements because they concerned "an investigation into possibly criminal past conduct." *Id.* at 827, 829. Like *Crawford*, moreover, *Davis* cautioned against overreliance on formality, stating that "the protections of the Confrontation Clause can[not] readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.* at 826. That is simply another manifestation of the more general principle that statements should not be exempted for lack of formality where evidentiary purpose is otherwise shown.

While *Davis* addressed formality at points, it did so to shed light on evidentiary purpose. It cited the informality of McCottry's 911 call to support its conclusion that the call's "primary purpose was to enable police assistance to meet an ongoing emergency." 547 U.S. at 827-28. And it analyzed the formality of Hammon's statements to ascertain whether "the purpose of the exercise was to nail down the truth about past criminal events." *Id.* at 830. Both passages are consistent with the principle that formality matters to the extent it informs evidentiary purpose. See p. 13, *supra*.

Moreover, the factors the Court considered as bearing on formality actually seem more relevant to evidentiary purpose. The Court deemed Hammon's statements "for-

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[7] Although *Davis* referred broadly to the "purpose of the interrogation," it made clear that "the declarant's statements," not "the interrogator's questions," are ultimately what matter. 547 U.S. at 822-23 & n.1. That must be so: Statements made unwittingly to an undercover police officer, for example, are non-testimonial even if elicited for an evidentiary purpose. See *Crawford*, 541 U.S. at 58. Of course, an officer's *objectively manifested* purpose may bear on the respondent's intent.

mal enough" because they were made "in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. Those factors seem more relevant to whether the speaker was providing evidence in a criminal investigation, not "formality" as such. Elsewhere, the Court described McCottry's 911 call as informal because it was "frantic" and the circumstances "not tranquil." *Id.* at 827. But those factors were also directly relevant to her lack of evidentiary intent because they confirmed that her statements were "a call for help against a bona fide physical threat." *Ibid.*[8]

Most recently, in *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), the Court explicitly relied on the statements' "evidentiary purpose." *Id.* at 2532. It also considered their formality. See *ibid.* But, as in *Crawford*, the statements qualified under either standard, so the Court did not address whether lack of formality would exempt statements whose evidentiary purpose was otherwise clear. See *ibid.*

The Court should now explicitly hold what its prior cases suggest and what the historical record compels: A

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[8] Admittedly, in a footnote responding to the dissent, the Court indicated it was "not disput[ing]" the necessity of formality, although it opined that the requirement would be met by the mere fact that false reports are criminal offenses. See 547 U.S. at 830-31 n.5; cf. *id.* at 826-27. But that oblique footnote was hardly part of the case's holding. Throughout the rest of the opinion, the Court treated formality as bearing on evidentiary purpose. Further, it makes little sense to exempt statements from confrontation requirements solely because a State chooses not to criminalize false reports. At common law, an *oath* mattered in part precisely because it authorized prosecution for perjury. See 4 Blackstone (1769), *supra*, at 136-37. The theory that States can evade confrontation rights by decriminalizing false reports is thus just a variation on the already-rejected theory that States can evade confrontation rights by interrogating witnesses unsworn. See *Crawford*, 541 U.S. at 52-53 & n.3.

statement's testimonial status depends on whether it was made to provide evidence in a criminal investigation or prosecution. Formality may shed light on that purpose, but where a statement's evidentiary purpose is otherwise clear, no lack of formality can redeem it.

II. Covington's Statements Were Testimonial Because They Were Made To Provide Evidence in a Criminal Investigation

The court below correctly held Covington's statements testimonial. It identified the proper evidentiary-purpose standard from *Davis*. Pet. App. 15A. And it correctly applied that standard to these facts.

As the court noted, Covington "told the police that defendant shot him about 30 minutes earlier at defendant's house, which was about six blocks away, and that he drove himself to the gas station." Pet. App. 15A-16A. "These statements related solely to events that had occurred in the past and at a different location." *Id.* at 16A. Given those circumstances, the statements' primary purpose was "to enable the police to identify, locate, and apprehend the perpetrator." *Ibid.* The statements, in other words, were made *as evidence* in a criminal investigation—to provide a basis for official action, the arrest of a suspected offender. Where a person accuses someone of a crime and describes the offense to responding police officers after the crime has been completed, the statements are testimonial, because any reasonable person in those circumstances would understand he was providing that information to further a police investigation and to procure the apprehension of the perpetrator.

