No. 09-150

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

RICHARD PERRY BRYANT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a shooting victim's statements identifying and describing his assailant and the circumstances of the shooting in response to police officers' initial on-the-scene questioning are "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued Page

Constitution, statute and rule:

Miscellaneous:

In the Supreme Court of the United States

No. 09-150

STATE OF MICHIGAN, PETITIONER

v.

RICHARD PERRY BRYANT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the rule under the Confrontation Clause of the Sixth Amendment barring the admission of the "testimonial" statements of witnesses who are unavailable for cross-examination at trial and were not previously subject to cross-examination, see *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies to statements made by a shooting victim in response to police officers' initial on-the-scene questioning. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case.

STATEMENT

1. On the evening of April 28, 2001, Anthony Covington told his brother that he was going to the home of a man named Rick to attempt to retrieve an expensive coat Covington had previously traded to Rick for drugs. Covington lived down the street from Rick and had been buying cocaine from Rick for about three years. According to Covington's brother, Rick sold drugs to Covington from his back door. Pet. App. 2A, 9A.

The next morning at about 3:25 a.m., officers of the Detroit Police Department were dispatched to a gas station to respond to a report that a man had been shot. Pet. App. 9A. When the officers arrived at the location, they found Covington lying next to his car on the driver's side of the vehicle, between the gas pumps and the front door of the station. *Ibid.*; J.A. 7, 34-35, 42-43, 80, 100, 150. Covington was bleeding from an apparent gunshot wound, clutching his abdomen, and apparently in considerable pain. J.A. 8, 11, 35, 38-39, 75, 83, 101. After asking his name, the officers asked Covington what had happened. J.A. 18, 21-22, 36, 101-102. In response to the officers' questions, Covington stated that he had been shot by a man named Rick around 3 a.m. through the back door of Rick's house. After he was shot, he had driven himself to the gas station. Pet. App. 9A; J.A. 12-13, 21-24, 37-40, 76, 78, 102, 126-128. Covington told the officers that he did not know Rick's last name, but provided a physical description. Pet. App. 9A; J.A. 84-86, 103, 114-115, 133-135. He also described the location of the shooting, which was approximately six blocks from the gas station. J.A. 59-60, 102-103.

Covington spoke to the officers slowly and in a low voice and appeared to have difficulty breathing. J.A. 18-19, 38, 57-58, 75, 83, 111-112, 126. About five to ten min-

utes after the officers responded to the call, paramedics arrived and the officers' questions ceased. J.A. 40-41, 116-117, 138. Covington died from his wounds at a hospital a few hours later. Pet. App. 1A, 10A.

Shortly after the paramedics arrived, three of the officers went to the location Covington had described. Pet. App. 1A, 10A. They found Covington's wallet and identification outside, a bullet hole in the back door, and a bullet and blood on the porch. *Ibid.* Respondent's girlfriend and his three children were inside. *Id.* at 1A-2A, 10A. Respondent's girlfriend testified at trial that she and respondent had been living at the house for several months and that respondent had been at the house earlier that evening. *Id.* at 2A, 10A. She also testified that she did not see respondent after that night. *Id.* at 2A.

Respondent was arrested a year later in California. Pet. App. 2A, 10A. He was extradited to Michigan, where he was charged with first-degree murder, possession of a firearm by a felon, and possession of a firearm during commission of a felony. *Ibid.*

2. At trial, the State introduced the testimony of the officers who responded to the police dispatch, each of whom described the conversation with Covington at the gas station. *E.g.*, J.A. 74-96, 98-123, 125-146. The court admitted the officers' description of Covington's statements, including Covington's identification of his assailant, under the State's excited utterance exception to the hearsay rule, which permits the introduction of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Mich. R. Evid. 803(2); see J.A. 70-72; see also Pet. App. 2A. After an earlier jury hung, a second jury on retrial convicted respondent

of second-degree murder and the two firearms offenses. *Id.* at 10A.

3. The Michigan Court of Appeals affirmed. Pet. App. 1A-7A. While the appeal was pending, this Court issued its decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), which held that the Confrontation Clause generally precludes the admission of out-of-court "testimonial" statements if the declarant is not present at trial for cross-examination. Relying on *Crawford*, petitioner argued that the admission of Covington's statements to the police violated the Confrontation Clause. The court rejected the argument, concluding that Covington's statements were not testimonial because they were "not the result of police interrogation" and were "not any type of '*ex parte* in-court testimony or its functional equivalent.'" Pet. App. 3A (quoting *Crawford*, 541 U.S. at 51).

