1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HERSHEL HAMMON, :

4 Petitioner :

5 v. : No. 05-5705

6 INDIANA. :

7 - - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Monday, March 20, 2006

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 11:04 a.m.

13 APPEARANCES:

14 RICHARD D. FRIEDMAN, ESQ., Ann Arbor, Michigan; on

15 behalf of the Petitioner.

16 THOMAS M. FISHER, ESQ., Solicitor General,

17 Indianapolis, Indiana; on behalf of the Respondent.

18 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.;

20 on behalf of the United States, as amicus curiae,

21 supporting the Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Hammon v. Indiana.

5 Mr. Friedman.

6 ORAL ARGUMENT OF RICHARD D. FRIEDMAN

7 ON BEHALF OF THE PETITIONER

8 MR. FRIEDMAN: Mr. Chief Justice, and may it

9 please the Court:

10 The Court can decide these cases, as it

11 decided Crawford without testing the outer bounds of

12 the Confrontation Clause, by adopting a simple

13 proposition that is easily understood by and

14 intuitively sensible to ordinary lay people and so

15 capable of being passed on from generation to

16 generation as one of the cornerstones of our

17 fundamental liberties.

18 A criminal conviction cannot be based on an

19 accusation made privately to a known law enforcement

20 officer. If a State wishes that such an accusation

21 be presented in support of a conviction, then it must

22 ensure that the accuser testifies in the manner long

23 required by the common law system of criminal justice,

24 in the presence of the accused, under oath, and subject

25 to cross examination.

1 As in Crawford, the Court does not need to
2 offer a comprehensive definition of the term
3 testimonial. It is enough to say that an accusation to
4 a known law enforcement officer must be testimonial
5 under any plausible definition.
6 JUSTICE BREYER: When, for example, there's
7 an undercover agent, a law enforcement officer -- let's
8 think of the mafia or the Ku Klux Klan reveals himself.
9 One of the co-conspirators during the ongoing
10 conspiracy switches sides. But no. He doesn't switch.
11 He's still in the conspiracy. Makes a whole lot of
12 statements. Those are all inadmissible, though they'd
13 come in now because they would be in the furtherance of
14 the conspiracy.
15 MR. FRIEDMAN: Statements in furtherance of a
16 conspiracy, if I understand --
17 JUSTICE BREYER: Yes. There -- but there's
18 -- in other words, I've got your definition and all
19 I've tried to do is create a circumstance where, while
20 it fits your definition, it's made by a person that is
21 in the conspiracy. So I make him undercover, the law
22 enforcement officer.
23 MR. FRIEDMAN: If it's an undercover law
24 enforcement --
25 JUSTICE BREYER: But known.

1 MR. FRIEDMAN: By -- by known, I mean to the
2 declarant.
3 JUSTICE BREYER: Yes.
4 MR. FRIEDMAN: By known, I mean to the
5 declarant. So if it's --
6 JUSTICE BREYER: Yes.
7 MR. FRIEDMAN: -- if it's an undercover agent
8 and so it's a statement to an undercover --
9 JUSTICE BREYER: So you're saying my
10 hypothetical could never come up. What I'm trying to
11 do is -- it seems to me that your hypothetical is going
12 to take statements that would come in that are pretty
13 far removed from the prosecution that are in odd
14 circumstances, are not just a testimonial at all in
15 anybody's thought, but it keeps them out.
16 MR. FRIEDMAN: I -- I'm afraid I -- I don't
17 fully understand the hypothetical. If the -- if the
18 officer is not known to the declarant as a law
19 enforcement officer, then there's no problem. Then --
20 then the statement could --
21 JUSTICE BREYER: He's known.
22 MR. FRIEDMAN: If he's -- he's known to the
23 law enforcement officer and the member of the
24 conspiracy is making a --
25 JUSTICE BREYER: It's continuing.