That Covington presumably did not intend his statements as evidence *for trial* is immaterial. The confrontation right historically applied to the use at trial of statements originally made for pretrial investigative or prosecutorial purposes, not just evidence generated for trial. Marian committal depositions were taken when deciding

whether to bail or commit a prisoner pending trial, and coroners' depositions were taken during an investigation into a cause of death; in both cases, use as evidence at trial was a possibility, but not the purpose. See 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 Phil. & M., c. 10 (1555); John H. Langbein, *Prosecuting Crime in the Renaissance* 5-54 (1974).[9] This Court has regularly deemed it sufficient that statements are made to provide evidence in a *criminal investigation or prosecution*, even if not intended specifically for trial. See, *e.g.*, *Davis*, 547 U.S. at 830 (statements "for use in [the officer's] 'investigat[ion]'"); *id.* at 829, 830-31 & n.5, 832 n.6; *Crawford*, 541 U.S. at 53. Any reasonable person in Covington's position would have understood he was furnishing information to help the police investigate a crime and bring the offender to justice. That is a quintessential evidentiary purpose.

The State offers essentially two arguments in response. But neither has merit.

A. The Fact That a Potentially Dangerous Offender Remained at Large Did Not Make Covington's Accusations Non-Testimonial

Relying on *Davis*, the State urges that the fact the suspect was still at large when Covington made his statements constituted an "ongoing emergency" that ren-

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[9] In fact, historical controversies over testimony taken specifically *for trial* were relatively rare. The common law recognized a form of deposition to preserve evidence for trial—the "deposition *de bene esse*"—but such depositions were inadmissible in criminal cases for lack of statutory authority. See *People* v. *Restell*, 3 Hill 289, 294-99 (N.Y. Sup. Ct. 1842); *Case of Thatcher & Waller*, T. Jones 53, 53-54, 84 Eng. Rep. 1143, 1143 (K.B. 1676); cf. *Rex* v. *Pain*, Comb. 358, 358-59, 90 Eng. Rep. 527, 527 (K.B. 1697). That is why confrontation disputes typically involved depositions taken for pretrial investigatory or prosecutorial purposes, for which such authority *did* exist, in the form of the Marian statutes.

dered the statements non-testimonial. But the State misreads *Davis*. That case did not establish an all-purpose "emergency" exception to the Confrontation Clause. Rather, the ongoing emergency mattered there because it bore on the declarant's evidentiary intent: It made McCottry's statements a "call for help against a bona fide physical threat" rather than a narrative of past criminal conduct designed to further a police investigation. 547 U.S. at 827. By contrast, the fact that a dangerous offender is at large and needs arresting, even if an "emergency" in some sense, does not undermine the declarant's evidentiary intent. A particularly pressing criminal investigation is still a criminal investigation, and accusers who make statements to further it are "witnesses" under the Sixth Amendment. That in no way impugns the police for responding to the "emergency" the way they did here; it simply requires the prosecution to afford an opportunity for cross-examination if it later decides to introduce the witness's accusations at the defendant's trial. See *id.* at 832 n.6.[10]

The State's proposed expansion of *Davis* is flatly contrary to the historical record. That an accusing witness gave a statement to help identify and apprehend a dangerous offender has never justified exempting it from the Confrontation Clause.

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[10] That the circumstances might qualify as an "emergency" under *Miranda*'s public-safety exception, *New York* v. *Quarles*, 467 U.S. 649, 655-58 (1984), or the Fourth Amendment's exigent-circumstances exception, *Brigham City* v. *Stuart*, 547 U.S. 398, 403-07 (2006), is irrelevant. Those contexts involve inquiries into the overall reasonableness of police conduct, and an emergency matters because it strengthens the State's interest in expeditious action. Here, an emergency is relevant for the entirely different reason that it *sometimes* disproves the declarant's intent to assist a criminal investigation. And when the only "emergency" is a criminal on the loose who needs arresting, it does not disprove that intent at all.