4. While respondent's application for leave to appeal to the Michigan Supreme Court was pending, this Court issued its decision in *Davis* v. *Washington*, 547 U.S. 813 (2006), which concerned whether statements made to law enforcement personnel during a 911 call and at a crime scene were testimonial under *Crawford*. The Court held in *Davis* that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," but "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." *Id.* at 822.

The Michigan Supreme Court remanded the case to the Michigan Court of Appeals for further consideration in light of *Davis*. *People* v. *Bryant*, 722 N.W.2d 797 (2006). On remand, the Michigan Court of Appeals again affirmed. J.A. 147-153.

The Michigan Court of Appeals held that Covington's statements were nontestimonial under the rule articulated in *Davis* because the statements "were made in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency." J.A. 152. The court explained that "[t]he police were, indeed, responding to an emergency—someone at the gas station was shot and laying on the ground." J.A. 151. The court further concluded that the officers' questions were aimed at responding to that emergency: the questions were designed to determine if Covington was the victim of a crime and if the perpetrator posed a continuing threat. J.A. 151-152. Although the court agreed with respondent that Covington's answers would also aid a criminal investigation, the court found that "the *primary* purpose" of the questioning was not to investigate a past crime but "to assess the potentially dangerous situation as quickly as possible in an attempt to secure the victim's, their own, and the general public's safety." J.A. 152.

5. A divided Michigan Supreme Court reversed. Pet. App. 8A-47A.

a. The majority found that "'the primary purpose' of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator" and not "to enable the police to meet an ongoing emergency." Pet. App. 16A. In support of that conclusion, the court emphasized that Covington's state-

ments "related solely to events that had occurred in the past and at a different location" and were made in response to questions asking "what had happened in the past, not what was currently happening." *Ibid.* In the Court's view, the relevant emergency "was over once the victim was able to escape from [respondent] and drive six blocks to the gas station." *Id.* at 16A n.8.

The Michigan Supreme Court rejected the State's argument that the emergency continued while the police were actively attempting to find and apprehend the perpetrator, reasoning that the argument would "effectively render non-testimonial all statements made before the offender was placed behind bars." Pet. App. 18A. The court also rejected the argument that Covington's statements were nontestimonial because police were responding to a seriously wounded person, reasoning that the argument would mean that "all statements made while the police are questioning a seriously injured complainant would be rendered non-testimonial." *Id.* at 19A. The court considered that result to be "clearly inconsistent with the commands of the Supreme Court by confusing a medical emergency with the emergency circumstances of an ongoing criminal episode." *Ibid.*

Finally, although the Michigan Supreme Court acknowledged that a testimonial statement might be admissible if it were considered a dying declaration, see Pet. App. 23A & n.18 (citing *Crawford*, 541 U.S. at 56 n.6), the Michigan Supreme Court held that the State had failed to preserve that issue and that the record did not support application of the dying declaration rule. *Id.* at 23A-26A.

b. Three justices dissented. For the reasons given by the Michigan Court of Appeals, Justice Weaver would have affirmed on the ground that "the declarant's state-

ments were made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency. Pet. App. 27A.

In a separate dissent, Pet. App. 27A-35A, Justice Corrigan, joined by Justice Young, criticized the court for examining the facts "in hindsight, rather than with an objective view of the circumstances at the time the statements were made," *id.* at 28A, and for reading this Court's cases as establishing "a bright-line rule * * * that an emergency ends the moment the assailant and victim are physically separated to any extent," *id.* at 30A. Justice Corrigan emphasized that, when the police questioned Covington, "the shooting had just occurred, the statements were made only blocks away from the crime, the victim was in pain from untreated wounds that would soon prove to be fatal and was having trouble talking, and it was uncertain whether he, the police, or the public were out of physical danger." *Id.* at 32A-33A. In Justice Corrigan's view, those circumstances were sufficient to establish that "the emergency was ongoing and the victim's statements were non-testimonial." *Id.* at 33A.

SUMMARY OF ARGUMENT

The Michigan Supreme Court erred in holding that a shooting victim acted as a "witness" against respondent when he identified respondent as his assailant in response to police officers' initial on-the-scene questioning.

The Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford* v. *Washington*, 541 U.S. 36, 51 (2004), entitles a criminal defendant to confront those "who 'bear testimony'" against him. Absent a prior op-

portunity for cross-examination, the Court held, the Clause generally prohibits the government from introducing in a criminal trial a declarant's out-of-court testimonial statements if the declarant does not appear and thus cannot be cross-examined.

Although the Court in *Crawford* did not provide a comprehensive definition of the term "testimonial," it made clear that the term applies to those modern practices most closely related to the historical use of *ex parte* examinations as evidence against the accused, including the use of a formal, recorded statement given in response to a structured custodial interrogation. But as the Court made clear in *Davis* v. *Washington*, 547 U.S. 813 (2006), not all statements given in response to law-enforcement questioning are "testimonial." Statements given in response to questioning that, objectively considered, is primarily aimed at enabling police assistance to meet an ongoing emergency are not properly considered testimonial. Such questioning bears little resemblance to the historical abuses that animated the Confrontation Clause, and an individual who responds to such questions does not act as a "witness" against the accused.

In this case, the police officers who questioned Covington were responding to reports of an emergency. They arrived to discover a critically injured individual suffering from a recently inflicted gunshot wound, from which he would die a few hours later. Viewed objectively, the brief questioning that followed was not designed primarily to elicit testimonial evidence for use in a future prosecution. The few questions the officers asked—"what had happened, who had shot him, and where the shooting had occurred," Pet. App. 15A—sought exactly the information needed to permit the officers to assess the situation and the existence of a

threat to the public safety. Covington's responses to those questions were not testimonial, and their admission in Covington's absence did not violate the Confrontation Clause.

ARGUMENT

THE CONFRONTATION CLAUSE DOES NOT BAR ADMISSION OF A SHOOTING VICTIM'S RESPONSES TO POLICE OFFICERS' INITIAL ON-THE-SCENE QUESTIONING

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court held that the Confrontation Clause bars the introduction into evidence at a criminal trial of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id*. at 51, 53-54.

In this case, shortly after Anthony Covington was shot, and while he lay on the ground in pain with his shooter at large, he answered police officers' on-the-scene questions about "what had happened, who had shot him, and where the shooting had occurred." Pet. App. 15A. Those statements were not "testimonial" within the meaning of *Crawford*. An individual does not act as a "witness" when he responds to law-enforcement questioning that, viewed objectively, is designed primarily to enable police officers to meet an ongoing emergency. *Davis* v. *Washington*, 547 U.S. 813, 822 (2006). A report of an individual suffering from a serious, recently inflicted wound objectively signals the existence of such an emergency, and the inquiries made by the police officers on the scene were targeted precisely to

assess the situation and the threat to public safety. In these circumstances, the Confrontation Clause does not bar the introduction of the victim's responses as evidence at trial.

A. Statements Responding To Emergency Questioning Are Not Testimonial Under *Crawford*

1. After reviewing the origin of the confrontation right, the Court in *Crawford* concluded that the Confrontation Clause's principal concern is "testimonial" hearsay. The historical record demonstrated that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50. Pretrial examinations had become common in England under the Marian bail and committal statutes, see 1 & 2 Phil. & M., c. 13 (1554), under which justices of the peace would formally examine criminal suspects and witnesses before trial and then certify the written results to the trial court. The results were used as evidence in some cases. *Crawford*, 541 U.S. at 43-44. English law developed a confrontation right in reaction to the practice of reading official examinations at trial "in lieu of live testimony, a practice that 'occasioned frequent demands by the prisoners to have * * * the witnesses against him * * * brought before him face to face.'" *Id.* at 43 (quoting 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 326 (1883)); see, *e.g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603) ("Call my accuser before my face.").