1 MR. FRIEDMAN: It's a continuing conspiracy,
2 but -- but that statement to the law enforcement
3 officer saying that somebody else in the conspiracy has
4 committed a crime, would not, in fact, be in
5 furtherance of the conspiracy. It would blow the
6 conspiracy apart.
7 JUSTICE BREYER: All right. You've convinced
8 me I have a bad hypothetical.
9 (Laughter.)
10 JUSTICE BREYER: You go ahead.
11 MR. FRIEDMAN: I -- I don't think it's --
12 Your Honor, I feel duty-bound to say there are no bad
13 hypotheticals, but there are -- there are easy ones,
14 and I think if -- if it's a known officer -- it's -- in
15 that situation, it's going to be accusatorial. If it's
16 not a known officer, it's -- it's not accusatorial --
17 JUSTICE ALITO: What if a statement is made
18 to a known law enforcement officer providing
19 information that's -- that's very incriminating against
20 somebody, but it doesn't specifically identify that
21 person? Does that fall within your test?
22 MR. FRIEDMAN: I -- I believe it does. Of
23 course, in this case we have both, a description of the
24 crime and an identification of the perpetrator.
25 JUSTICE ALITO: So it's an accusation even

1 though it doesn't identify the person who is alleged to
2 be the perpetrator?
3 MR. FRIEDMAN: We could call it what we will.
4 I think -- I think that it still would be within the
5 narrow proposition that we're advocating that a -- that
6 a description of the crime to a known --
7 JUSTICE ALITO: So really, your test is any
8 evidence that's -- any statement made to the police or
9 -- is an -- is testimony.
10 MR. FRIEDMAN: No, Your Honor. I think it --
11 it either has to describe a crime or identify the
12 perpetrator or, as in this case, do both. So --
13 JUSTICE ALITO: Any relevant evidence given
14 to law enforcement is testimonial.
15 MR. FRIEDMAN: Well, when you say -- when you
16 say relevant, I think that if the law enforcement
17 officer -- if -- if it's a statement to a known law
18 enforcement officer in the line of duty, it's -- it's
19 almost always going to be testimonial. If it -- if it
20 identifies the -- the perpetrator or describes the
21 crime, I would say it's clearly testimonial, or if it's
22 in response to the -- to the officer's inquiries, it's
23 clearly --
24 JUSTICE ALITO: If somebody calls and says, I
25 just saw a blue Toyota with Ohio plates commit a hit

1 and run, that's testimonial?

2 MR. FRIEDMAN: I believe -- I believe so.

3 Now -- now, in fact, that would provide some

4 identifying information because it is a person who is

5 associated with that blue -- with that blue Toyota.

6 But if it's simply a officer in the donut shop, I just

7 saw Jack, he's back in town, with no clear relation to

8 any -- any crime, that's presumably just chatter and

9 that wouldn't be testimonial even if it -- even if it

10 later becomes relevant.

11 JUSTICE ALITO: But if it's relevant that

12 Jack is back in town, then that's testimonial.

13 MR. FRIEDMAN: If -- if at the moment that

14 it's made, the declarant understands that Jack being

15 back in town might be useful in an investigation, or if

16 a reasonable person in the position of the declarant

17 would understand it, that would be testimonial. Yes.

18 Yes, Your Honor.

19 So the -- the basic principle for which we're

20 advocating does not lie at the -- outside of the -- of

21 the definition of testimonial. I think it's simply a

22 core proposition.

23 JUSTICE ALITO: And the people who are making

24 all these statements are -- are to be understood as

25 witnesses against somebody within the -- the language

1 of the Confrontation Clause?

2 MR. FRIEDMAN: I think within the -- within

3 the meaning of the Confrontation Clause, if those

4 statements are allowed at proof -- as proof at trial

5 without the person coming in, then what we have

6 essentially done is created a system by which people

7 can create evidence for use by the legal system, by

8 engaging those statements without coming into court.

9 That's -- that's right.

10 And so I think one of the critical factors

11 here is to imagine what happens if statements, such as

12 the ones in -- in this case, are admitted -- are

13 admissible, and this Court holds -- holds that they

14 are, then basically they always can be admitted. Then

15 any State is free to create a system in which a

16 statement to a responding officer comes in as proof.