1. The State's theory is impossible to square with the framing-era treatment of arrest warrant applications. In addition to their Marian committal duties, justices of the peace had authority to issue arrest warrants based on probable cause that a crime had been committed. See 2 Hawkins (1721), *supra*, at 84-86; 2 Burn (1755), *supra*, at 508-10. Justices normally took the examination of the party applying for the warrant under oath and in writing. See 2 Hale (1736), *supra*, at 111; 2 Burn (1755), *supra*, at 508. Those warrant applications thus resembled Marian committal depositions: Both were essentially sworn narratives of the defendant's guilt. Cf. 1 Chitty, *supra*, at 80. But they differed in a key respect: Because warrant applications sought to authorize an arrest, rather than to commit a suspect already arrested, they were necessarily taken in the suspect's absence.

If the State's "emergency" theory were good law, those warrant applications would have been routinely admitted in framing-era criminal trials. The whole point of applying for an arrest warrant was to procure the apprehension of a dangerous criminal still on the loose. The applications were sworn and in writing, so there was no defect of formality. They were a routine feature of common-law criminal procedure, so there was no shortage of cases where the issue would arise. And they were a gold mine of incriminating evidence, as the facts justifying arrest are typically the same ones justifying conviction. Despite all that, *amicus* has not found a single reported case where a court admitted an arrest warrant application against a criminal defendant. In the two cases where prosecutors even attempted the strategy, the evidence was soundly rejected on confrontation grounds.

In *State* v. *Hill*, 20 S.C.L. (2 Hill) 607 (App. L. 1835), the court considered a "deposition given in evidence [that] was made on the application for a warrant to arrest the prisoner, and in his absence." *Id.* at 608. It noted

that *committal* depositions were admissible "if the accused is present and has an opportunity of cross examining the witness." *Id.* at 609. But it refused to extend that rule to warrant applications because they were *ex parte*:

> [N]o rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence. Charges for criminal offences are most generally made by the party injured, and under the influence of the excitement incident to the wrong done, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgement may detect, but which it is impossible exactly to describe, and we know too how necessary a cross examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community.

Id. at 610-11. *Hill* was a thoroughly reasoned and influential early American decision on the confrontation right. See, *e.g.*, *People* v. *Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) (citing *Hill* for the point that "the original complaint on oath before the magistrate on applying for the warrant * * * was [n]ever received in evidence"); *State* v. *Campbell*, 30 S.C.L. (1 Rich.) 124, 130-31 (App. L. 1844) (the leading American case on coroners' depositions; relying heavily on *Hill*). This Court cited *Hill* in both *Crawford* and *Davis*. 541 U.S. at 50; 547 U.S. at 824 n.3.

The same point recurred in *Collier* v. *State*, 13 Ark. 676 (1853). The trial court there had admitted "the affidavit of [a witness], taken before a justice of the peace, * * * to the effect that the prisoner, on the day previous,

assaulted and wounded him with a knife, *and praying a warrant for his apprehension*," as well as a deposition taken the same day. *Id.* at 677 (emphasis added). The state supreme court reversed. The testimony, it held, was "altogether objectionable" because it was given, not when the prisoner was "brought before the committing magistrate," but rather when he "was not present, [and] was in another part of the country, and had not then been arrested." *Id.* at 678. The evidence "violat[ed] the spirit of his constitutional right to be * * * confronted with the witnesses against him." *Ibid.* That decision, like *Hill*, is irreconcilable with the State's position.

The analogy to arrest warrant applications is strong on these facts. Covington told law-enforcement authorities about a past crime for the purpose of enabling the apprehension of its perpetrator. That is *exactly* what a framing-era witness would do in seeking an arrest warrant. The primary difference is that warrant applications were typically sworn depositions or affidavits while the accusations here were unsworn oral statements, but the Court has already held such differences immaterial. See *Crawford*, 541 U.S. at 52-53 & n.3. The analogy between Covington and a warrant applicant is at least as strong as the analogy between Sylvia Crawford and a Marian committal deponent. See *id.* at 52-53. Covington's accusations were inadmissible for the same reason.

2. The State's theory also collides with the treason trials that helped inspire the Confrontation Clause, which involved "emergencies" far more pressing than the one here. *Raleigh's Case*, for example, involved an alleged conspiracy with Spanish forces to overthrow the government and install Arabella Stuart in the King's place. See 2 How. St. Tr. 1, 1-3 & n.* (1603); 1 David Jardine, *Criminal Trials* 389-99 (1832). A number of suspects were apprehended and examined over several days as the Crown tried to ascertain the scope of the plot and iden-

tify the conspirators.[11] That chronology undermines any claim that the examinations were part of a calm, collected exercise to build a record for Raleigh's trial. Rather, the Crown was arresting and examining everyone it could get its hands on in an effort to uncover the plot and apprehend all those responsible.

