No. 07-359

In the Supreme Court of the United States

JAMES H. FOERSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the trial court's admission into evidence of an unavailable witness's "forgery affidavit," which listed checks the witness stated he had not written and was prepared at the request of his bank for the purpose of refunding amounts fraudulently withdrawn from his account, violated the Sixth Amendment's Confrontation Clause or Military Rule of Evidence 803(6).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Crawford v. *Washington*, 541 U.S. 36 (2004) 4, 5, 6, 7
Davis v. *Washington*, 126 S. Ct. 2266 (2006) 4, 6, 7, 8
Ohio v. *Roberts*, 448 U.S. 56 (1980) 6
United States v. *Saget*, 377 F.3d 223 (2d Cir. 2004), cert. denied, 543 U.S. 1079 (2005) 7
United States v. *Sandles*, 469 F.3d 508 (6th Cir. 2006), cert. denied, 128 S. Ct. 229 (2007) 9

Constitution, statute and rule:

U.S. Const. Amend. VI (Confrontation Clause) 4, 6
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 107, 10 U.S.C. 907 2
Art. 121, 10 U.S.C. 921 . . . . . 1, 2
Art. 123, 10 U.S.C. 923 2
Fed. R. Evid. 803(6) 5
Military R. Evid. 803(6) 9

In the Supreme Court of the United States

No. 07-359

JAMES H. FOERSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 65 M.J. 120. The decision of the United States Army Court of Criminal Appeals (Pet. App. 17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2007. The petition for a writ of certiorari was filed on September 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a court-martial by a military judge sitting alone, petitioner pleaded guilty to a single specification of larceny, in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 921. Pet. App. 1a.

After a trial before a panel of officers, he was also convicted, contrary to his pleas, of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. 907; nine specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. 921; and nine specifications of forgery, in violation of Article 123, UCMJ, 10 U.S.C. 923. Pet. App. 1a-2a. The panel sentenced him to 12 months of confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. *Id.* at 2a. The convening authority approved all but the forfeiture part of the sentence. *Ibid.* The Army Court of Criminal Appeals affirmed. *Id.* at 17a. On discretionary review, the Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1a-16a.

1. While deployed in Iraq, Sergeant Jason Porter reported to his commanding officer and to law enforcement that someone had forged and cashed several checks from his personal account at the Fort Sill National Bank (FSNB) in Fort Sill, Oklahoma. Pet. App. 3a. When Sgt. Porter returned to Oklahoma from Iraq, he attempted to recover the fraudulently withdrawn money. *Ibid.*

Pursuant to FSNB's internal procedures, Sgt. Porter appeared in person at the bank, presented valid identification, and completed a form, entitled "AFFIDAVIT OF UNAUTHORIZED SIGNATURE (FORGERY AFFIDAVIT)." Pet. App. 3a, 4a. The form required him to list, for each of the checks he claimed had been forged, the check number, its amount, and its payee. *Id.* at 19a-20a. Sgt. Porter was required to swear that neither he nor any authorized signatory on his account had signed or received any benefit from the listed checks. *Id.* at 19a-20a. He also consented to the bank's delivery of the form to "any prior party to the instrument, clearing

house, law enforcement authority, law officer, prosecutor, insurer or bonding company," and agreed "to cooperate with such prior parties and authorities in connection with any criminal prosecution or civil action respecting" the fraudulent checks. *Id.* at 20a. Finally, Sgt. Porter was required to sign the form five consecutive times for comparison with the signature card the bank had on file. *Id.* at 5a, 20a.

FSNB's procedures called for a senior bank official to verify the information in the forgery affidavit and compare the signatures before authorizing reimbursement. Pet. App. 5a. After a bank official completed this task, FSNB reimbursed Sgt. Porter's account and retained the affidavit in its files. *Id.* at 3a, 5a-6a. When Army Criminal Investigation Division (CID) agents eventually requested the affidavit from FSNB, FSNB complied with the request. *Id.* at 5a.

2. When petitioner was later brought to trial, Sgt. Porter was in Kuwait for redeployment to Iraq. Pet. App. 3a. Citing Sgt. Porter's leadership role, his commander declined to return him for trial. *Ibid.* As a result, the government made it known that it intended to introduce the forgery affidavit at trial as a business record. *Id.* at 3a-4a. Petitioner filed a motion in limine arguing that the affidavit was inadmissible hearsay, and that its admission at trial would violate his Sixth Amendment right of confrontation. *Id.* at 4a.