17 There's no need for the -- for the -- the declarant to

18 show up at trial, and there's no doubt that -- that

19 that is what would happen. California and Oregon have

20 already adopted such statutes, and -- and my State of

21 Michigan is on the verge of doing so.

22 JUSTICE SCALIA: Statutes that -- that say

23 what?

24 MR. FRIEDMAN: That say -- that say

25 accusations to a -- made to a law enforcement officer,

1 in the case of Oregon and the pending Michigan bill,
2 accusations of domestic violence are admissible so long
3 as they are made reasonably freshly -- but they give a
4 24-hour time frame -- they -- they are admissible. No
5 need for excitement. So -- so the idea that -- that
6 the jurisdictions have limited this to -- to excited
7 utterances is -- is not -- is not so. If -- if the
8 Court affirms the decision here, I think the message
9 would go out that these -- that these statutes are
10 perfectly okay.
11 JUSTICE GINSBURG: And those -- those --
12 JUSTICE KENNEDY: And -- and what -- what is
13 the theory on which the statutes are -- are adopted?
14 MR. FRIEDMAN: The --
15 JUSTICE KENNEDY: What's the argument that
16 they propose to say it's not testimonial? I know you
17 disagree with it, but --
18 MR. FRIEDMAN: Justice Kennedy, the -- I
19 don't think there is a theory. And I say that quite
20 seriously. I -- I actually testified last month before
21 the Michigan House on the -- the bill saying I believe
22 this bill is blatantly unconstitutional. I believe
23 it's going to be held unconstitutional within a few
24 months. There was not a high level of interest in the
25 constitutional argument before the legislature. I

1 don't think there is a theory. I think the -- I think
2 the theory is that prosecutors say that these would be
3 good laws to pass. So --
4 JUSTICE BREYER: What's -- what's worrying me
5 on this is -- I'll tell you my concern without the
6 hypothetical. Crawford wrenches the Confrontation
7 Clause free of the hearsay rule, and therefore,
8 testimony -- it might be testimonial even though it is
9 not hearsay or falls within an -- doesn't fall within
10 an exception. You understand what I'm saying. Fine.
11 Now, you come along with a suggestion, and
12 what struck me immediately was that, wait a minute,
13 can't I easily think -- apparently not easily -- can't
14 I easily think of instances where it would be
15 testimonial but it isn't an accusation made to a
16 policeman. And conversely, can't I easily think -- not
17 easily -- of instances where, well, it would have come
18 in, but it was statements made to a policeman maybe
19 years before, maybe about this, maybe about that?
20 Maybe it's a hospital record. Maybe it's a business
21 record. There are all kinds of exceptions to the
22 hearsay rule, and they don't run parallel to the test
23 you've just given. That's what's worrying me. What's
24 the test?
25 MR. FRIEDMAN: Your Honor, let -- let me be

1 very clear. We do not propose that this categorical
2 principle that an accusation to a law enforcement
3 officer is a definition of what's testimonial. We
4 regard this as a core category of testimonial
5 statements such as the core categories that the Court
6 listed in Crawford. So -- so if a statement fits
7 within that -- within that category, that is sufficient
8 to make it testimonial.
9 JUSTICE GINSBURG: Such as in Crawford, but
10 in Crawford, it was the kind of formal statement, the
11 Court said, materials such as affidavits, custodial
12 examinations, prior testimony that the defendant was
13 unable to cross examine, or similar pretrial
14 statements. Similar pretrial statement is not an
15 agitated woman calling 911 or telling a police officer
16 who -- as in your case, who comes in response to a
17 call, there's a disturbance going on in that house, get
18 there.
19 MR. FRIEDMAN: Right. I -- I understand,
20 Justice Ginsburg. Of course, Crawford was only listing
21 a non-exclusive list of -- of core -- of core
22 categories.
23 JUSTICE SCALIA: Yes. We -- we -- that --
24 that quotation was a -- a description of what Crawford
25 described as the core.