Fenwick's Case also refutes the State's theory. That case involved a plot to assassinate the King and facilitate a French invasion. See 13 How. St. Tr. 537, 547-48 (H.C. 1696); 4 Thomas B. Macaulay, *The History of England* 568-70 (London 1855). Although a variety of *ex parte* testimony was introduced, the most contested was an information a co-conspirator, Goodman, had sworn out implicating Fenwick and other conspirators. See 13 How. St. Tr. at 591-610. When Goodman gave that testimony, Fenwick had not yet been arrested; he was still on the run a month later, after he was indicted. See 13 How. St. Tr. at 547, 607 (dates); Macaulay, *supra*, at 714-15; *Carmell* v. *Texas*, 529 U.S. 513, 526-27 (2000).

Raleigh's and Fenwick's trials were two of the most salient confrontation abuses in English history. See

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[11] One Anthony Copley was arrested and examined on July 12, 1603. See William Stebbing, *Sir Walter Ralegh: A Biography* 188 (1899); 1 Edward Edwards, *The Life of Sir Walter Ralegh* 365 (1868). Other arrests and examinations followed—Brooke, Watson, Grey, Markham. Stebbing, *supra*, at 188; 1 Edwards, *supra*, at 365, 369-71. Raleigh himself was examined while visiting Windsor between July 12 and 16. Stebbing, *supra*, at 188-90; 1 Edwards, *supra*, at 365-68. He then returned home (although by one account was put on house arrest). Stebbing, *supra*, at 190; 1 Edwards, *supra*, at 368. Information from Raleigh cast suspicion on Cobham, who was examined multiple times, culminating in a July 20 confession accusing Raleigh. Stebbing, *supra*, at 191-92; 1 Edwards, *supra*, at 371-72. Raleigh was then promptly imprisoned in the Tower. 1 Edwards, *supra*, at 373. Although Cobham's is the best known, many of those examinations were introduced at Raleigh's trial. See 2 How. St. Tr. at 10-24; 1 Jardine, *supra*, at 410-33.

Crawford, 541 U.S. at 44-46; *e.g.*, 2 Hawkins (1721), *supra*, at 428 & n.a, 430 & n.c. If the mere need to apprehend dangerous offenders made confrontation principles inapplicable, the cases would have been unobjectionable.

B. Covington's Need for Medical Care Did Not Render His Accusations Non-Testimonial

The State also urges that Covington's accusations were admissible because his injuries posed an ongoing medical emergency. This Court has indeed suggested that statements "for [medical] treatment purposes" are non-testimonial. *Melendez-Diaz*, 129 S. Ct. at 2533 n.2. But the court below properly rejected the argument on these facts.

Not only were Covington's statements made to investigating police officers rather than medical personnel. Pet. App. 9A. They also went well beyond medically relevant facts (that Covington had been shot and needed medical care) to matters of negligible diagnostic relevance but considerable investigatory significance (the shooter's identity and the events leading up to the shooting). *Ibid.* Any reasonable person in Covington's position would have understood he was providing information for a police investigation, not to obtain medical care.

The federal hearsay exception for statements seeking medical aid excludes statements concerning an injury's cause unless "reasonably pertinent to diagnosis or treatment." Fed. R. Evid. 803(4). And courts have held that accusations identifying one's assailant "'seldom, if ever,'" qualify. *E.g.*, *United States* v. *Gabe*, 237 F.3d 954, 958 (8th Cir. 2001). While the scope of Rule 803(4) obviously cannot determine the scope of the Confrontation Clause, the common-sense notion that there is little medical relevance to statements accusing someone of a crime and describing the preceding events is apt in either context.

III. Covington's Accusations Are Not Exempt As Excited Utterances or *Res Gestae*

The State's *amici* invoke the "excited utterance" exception to the hearsay rule and its precursor, the "*res gestae*" exception, urging the Court either to rely on them in defining the scope of testimonial statements or to treat them, like dying declarations, as categorical exclusions. Those arguments lack merit.