The Court explained that the text of the Confrontation Clause, which guarantees a criminal defendant's right to confront "the witnesses against him," reflected

the historical concerns underlying the development of the confrontation right. Citing a 1828 dictionary, the Court noted that the term "witnesses" was understood to refer to those who "bear testimony," and "[t]estimony," in turn, was understood as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 114 (1828)). The Confrontation Clause's use of the term "witnesses" thus "reflects an especially acute concern with a specific type of out-of court statement." *Ibid.* As the Court noted, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid.*

Although the Court in *Crawford* did not provide a "comprehensive" definition of the term "testimonial," it made clear that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations"—that is, "the modern practices with closest kinship to the abuses at which the Confrontation Clause is directed." 541 U.S. at 68; see also *id.* at 52.[1] Applying that understanding, the Court held that the evidence at issue in the case—a tape-recorded statement made while the declarant was in police custody, after she had been given *Miranda* warnings, and "given in response to structured police questioning"—was testimonial. *Id.* at 53 n.4. The admission of the statement at trial, where the defendant

[1] The Court noted that it used "the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Crawford*, 541 U.S. at 53 n.4.

had no opportunity to cross-examine the declarant, therefore violated the Sixth Amendment. *Id.* at 68.[2]

2. The Court clarified the scope of *Crawford*'s bar on the admission of testimonial hearsay in *Davis*, which concerned whether certain statements given in response to law-enforcement questioning qualify as testimonial. See 547 U.S. at 817. While again declining to provide a comprehensive definition of "testimonial," the Court rejected the argument that all statements given to law-enforcement personnel so qualify. *Id.* at 826-827. The Court noted that, in particular cases, law-enforcement questioning may not be designed "primarily to 'establish or prove' some past fact," *id.* at 827 (brackets omitted), but instead to "describe current circumstances requiring police assistance," *ibid.* Identifying no historical example in which a "statement[] made during an ongoing emergency," *id.* at 828, was thought to implicate the confrontation right, the Court concluded that statements "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" are nontestimonial. *Id.* at 822. On the other hand, statements are testimonial if

---

[2] The Court in *Crawford* identified two historical exceptions to the general bar on admission of unconfronted testimonial statements: one for dying declarations, see 541 U.S. at 56 n.6, and the other for statements made by witnesses wrongfully prevented from testifying at trial, *id.* at 62; see *Giles* v. *California*, 128 S. Ct. 2678, 2683 (2008). Neither exception is at issue in this case. The State did not preserve the argument that Covington's statements qualified as dying declarations. See Pet. App. 23A-26A. And in *Giles*, this Court held that the forfeiture-by-wrongdoing exception applies only "when the defendant engaged in conduct *designed* to prevent the witness from testifying," and does not otherwise permit admission at trial of the testimonial statements of murder victims. 128 S. Ct. at 2683, 2693.

"the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Ibid.*

Applying that rule to the facts of *Davis*, the Court found that an assault victim's identification of her assailant in response to questioning by a 911 operator was not testimonial. 547 U.S. at 826-829. The court explained that "[a] 911 call * * * and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establish or prove' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827 (brackets omitted). The Court also identified several features that distinguished the 911 call from the interrogation in *Crawford*: unlike the declarant in *Crawford*, the 911 caller "was speaking about events *as they were actually happening*," and not "hours after the events she described had occurred"; the declarant "was facing an ongoing emergency" and seeking "help against a bona fide physical threat"; "the nature of what was asked and answered, * * * viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past"; and "the difference in the level of formality between the two interviews [was] striking." *Ibid.* "[F]rom all this," the Court concluded that the declarant in *Davis* "simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828.

By contrast, in *Davis*'s companion case, *Hammon* v. *Indiana*, the Court found that an assault victim's statements to police arriving on the scene of a reported domestic disturbance were testimonial. *Davis*, 547 U.S. at

829. Upon the officers' arrival, the declarant had told them that "things were fine * * * and there was no immediate threat to her person"; the officers then separated her from the defendant and had her "deliberately recount[]" the details of the criminal event. *Id.* at 830. The Court found that these "statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination." *Ibid.* The Court declined, however, to foreclose the possibility that "questions at a scene will yield nontestimonial answers." *Id.* at 832. The Court acknowledged that officers called to the scene of a reported domestic disturbance "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim," *ibid.* (quoting *Hiibel* v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186 (2004)), and that "[s]uch exigencies may *often* mean that 'initial inquiries' produce nontestimonial statements," *ibid.* The Court held only that when the declarant's statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." *Ibid.*

B. Covington's Statements Were The Product Of Police Questioning Primarily Designed To Respond To An Ongoing Emergency And Were Therefore Nontestimonial

1. Under the standard articulated in *Davis*, Covington's statements were nontestimonial. Although they were made in the course of police interrogation, the circumstances objectively indicated "that the primary purpose of the interrogation [was] to enable police assis-

tance to meet an ongoing emergency." *Davis*, 547 U.S. at 822.