1 MR. FRIEDMAN: Right.
2 JUSTICE SCALIA: Not -- not the totality of
3 --
4 MR. FRIEDMAN: Certainly not the totality,
5 and if you say, well, this statement was informal, it
6 -- it doesn't make sense and I think it conflicts with
7 a comment in Crawford in footnote 3 to say, well,
8 informal testimony is -- is okay, as the Court said in
9 -- in Crawford. If -- if sworn out-of-court testimony
10 is invalid, it wouldn't make sense to say that unsworn
11 testimonial statements are perfectly okay.
12 Now, so far as the principle that -- that
13 because the witness is under agitation, the -- the
14 Confrontation Clause doesn't -- doesn't apply, I don't
15 think that's -- that's valid at -- at all. It
16 certainly isn't valid historically. If -- if it were,
17 we would have seen examples over history in which
18 agitated declarants -- their statements came in. But
19 as -- as General Dreeben has indicated, the very -- the
20 very organizing principle of prosecution was that the
21 accuser must come and -- come and testify.
22 JUSTICE GINSBURG: Did the legislatures that
23 have passed laws of the kind you describe have before
24 them information that there is a rather high incidence
25 of the victim being intimidated and therefore not

1 showing up in court to testify?

2 MR. FRIEDMAN: Your -- Your Honor, in the --

3 in the Old Bailey sessions papers there were

4 approximately 2 percent of the cases, the victim who

5 was the prosecutor did not show up. It was a recurring

6 -- a recurring matter. Why they didn't show up may

7 have been for various reasons. And I want to emphasize

8 that the State in the very first paragraph of its brief

9 emphasizes that there are numerous reasons why, in the

10 domestic violence context, the -- the accuser may not

11 testify in court. And in those roughly 2 percent of

12 all the cases, which is 2,000 cases, in not a single

13 one -- well, I'm sorry. There was one in which there

14 was a -- a conviction. That's because -- because the

15 defendant -- because the defendant confessed. But in

16 all the others, the accusation was -- the -- the case

17 was summarily dismissed.

18 JUSTICE SCALIA: Well, you -- you have to

19 assume not only that the victim is unwilling or

20 reluctant to testify, you have to assume that the

21 victim has disappeared because the victim, unwilling or

22 not, could be subpoenaed. Isn't that right?

23 MR. FRIEDMAN: The -- the victim could be

24 subpoenaed, and in -- in this case, as in Davis, the

25 victim was subpoenaed, but subpoenas have to be

1 enforced. And -- and I think in some cases the
2 prosecution does -- simply doesn't enforce the
3 subpoenas. It's what the Cook County --
4 JUSTICE SCALIA: Right, but I'm saying the scope
5 of the problem is -- is much more narrow than what is
6 suggested by simply describing how often it is that the
7 -- that the complaining witness is reluctant to
8 testify. That doesn't stop anything.
9 MR. FRIEDMAN: Well --
10 JUSTICE SCALIA: Reluctant or not, that
11 witness can be -- can be subpoenaed.
12 MR. FRIEDMAN: That is -- that is correct,
13 Justice Scalia. It is the State's choice whether to
14 compel the -- the person to -- to testify, and if, as
15 Cook County has done, they put in particular efforts to
16 protect the witness, to encourage her to testify, then
17 prosecutors get a very high return. That is, in -- in
18 the Cook County program, 80 percent of -- of the
19 witnesses testify. They get a very high conviction
20 rate, and they protect the -- the witnesses.
21 So I think the message from this Court is
22 going to be one of two things. Either it's okay to
23 adopt a California/Oregon type of statute and just --
24 just let any statements come -- come in, or we have to
25 put in the resources to -- to -- into domestic violence

1 to ensure that the witnesses come -- come to court.

2 JUSTICE GINSBURG: I don't know why the or

3 would necessarily follow. I mean, if you prevail,

4 there's nothing that compels the State to put money in

5 what has been suggested, a training program, shelters,

6 counselors for these people.