A. There Was No *Res Gestae* or Excited Utterance Exception at Framing-Era Common Law

Eighteenth-century evidence and criminal procedure treatises contain thorough discussions of the rule against hearsay. They uniformly fail to mention any exception for excited utterances or *res gestae*.

Gilbert's original edition, for example, mentioned only one exception for unsworn hearsay: "Corroboration of a Witness['s] Testimony to shew that he affirmed the same thing before on other Occasions." Gilbert (1754), *supra*, at 108. Lofft's expanded 1791 edition added dying declarations, the defendant's own admissions, and a now-obscure "inducement" exception applicable to certain background information that did not implicate the defendant personally. 1 Geoffrey Gilbert, *The Law of Evidence* 280 (Lofft ed., 1791); 2 *id.* at 891. It also mentioned exceptions pertinent to civil cases—prescription, title, ancestry, legitimacy, 1 *id.* at 279—but cautioned that they "have their place in civil, [and] do not apply to criminal Cases," 2 *id.* at 889. Neither edition mentions excited utterances or *res gestae*.

Hawkins's original edition noted only three exceptions: the defendant's own admissions, a testifying witness's prior consistent or inconsistent statements, and the "inducement or illustration" exception mentioned above. 2 Hawkins (1721), *supra*, at 431. Leach's expanded 1787 edition added dying declarations. 2 William

Hawkins, *A Treatise of the Pleas of the Crown* 619 & n.10 (Leach 6th ed. 1787). Because Hawkins's treatise concerned criminal procedure, it did not mention any civil exceptions. And there is no mention of excited utterances or *res gestae*.

Other treatises contained similar lists. See William Nelson, *The Law of Evidence* 232 (1717) (corroboration, inducement); Bathurst (1761), *supra*, at 111-13 (corroboration, legitimacy, ancestry, prescription, title); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 345 (8th ed. 1764) (dying declarations, corroboration, legitimacy, ancestry, prescription); Buller (1772), *supra*, at 290-91 (same as Bathurst); Peake (1801), *supra*, at 7-13 (pedigree, prescription, custom, business records, admissions). "*[N]one* of the preframing sources mentioned the modern 'res gestae' [or] 'spontaneous declaration' [exceptions]." Davies, *supra*, at 418 (emphasis added). Aside from dying declarations, moreover, the exceptions that *were* mentioned generally covered either statements not implicating the confrontation right (admissions, corroboration, etc.) or matters that by nature pertained only to civil cases (ancestry, prescription, etc.). Thus, not only was there no *res gestae* or "excited utterance" exception, there was no reason to anticipate the emergence of such an exception.

The only pre-framing authority the State's *amici* cite is *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693) (also reported at Holt 286, 90 Eng. Rep. 1057). *Thompson* was a *civil* suit for personal injuries in which the court admitted statements made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Id.* at 402, 90 Eng. Rep. at 179. That single case, however, was too obscure to have informed contemporary understanding of the Confrontation Clause.

As already explained, none of the eighteenth-century treatises mentioned a *res gestae* or excited utterance exception, much less cited *Thompson* for that exception. See pp. 24-25, *supra*. And the treatises that did cite *Thompson* did so for a variety of propositions. Gilbert cited it for the point that prior consistent statements were admissible—evidently assuming that the declarant had testified at trial and that the prior statement was admitted only to corroborate her testimony. See Gilbert (1754), *supra*, at 108 & n. Bacon cited it (somewhat cryptically) for the inducement exception, which did not extend to evidence implicating the defendant personally. See 2 Bacon, *supra*, at 313 & n. Starkie later cited it for the point that "the *fact* of making the complaint immediately * * * is admissible in evidence"—as if the fact of the report, but not its contents, had been admitted. 1 Starkie, *supra*, at 149 & n.(p) (emphasis added); cf. *Rex* v. *Clarke*, 2 Stark. 241, 242-43, 171 Eng. Rep. 633, 634 (1817). That treatise-writers could not even agree what point *Thompson* stood for strongly suggests it was a historical oddity. Surely if the legal community understood the case to stand for the doctrine now ascribed to it, some treatise, somewhere, would have said so in the hundred years between its decision and the framing.