The police officers in this case arrived on the scene at the gas station in response to reports that a man had been shot. When they arrived, they found Covington on the ground suffering from a recently inflicted gunshot wound. At the time, they did not know who Covington was, whether the shooting had occurred at the gas station or at a different location, who the assailant was, or whether the assailant posed a continuing threat to Covington or others. The questions the officers posed—"what had happened, who had shot him, and where the shooting occurred," Pet. App. 15A—were reasonably necessary "to assess the situation, the threat to their own safety, and possible danger to the potential victim," as well as the public at large. *Davis*, 547 U.S. at 832 (quoting *Hiibel*, 542 U.S. at 186). In responding to those questions while lying in the gas station lot, Covington "was not acting as a *witness*"; he "was not *testifying*." *Id.* at 828. He was instead providing information necessary for the police officers to evaluate and respond to the "exigencies" of the situation. *Id.* at 832.

2. The circumstances of the questioning in this case bear no resemblance to the historical abuses at which the confrontation right is directed. Unlike in, for example, *King* v. *Dingler*, 168 Eng. Rep. 383 (1791), the police officers in this case did not depose (and indeed had no opportunity to depose) a victim in the absence of the defendant, with an eye to preserving that unconfronted testimony for use at a later trial. Cf. *Davis*, 547 U.S. at 828 (characterizing the statement in *Dingler* as "a weaker substitute for live testimony") (quoting *United States* v. *Inadi*, 475 U.S. 387, 394 (1986)). Instead, the police arrived at the scene to discover a critically

wounded victim who lay bleeding on the ground, with the perpetrator at large. The information they sought was vital to evaluate the situation and to formulate an appropriate response.

And much as in *Davis*, the distinctions between the questioning here and the interrogations at issue in *Crawford* and *Hammon* are "apparent on the face of things." *Davis*, 547 U.S. at 827. Whereas the responding officers in *Hammon* heard from the victim that "things were fine," *id.* at 830, the officers who responded to the gas station saw when they arrived that things were *not* fine. Whereas the suspected perpetrators in *Crawford* and *Hammon* had been identified and any danger they presented had effectively been neutralized, see *Crawford*, 541 U.S. at 38 (defendant arrested); *Davis*, 547 U.S. at 830 (defendant in presence of the police and forcibly separated from the victim), the identity and whereabouts of Covington's assailant were unknown to the officers when they began their questioning.

Significantly, whereas the interrogations in *Crawford* and *Hammon* were formal and deliberate, see *Crawford*, 541 U.S. at 53 n.4; *Davis*, 547 U.S. at 819-820, 830-831, the interrogation in this case was, of necessity, informal and unstructured. The informality of the questioning stands in sharp contrast to the kinds of formal statements that have traditionally been thought to implicate the confrontation right. See *Davis*, 547 U.S. at 825-826, 827, 830 n.5; see also *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring) (taking the view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions") (internal quotation marks and citation omitted);

Giles v. *California*, 128 S. Ct. 2678, 2694 (2008) (Alito, J., concurring) (questioning whether statements made to a police officer responding to a domestic-violence report qualified as "testimonial"). The police officers had no control over the location of the interview; they had only a few minutes to ask questions before the paramedics arrived; and they had no opportunity to structure their questions, much less attempt to shape Covington's testimony for use at a future criminal trial. Cf. *Crawford*, 541 U.S. at 56 n.7 (raising concerns that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse").

C. The Michigan Supreme Court Erred In Concluding Covington's Statements Were Inadmissible Under The Confrontation Clause

1. In concluding that the admission of Covington's statements to police violated the Sixth Amendment, the Michigan Supreme Court reasoned that the "primary purpose" of the police officers' questioning could not have been to "enable police assistance to meet an ongoing emergency" because the shooting had already occurred and the "police asked the victim what had happened in the past, not what was currently happening." Pet. App. 15A-16A. The court was mistaken. Although *Davis* involved a present-tense report to a 911 operator, see 547 U.S. at 817, and *Hammon* a past-tense report to a note-taking police officer, see *id.* at 831-832, the Court in *Davis* did not assign dispositive significance to that fact. In this case, the existence of an emergency—and a purpose of responding to that emergency—did not vanish as soon as the gun was fired and the now-wounded Covington fled the scene. When the police

found Covington, they knew that an armed assailant had recently shot a man and could have been in the immediate vicinity—or could have gone elsewhere in search of other victims. A reasonable officer's primary purpose in asking a critically wounded person about what happened is not, as in *Hammon*, to "nail down the truth about past criminal events" for future use in a potential criminal prosecution. *Id.* at 830. That purpose is instead to help the officer better understand "what was currently happening"—that is, to assess the nature of a present threat to public safety.