7 MR. FRIEDMAN: They --

8 JUSTICE GINSBURG: Nothing at all compels the

9 State to do that.

10 MR. FRIEDMAN: They -- they would not be

11 compelled to do that, but -- they would not be

12 compelled constitutionally to do that. They would

13 simply be deprived of a -- of -- of the so-called

14 evidence-based prosecution, which has just been a

15 phenomenon of the last 14 years.

16 JUSTICE SCALIA: Your point, I thought, was

17 that that would be the incentive for --

18 MR. FRIEDMAN: That -- that --

19 JUSTICE SCALIA: -- for police departments,

20 of course --

21 MR. FRIEDMAN: That -- that -- that is

22 correct.

23 JUSTICE SCALIA: -- if they want to make

24 their cases.

25 MR. FRIEDMAN: That is correct. They -- they

1 would -- they want to make their cases, and -- and I
2 think they can make their cases best if the witness
3 testifies, in which case, under the Confrontation
4 Clause now -- now construed, there's no objection then
5 to bringing in the prior statement at all.
6 JUSTICE BREYER: What about present sense
7 perceptions? That might be a good one.
8 MR. FRIEDMAN: And -- and --
9 JUSTICE BREYER: Apparently 803(1) has the
10 first exception --
11 MR. FRIEDMAN: Right.
12 JUSTICE BREYER: -- to the hearsay rule.
13 It's present sense impression.
14 MR. FRIEDMAN: Yes.
15 JUSTICE BREYER: So on the phone, somebody is
16 describing very calmly -- very calmly to the policeman
17 the terrible crime that he sees going on in front of
18 him. Now, I gather from the fact that it's an -- that
19 it is a exception, that now in the Federal courts that
20 would be admissible.
21 MR. FRIEDMAN: Well, it would have been under
22 Roberts presumably.
23 JUSTICE BREYER: Yes. No. Forget the --
24 yes. Every day of the week, they come in. Is that
25 right? Present sense impressions. It's here as the

1 first exception to the hearsay rule.

2 MR. FRIEDMAN: It's -- it's an exception. In

3 civil cases, there's no problem. In -- in criminal

4 cases --

5 JUSTICE BREYER: Well, there it is, 803(1).

6 MR. FRIEDMAN: That's right.

7 JUSTICE BREYER: I mean, and you practiced

8 this for years. See. I mean, you're an expert in

9 this, and I -- I think my impression -- just tell me if

10 I'm wrong -- is it's 803(1). It says a present sense

11 impression comes in. So I guess it does unless I'm --

12 MR. FRIEDMAN: Yes, but until -- until White

13 v. Illinois basically let the guard down, these --

14 these statements could not come -- accusatory

15 statements that might have been in present sense

16 impressions did not -- were -- were not the basis for

17 prosecutions. Once -- once White v. Illinois was

18 decided, then -- then courts allowed them in routinely.

19 JUSTICE BREYER: So if we adopt your rule, a

20 person calls up on the phone and says, I'm here at the

21 baseball game, there's a terrible crime going on in

22 front of me, and he describes it --

23 MR. FRIEDMAN: Right.

24 JUSTICE BREYER: -- to the police officer,

25 that no longer could come in.

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1 MR. FRIEDMAN: I -- I believe that is correct
2 because that --
3 JUSTICE SCALIA: I should hope not. I mean
4 --
5 MR. FRIEDMAN: It -- it shouldn't. It's an
6 accusatory -- it's an accusatory statement to -- to a
7 -- a -- to law enforcement.
8 Now, I mean, the Court could, if it wanted,
9 carve out or -- or draw the line at statements that are
10 describing the contemporaneous -- the absolutely
11 contemporaneous commission of a crime. I don't think
12 it's a particularly good line to draw.
13 JUSTICE BREYER: No, no. I wasn't --
14 MR. FRIEDMAN: Yes.
15 JUSTICE BREYER: -- trying to reduct you out
16 of --
17 MR. FRIEDMAN: Right.
18 JUSTICE BREYER: I just wanted to know what
19 the facts are about the rule. I was just -- that's
20 what I was asking.
21 MR. FRIEDMAN: The -- the rule is that the
22 hearsay law -- the rule against hearsay provides -- the
23 modern rule against hearsay provides no -- no
24 restriction. The Confrontation Clause should.
25 And let me address the -- your concern,