The suggestion that this lone case renders *res gestae* or excited utterances comparable to dying declarations is absurd. The dying declaration exception was recognized in at least nine eighteenth-century English cases,[12] was

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[12] *King* v. *Ely* (1720), in 12 Charles Viner, *A General Abridgment of Law and Equity* 118 (c. 1757); *Rex* v. *Reason & Tranter*, 1 Strange 499, 499-500, 93 Eng. Rep. 659, 659-60 (K.B. 1722); *Bambridge's Case*, 17 How. St. Tr. 397, 417 (1730); *Tinckler's Case* (1781), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 354 (1803); *King* v. *Drummond*, 1 Leach 337, 337-38, 168 Eng. Rep. 271, 272 (1784) (reported 1789); *King* v. *Radbourne*, 1 Leach 457, 460-62, 168 Eng. Rep. 330, 332-33 (1787) (reported 1789/1800); *King* v. *Wood-*

noted in multiple framing-era treatises, see pp. 24-25, *supra*, was endorsed by state and federal courts immediately after the framing,[13] and had conceptual roots dating back to *Raleigh's Case*.[14] That impressive pedigree illustrates the sort of support this Court should insist on before invoking a historical hearsay exception to narrow the Sixth Amendment's scope. One solitary decision in an enigmatic and inconsistently described *civil* case does not remotely meet that standard.

B. The Nineteenth-Century *Res Gestae* Exception Does Not Support the State's Position

A *res gestae* exception did emerge during the *nineteenth* century, but it does not help the State. "*Res gestae*" is, literally, "things done." *Black's Law Dictionary* 1423 (9th ed. 2009). The theory behind the exception was that a statement could be admitted if it had independent significance as a "circumstance which is part of the transaction itself." 1 Starkie, *supra*, at 47-48; see also S.M. Phillipps, *A Treatise on the Law of Evidence* 102 (1814); William D. Evans, *On the Law of Evidence*, in 2 Robert J. Pothier, *A Treatise on the Law of Obligations or Contracts* app. 16, at 141, 284 (1806). Thus, a crime victim's exclamation during the attack—such as "Don't, Harry!"—would be *res gestae*, while an account after the attack would not. *Regina* v. *Bedingfield*, 14 Cox Crim. Cas. 341, 342-43 (1879). The exception did not extend to

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cock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) (reported 1789); *John's Case* (1790), in 1 East, *supra*, at 357; *Welbourn's Case* (1792), in 1 East, *supra*, at 358.

[13] *Respublica* v. *Langcake*, 1 Yeates 415, 416-17 (Pa. 1795); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31 (Super. L. & Eq. 1798); *United States* v. *McGurk*, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680); *United States* v. *Veitch*, 28 F. Cas. 367, 367-68 (C.C.D.C. 1803) (No. 16,614).

[14] See 2 How. St. Tr. at 18 ("*Nem morituru*s *praesumitur mentiri*"—a dying man never lies); 1 Jardine, *supra*, at 435.

"narrative[s] of past events, made after the events are closed." Francis Wharton, *A Treatise on the Law of Evidence in Criminal Issues* § 264, at 198 (9th ed. 1884); see also *Enos* v. *Tuttle*, 3 Conn. 247, 250 (1820); Friedman & McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171, 1209-24 (2002).

Prosecutors often tried to invoke the *res gestae* exception to admit out-of-court accusations made shortly after a crime, on the theory that they were sufficiently contemporaneous to be part of the *res gestae*. Courts routinely rejected such attempts. In *Mayes* v. *State*, 1 So. 733 (Miss. 1887), for example, the court rejected a stabbing victim's identification of his assailant five minutes after the crime. *Id.* at 733-34. It explained: "The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent; in the other, it is not." *Id.* at 735. Other cases were similar. See, *e.g.*, *Bedingfield*, 14 Cox Crim. Cas. at 342-43 (excluding statement made by decedent upon emerging from house immediately after having throat cut); *State* v. *Davidson*, 30 Vt. 377, 383-84 (1858); *State* v. *Carlton*, 48 Vt. 636, 642-44 (1876); *Binns* v. *State*, 57 Ind. 46, 48-51 (1877); *Jones* v. *State*, 71 Ind. 66, 81-83 (1880); *State* v. *Pomeroy*, 25 Kan. 349, 350-51 (1881); *State* v. *Estoup*, 1 So. 448, 448-50 (La. 1887); *People* v. *Ah Lee*, 60 Cal. 85, 88-92 (1882) (plurality), and *People* v. *Wong Ark*, 30 P. 1115, 1115-16 (Cal. 1892), both overruled by *Showalter* v. *W. Pac. R. Co.*, 106 P.2d 895, 898-99 (Cal. 1940); Fisher, *What Happened—and What Is Happening—to the Confrontation Clause*, 15 J.L. & Pol'y 587, 591-608 (2007).