The military judge ruled that the forgery affidavit was generated in order to prevent bank fraud and was admissible as a business record. Pet. App. 4a, 5a-6a, 10a. She also concluded that "[s]ince a business record is a firmly rooted hearsay exception no further Confrontation Clause analysis is necessary." *Id.* at 4a (brackets in original; emphasis omitted). The military judge made

that decision before this Court held, in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the admission of testimonial hearsay violates the Confrontation Clause unless the defendant had a prior opportunity to cross-examine the declarant. The United States Army Court of Criminal Appeals affirmed the conviction and sentence in a per curiam unpublished opinion. Pet. App. 17a.

3. On further appeal, the United States Court of Appeals for the Armed Forces rejected petitioner's Confrontation Clause claim. It observed that in *Davis* v. *Washington*, 126 S. Ct. 2266, 2273 (2006), this Court stated that "[o]nly [testimonial] statements * * * cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." Pet. App. 6a-7a. The court then concluded that the admission of the forgery affidavit did not raise Confrontation Clause concerns because the affidavit was not testimonial. *Id.* at 9a-13a. In support of that conclusion, the court relied on several factors: that Sgt. Porter made the affidavit "without a request from, or the participation of, law enforcement or the prosecutor," *id.* at 9a; that the affidavit stated "objective facts" and did not identify petitioner (or anybody) as the forger, *ibid.*; that FSNB's "primary purpose" in eliciting the affidavit was to ensure that it would not be defrauded by an account holder, *ibid.*; and that Sgt. Porter's "primary purpose" in completing the affidavit was to be reimbursed for missing funds, *ibid.* The court explained that the language in the affidavit allowing the document to be turned over to law enforcement did not "change the primary purposes" of the affidavit, or transform it into a testimonial statement. *Id.* at 9a-10a.

The court of appeals rejected petitioner's argument that all affidavits are testimonial in nature. Pet. App. 11a-12a. The court recognized that, in *Crawford*, 541 U.S. at 51-52, this Court mentioned affidavits as a category of out-of-court statement that could be considered testimonial. Pet. App. 11a. The court of appeals explained, however, that *Crawford* was referring to affidavits developed by law enforcement or government officials, or by private individuals acting in concert with law enforcement or government officials. *Ibid.* Other types of affidavits, according to the court of appeals, "remain subject to a contextual analysis to determine whether they are, or are not, testimonial." *Id.* at 11a-12a. In context, it concluded, the forgery affidavit was nontestimonial.

The court of appeals also concluded that the affidavit was admissible as a business record under Military Rule of Evidence 803(6) (which is analogous to Federal Rule of Evidence 803(6)). Pet. App. 13a-16a. The court of appeals held that, even though the affidavit was completed by a third party (Sgt. Porter), it was "procured [by the bank] in the normal course of business," *id.* at 14a, its contents were "relied on" by the bank "in the regular course of [its] business," *id.* at 15a, and it "bore sufficient indicia of trustworthiness," *ibid.*

ARGUMENT

Petitioner renews his claims that the admission into evidence of the forgery affidavit violated the Confrontation Clause and Military Rule of Evidence 803(6). The court of appeals correctly rejected those claims. Its decision does not conflict with the decision of any other court of appeals and does not warrant further review.

1. a. Before this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), an out-of-court statement by an unavailable declarant was admissible under the Confrontation Clause only if it bore "adequate 'indicia of reliability.'" *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). In *Crawford*, the Court repudiated the *Roberts* framework, holding that "testimonial" hearsay would no longer be admissible based on a showing of the statement's reliability. Instead, the Court concluded that the Confrontation Clause categorically bars the admission of testimonial hearsay unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine him. *Crawford*, 541 U.S. at 68. The Court in *Crawford* left unresolved whether, under this approach, nontestimonial hearsay continued to be subject to the requirements of the Confrontation Clause. *Id.* at 61. Thereafter, in *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), the Court made clear that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* at 2273.

In *Crawford*, the Court repeatedly assumed that government agents were actively involved in the creation of statements that it considered to be testimonial. See 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony."); *id.* at 52 ("Statements taken by police officers in the course of interrogations are also testimonial."); *id.* at 53 (referring to "[t]he involvement of government officers in the production of testimonial evidence"); *id.* at 53 n.4 (noting that the witness's statement was "knowingly given in response to structured police questioning"); *id.* at 56 n.7 ("Involvement of government officers in the production

of testimony with an eye toward trial presents unique potential for prosecutorial abuse."). The Court thus stated in *Crawford* that, "[w]hatever else the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." *Id.* at 68. As the Second Circuit has noted, each of those examples "involve[s] a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting." *United States* v. *Saget*, 377 F.3d 223, 228 (2004), cert. denied, 543 U.S. 1079 (2005).