1 Justice Breyer, that is this hearsay rather than --
2 than confrontation. I think -- I think that the notion
3 of the accuser is central to the confrontation right
4 and always -- and always has been, and those 2,000
5 cases really develop. As of 1791, the rule against
6 hearsay was barely developed, and we cite -- or the
7 -- the rule against hearsay was barely developed and
8 Edmund Burke said that a trained parrot could recite
9 all the laws of evidence in 5 minutes, and that is no
10 longer -- that is no longer so.
11 JUSTICE SCALIA: Edmund Burke say that?
12 MR. FRIEDMAN: Edmund Burke said that, yes.
13 JUSTICE GINSBURG: Mr. Friedman, can I go
14 back to your answer that the police will then -- in
15 response to the position that you're urging, will then
16 protect the victim and all these fine things? It
17 wasn't so long ago that the police wouldn't bother with
18 these prosecutions at all. They didn't care about
19 them. And if you say you're going to have to drag in
20 the victim, you're going to have to jail her for
21 contempt if she's so scared that she won't testify,
22 they'll say, who needs it. We've got a lot of other
23 crimes to prosecute.
24 MR. FRIEDMAN: Well, I -- I hope not, Your
25 Honor, and I -- I believe that we've gotten past the

1 point. I mean, I think we now recognize how serious a
2 -- a crime domestic violence is.
3 Let me emphasize that it is just as now
4 sometimes a prosecutor will compel a victim to
5 testify. It will still be that sometimes they will and
6 sometimes they won't. That will be a matter of -- of
7 State policy. There are other approaches as -- as
8 well. And -- and hopefully, compulsion isn't
9 necessary, I think, if the prosecutors pay -- pay
10 sufficient attention and -- and care, but beyond that,
11 there's the possibility of forfeiture. If, indeed, the
12 reason why the victim will not testify is because of
13 intimidation, then -- then the prosecution -- it is
14 open to the prosecution to prove that. In many cases,
15 the case can be proven --
16 JUSTICE GINSBURG: That's very powerfully
17 hard to prove, isn't it?
18 MR. FRIEDMAN: I don't think so, Your Honor.
19 And -- and, of course, it remains to be seen just how
20 easy or how hard it -- it is to -- to prove. But, in
21 fact, the -- as Mr. Fisher said, the rules of evidence
22 don't apply at the -- at the preliminary hearing. It's
23 the judge, not the -- the jury that has to decide. And
24 the standard of proof presumably would not be beyond a
25 reasonable doubt. So --

1 CHIEF JUSTICE ROBERTS: But you are back --
2 as Justice Breyer pointed earlier, you're making the
3 prosecution prove two crimes instead of one.
4 MR. FRIEDMAN: Well, intimidation is -- is a
5 crime, but it wouldn't -- it wouldn't be a full
6 criminal case. It would, as in many other contexts,
7 simply a preliminary hearing on -- on a threshold
8 issue. As we have for every evidentiary problem, for
9 every -- for any -- any evidentiary problem, such as
10 does the present sense impression exception apply,
11 there's a preliminary --
12 CHIEF JUSTICE ROBERTS: Well, but every
13 evidentiary problem, the -- the root of the problem is
14 not the inability of the -- or the unwillingness of the
15 primary victim to testify. I mean, that's what makes
16 intimidation so hard to prove in these cases is because
17 you have to get the -- if -- if the intimidation is
18 successful, the witness to testify about the -- the
19 crime is unavailable and unwilling to do so.
20 MR. FRIEDMAN: Well, it -- it would remain
21 for the Court to determine what the standards are for
22 proving --
23 JUSTICE SCALIA: Well, you wouldn't have to
24 prove beyond a reasonable doubt, would you?
25 MR. FRIEDMAN: I -- I wouldn't --