Admittedly, some courts took a broader view. In 1805, an English judge mentioned *Thompson* during a colloquy in an insurance lawsuit and characterized it as having ad-

mitted statements "as part of the res gestae." *Aveson* v. *Kinnaird*, 6 East 188, 193-94, 102 Eng. Rep. 1258, 1261 (K.B. 1805) (Ellenborough, C.J.). *Aveson* thus laid the groundwork for the conceptually dubious idea that the *res gestae* could include accusations of a crime if made sufficiently soon after. In *Rex* v. *Foster*, 6 Car. & P. 325, 325, 172 Eng. Rep. 1261, 1261 (1834), a court invoked *Aveson* to admit a victim's accusation made immediately after a carriage accident, and in *Commonwealth* v. *McPike*, 57 Mass. (3 Cush.) 181, 184 (1849), a court admitted accusations made shortly after a stabbing. In *Insurance Co.* v. *Mosley*, 75 U.S. 397, 405-09 (1869), this Court—in a divided decision—followed those cases in another civil insurance lawsuit.

All those cases, however, were controversial. An English treatise described *Foster* as "difficult to reconcile with established principles." David Power, *Roscoe's Digest of the Law of Evidence in Criminal Cases* 26 (5th ed. 1861). At least three state supreme courts expressly rejected *McPike*. See *Binns*, 57 Ind. at 51 ("against the weight of authority"); *Mayes*, 1 So. at 734-35 ("practically overruled"); *Ah Lee*, 60 Cal. at 88-92 (plurality) ("'very questionable'"). And a leading American authority wrote that *McPike* "cannot be sustained," *Mosley* "may be gravely questioned," and "[t]he better rule is that when the transaction is over, no matter how short may have been the interval, * * * declarations by the assailed * * * are not part of the *res gestae*." Wharton, *supra*, § 262, at 194-95 & n.2.

In any event, even those more liberal cases cannot help the State. *Foster* involved statements made "immediately after" the accident to another driver who had seen the carriage pass by; surely no more than a minute or two could have elapsed. 6 Car. & P. at 325, 172 Eng. Rep. at 1261. *Thompson* and *Mosley* appear similar. See Skin. at 402, 90 Eng. Rep. at 179 ("immediat[ely] upon

the hurt received"); 75 U.S. at 404 (declarations "made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there"). And while the delay in *McPike* may have been longer, see 57 Mass. at 182, there is no indication it was anywhere close to the half-hour lapse here, Pet. App. 15A-16A.

The United States cites those cases for the point that "[t]he Framers would not have understood the law categorically to forbid" statements of the sort at issue. U.S. Br. 18-19. To reverse the judgment on that basis, however, one would have to assume (1) that the Framers would have anticipated a *res gestae* doctrine wholly unknown at the time; (2) that they would have adopted the most expansive variation of that doctrine rather than the narrower and conceptually sounder one; and (3) that they would have extended those cases far beyond their facts. That is three inferential leaps too many.

To the extent *res gestae* concepts matter, they hurt rather than help the State. This Court made clear in *Davis* that there is a critical constitutional distinction between statements describing current conditions and those narrating past events. McCottry's 911 call was non-testimonial because she was "speaking about events *as they were actually happening*, rather than 'describ-[ing] past events,'" 547 U.S. at 827, while Hammon's statements were testimonial because they concerned not "'what is happening,' but rather 'what happened,'" *id.* at 830; see also *id.* at 828 ("an account of past events"); *id.* at 830 ("deliberately recounted * * * past events"). That distinction maps directly onto the *narrower* formulation of the *res gestae* rule, which covered statements contemporaneous with the transaction but not after-the-fact reports. That is no coincidence, as both tests ultimately seek to distinguish statements with independent significance from those that are merely a weaker substitute for

trial testimony. Had the Framers considered the *res gestae* principle in adopting the Sixth Amendment, therefore, they surely would have incorporated the narrower version, which would clearly exclude the statements here.

CONCLUSION

The decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted.

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