2. The historical record does not support a bright-line temporal rule of the sort the court below applied in this case. Both before and after the Framing of the Confrontation Clause, English and American courts allowed witnesses to testify about victims' statements made shortly after, as well as during, the relevant criminal act. See, *e.g.*, *Thompson* v. *Trevanion*, 90 Eng. Rep. 179 (K.B. 1694) (admitting the statement of a victim made "immediate upon the hurt received, and before [the victim] had time to devise or contrive any thing for her own advantage"). For example, in *Rex* v. *Foster*, 172 Eng. Rep. 1261 (1834), the defendant was charged with running the victim over in a cab. A witness who did not see the initial incident approached the victim groaning and near death in the street and was told what happened, a statement that the court found admissible as part of the res gestae. Other American decisions are to similar effect. See *Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181, 182, 184 (1849) (admitting victim's statement, after she had escaped to another room and the witness had gone to find help, that the defendant had stabbed her); see also *Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397, 405-409 (1869) (citing *Trevanion*, *Foster*,

and *M'Pike*, and concluding that statements made shortly after the infliction of injury are admissible as proof of the matter asserted). The Framers would not have understood the law categorically to forbid admission of unconfronted past-tense descriptions of recent attacks.

3. The Michigan Supreme Court attached significance to its belief that Covington's "primary purpose" in responding to the police questioning was "[o]bviously" not to seek police protection for himself from an ongoing physical threat, but to provide the police with information about the whereabouts and identity of the shooter so as to facilitate a prosecution. Pet. App. 16A. That reasoning is flawed for at least three reasons. First, the Michigan court's speculation about the victim's purposes is just that. Covington could just as easily have feared another attack against himself or his family; his state of mind as he lay bleeding on the ground is essentially unknowable. The application of the Confrontation Clause analysis does not depend on such indeterminate conjectures about a victim's state of mind. Second, although *Davis* did recognize that the Confrontation Clause applies to statements rather than questions, 547 U.S. at 822 n.1, the test that *Davis* adopted focused on the objective "primary purpose" of an interrogation, *id.* at 822, because that inquiry properly identifies "those who 'bear testimony,'" *id.* at 823 (quoting *Crawford*, 541 U.S. at 51). The Michigan Supreme Court thus erred in substituting a hypothetical-declarant-intent test for *Davis*'s focus on the objective primary purpose of the interrogation. Third, even when a victim's own safety is secured, as the Michigan court believed that Covington's was, Pet. App. 16A, the police have need of information about the shooter in order to assess the threat to their own

safety, see *Davis*, 547 U.S. at 832, and to others to whom the shooter may pose a danger. An emergency posed by an unknown shooter who remains at large does not automatically abate just because the police can provide security to his first victim.

4. To acknowledge that the officers' interrogation in this case was primarily designed to respond to an ongoing emergency, rather than to gather testimonial evidence about a past crime, is not to hold that any statement made while a perpetrator remains at large, or when police respond to a seriously injured victim, will be nontestimonial. See Pet. App. 18A-19A. The inquiry *Davis* requires is necessarily context-dependent; the circumstances attending the initial inquiry of police arriving on the scene of a reported shooting are likely to differ in relevant respects from, for example, the inquiry of police searching for the perpetrator of a nonviolent crime, or responding to a victim seriously injured in a car crash, rather than gunfire.

As has been true in its prior cases, there is no need for this Court to attempt to provide "an exhaustive classification" of "all conceivable statements in response to police interrogation" as testimonial or nontestimonial. *Davis*, 547 U.S. at 822. It suffices to recognize that, in the context of this case, the police officers' initial inquiries of the shooting victim were, objectively considered, primarily aimed at meeting an "ongoing emergency" under any reasonable definition of that term. *Ibid.* Admission of the resulting statements at trial, in the absence of the now-deceased victim, did not deprive respondent of his constitutional right to confront the witnesses against him.

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
DAVID E. HOLLAR
Attorney

MAY 2010