1 JUSTICE SCALIA: This is -- this
2 is a pretrial hearing on whether the -- the -- there's
3 been intimidation. Couldn't the judge just find it
4 more likely than not that the defendant has intimidated
5 a witness?
6 MR. FRIEDMAN: Prior decisions of the Court
7 suggest that that would most likely be the -- the
8 standard. It may be --
9 CHIEF JUSTICE ROBERTS: But the -- the judge
10 can't make that finding if the witness doesn't testify,
11 can he?
12 MR. FRIEDMAN: Oh, I think that -- that the
13 judge may well, and I think it would remain --
14 CHIEF JUSTICE ROBERTS: How's that? The
15 prosecutor goes in and says, we think the defendant has
16 intimidated the witness by saying he's not going to
17 support her financially, he's going to leave, whatever,
18 and -- and the -- presumably the -- the defendant says
19 no -- no, and the witness isn't there. The judge says,
20 well, I find by a preponderance of the evidence that he
21 has intimidated her?
22 MR. FRIEDMAN: I think it remains an open
23 question what the standards would be for -- for proof
24 and whether that would be constitutionally accepted.
25 This, of course, is a matter for -- for another day.

1 I think what the Court can't do is
2 effectively assume as a -- or create an irrebuttable
3 presumption that in all domestic violence cases, the --
4 the victim has been intimidated, which is what the
5 State asks, even though they acknowledge at the very
6 outset that there are many other reasons why -- why the
7 victim may not testify. The -- there's no domestic
8 violence exception for the confrontation right, just as
9 there's no organized crime exception for the
10 confrontation right.
11 So I do think that -- that what the
12 procedures are for forfeiture is -- is a big open
13 question. But -- but it's the State's burden to prove
14 forfeiture. It -- it can't be assumed as a per se
15 matter.
16 JUSTICE BREYER: Do you have a second choice
17 rule? I mean, we have Professor Amar, who has pretty
18 formal criteria.
19 MR. FRIEDMAN: Yes.
20 JUSTICE BREYER: We have the rule that you
21 just enunciated, and I don't want, before you sit down,
22 to -- I want to find out if you have an intermediate
23 position, a fall-back position.
24 MR. FRIEDMAN: Well, our -- our narrow rule
25 is -- is simply the -- an accusation to a law

1 enforcement officer. We -- we, of course, believe that
2 the more general test is reasonable expectation of the
3 declarant and that's where -- where I disagree with --
4 with Professor Amar. I don't know that he would -- I
5 don't know that he would disagree. I'd be surprised if
6 he would disagree that an accusation to a law
7 enforcement officer is -- is testimonial because --
8 because that is such a -- a narrow principle. Now --
9 now, he does speak about -- about formality, but
10 formality, for reasons I suggested, I don't think -- I
11 don't think makes an awful lot of sense because it then
12 gives the police officers and prosecutors an incentive
13 to take testimony informally.
14 And what we have then, as in this case, we
15 have not the affidavit, which -- which the State is
16 condemning as admissible. They now concede that that's
17 inadmissible. The evidence on which this prosecution
18 is based is a police officer's rendition of what he was
19 told orally, which is a denigrated form of -- form of
20 evidence. That's where a formality rule will -- will
21 get you.
22 CHIEF JUSTICE ROBERTS: Where -- where do you
23 come out on the person running out of the house and
24 yelling to her neighbor with the law enforcement
25 officer standing by?

1 MR. FRIEDMAN: And -- and --

2 CHIEF JUSTICE ROBERTS: It's not -- the

3 statement is not to the law enforcement officer, but he

4 or she overhears it.

5 MR. FRIEDMAN: If -- if the -- if the speaker

6 knows that the law enforcement officer is there --

7 CHIEF JUSTICE ROBERTS: Doesn't.

8 MR. FRIEDMAN: -- then -- then I -- then --

9 then it's not within the narrow categorical rule for which

10 we're -- we're asking now. It may come within the

11 general test of reasonable expectation.