Similarly, in *Davis*, the Court addressed only when "police interrogations produce testimony," and it expressly declined to consider "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" 126 S. Ct. at 2273, 2274 n.2; see also *id.* at 2282 n.1 (Thomas, J., concurring in the judgment in part and dissenting in part) (also presuming "the acts of the 911 operator to be the acts of the police"). The Court explained that, in the context of police questioning, statements are testimonial "when the circumstances objectively indicate that * * * the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-2274 (emphasis added).

In this case, the forgery affidavit was not made in the kind of "investigative environment" that indicates prosecutorial evidence gathering. FSNB required Sgt. Porter to make the affidavit in accordance with its own standard procedures. Law enforcement played no role in the elicitation or creation of the document. Nor, under the factual determinations affirmed by the court of appeals, was it the "primary purpose" (of either the bank or Sgt. Porter) to create evidence for use in a future prosecu-

tion. Sergeant Porter's "primary purpose" in completing the affidavit was "to be reimbursed for [his] missing funds." Pet. App. 9a. The bank's "primary purpose" in requiring the affidavit was "to ensure that it would not be defrauded by [Sgt. Porter]." *Ibid.* Although the affidavit authorized FSNB to turn the affidavit over to law enforcement, which the bank eventually did in response to a request by CID agents, that was not the primary purpose for which the affidavit was created or completed.

Petitioner implicitly disputes the lower courts' factual findings. Although petitioner concedes that "one purpose" of Sgt. Porter "was certainly to receive funds," he claims that "an equally strong purpose for the affidavit" was use in a fraud prosecution. Pet. 13. Petitioner also asserts that "litigation" was "a paramount concern" for the bank. *Ibid.* Such factual disputes do not warrant this Court's review. In any event, it is entirely reasonable to conclude that a victim of a forgery seeking to persuade the bank to restore his funds has the primary purpose of securing reimbursement; if the victim's purpose was to prove a fraud case, he would have approached law-enforcement authorities.[*] Likewise, a

---

[*] Petitioner relies in passing on this Court's decision in *Davis* for the proposition that Sgt. Porter, like one of the affiants in *Davis*, "had a self-interest in making an affidavit." Pet. 12. *Davis* does not assist petitioner. In that case, the victim of a domestic battery provided an affidavit to a responding officer who was investigating the reported domestic disturbance. 126 S. Ct. at 2272. This Court held that the victim's statements were testimonial and thus inadmissible because "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Id.* at 2278. In the instant case, by contrast, there was no police questioning, and the primary purpose of the affidavit—as determined by the courts below—was not to further a law-enforcement investigation.

bank has the logical primary purpose of safeguarding itself against fraud, and requiring an affidavit is an objectively reasonable way to do so.

b. Petitioner claims (Pet. 8) that there is a conflict in the circuits about the definition of "testimonial" statements, but the allegedly conflicting decision is easily distinguished. In the bank-robbery prosecution in *United States* v. *Sandles*, 469 F.3d 508 (6th Cir. 2006), cert. denied, 128 S. Ct. 229 (2007), the district court admitted an affidavit of an unavailable FDIC employee stating that she had searched FDIC records and uncovered nothing to show that the bank's FDIC-insured status had been terminated. The court of appeals held that the affidavit was erroneously admitted under *Crawford* because it was an "out-of-court testimonial statement[]." *Id.* at 516. As the court below explained, *Sandles* differs from this case for two principal reasons. First, the affidavit in *Sandles* was made by "a Government employee." Pet. App. 11a (quoting *Sandles*, 469 F.3d at 516). Second, the affidavit in *Sandles* was specifically made "for use by the prosecution at trial," whereas Sgt. Porter's affidavit took the form of "filling in the blanks on a form in the course of a private financial transaction." *Ibid.* Because the Sixth Circuit did not consider a situation in which a private party, for private purposes, prepared an affidavit for another private party, its decision in *Sandles* cannot conflict with the decision below.

2. Petitioner argues that, even if Sgt. Porter's affidavit was nontestimonial, it was still not admissible as a business record "under the relevant rules of evidence," apparently because "the method and circumstances" of its preparation "'indicate a lack of trustworthiness.'" Pet. 13-14 (quoting Military R. Evid. 803(6)). Petitioner does not explain what aspects of the affidavit he consid-

ers untrustworthy. More importantly, petitioner does not even suggest that there is any conflict among the lower courts about this entirely fact-bound claim. Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

NOVEMBER 2007