12 CHIEF JUSTICE ROBERTS: Is anybody -- is

13 anybody working for the State a law enforcement

14 officer?

15 MR. FRIEDMAN: No, not -- not within the --

16 within the narrow categorical rule that we're asking.

17 I think it's another question if, say, you're speaking

18 to a -- a doctor who's an employee of the State

19 hospital --

20 JUSTICE SCALIA: Or a 911 operator who was an

21 agent of -- of the police.

22 MR. FRIEDMAN: A 911 operator is a direct

23 conduit to the police, and the police are a direct

24 conduit to the court.

25 And -- and that addresses your hypothetical,

1 Justice Scalia, about the -- the affidavit right to the
2 court. The person writes an affidavit right to the
3 court. Under -- under the theory presented by the
4 State under the resemblance theory -- let's take away
5 the -- the sworn part of the affidavit. It's just a
6 letter or -- or a message over the Internet or a
7 videotape. All of those would be allowed because
8 there's no formality, because there's no interrogation,
9 and that's a grotesque result --
10 JUSTICE KENNEDY: I'm not sure what -- what
11 sense it makes. Two cases. The woman runs out and --
12 and says, he -- he stabbed me and I'm dying, he's a
13 murderer. Case one, it's a -- a neighbor. Case two,
14 it's a police officer and she sees that he's a police
15 officer. Why -- why should there be a difference? It
16 doesn't make any sense to me.
17 MR. FRIEDMAN: Well, I'm -- I'm not saying
18 there necessarily should be a difference. I think -- I
19 think in the --
20 JUSTICE KENNEDY: Well, I thought your test
21 was if she knows that he's a police officer, it's
22 testimonial.
23 MR. FRIEDMAN: We're saying that is an easy
24 case. That's what Professor Mosteller called a dead
25 bang case where it's made to a police officer.

1 JUSTICE KENNEDY: Well, let me put it this
2 way. I don't know why one case is so easier than the
3 other.
4 MR. FRIEDMAN: I think it's an easier case
5 because the police officer is a direct conduit to the
6 -- to the machinery of -- of justice. When you're
7 speaking to a police officer, you know you're speaking
8 to the State.
9 If the Court has no further questions, I'll
10 reserve the balance of my time.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Fisher.
13 ORAL ARGUMENT OF THOMAS M. FISHER
14 ON BEHALF OF THE RESPONDENT
15 MR. FISHER: Mr. Chief Justice, and may it
16 please the Court:
17 Amy Hammon's oral statements to Officer
18 Mooney arose in an emergency situation very similar to
19 a 911 call, not in a situation where a detective was
20 attempting to subvert the judicial system by developing
21 evidence in secret with no intention of ever letting
22 the witness testify at trial.
23 JUSTICE SCALIA: She's sitting down at -- at
24 a table, as I recall it, with the -- with the police
25 officer on the other side of the table.

1 MR. FISHER: She may -- yes, I think.
2 JUSTICE SCALIA: Has a cup of coffee.
3 MR. FISHER: Well, I don't know about that.
4 She was in the living room.
5 JUSTICE SCALIA: I thought there was a cup of
6 coffee, too. Maybe -- I don't know where I got that
7 from. Maybe I made it up.
8 MR. FISHER: Well, what we know is that the
9 --
10 JUSTICE SCALIA: It didn't seem to me a
11 terribly emergency situation in -- in that kind of a
12 context.
13 MR. FISHER: I respectfully disagree, Your
14 Honor. We're talking about a woman who has -- has
15 stated that she has suffered a beating from her
16 husband, that -- a beating that may flare up at any
17 time if the officers withdraw, and the officer needs to
18 know what happened so that he can properly address the
19 situation.
20 JUSTICE SCALIA: At the time, the officer is
21 right there in the house. There's certainly no
22 emergency at the time. Now, you could say that -- that
23 the woman is frightened about a recurrence, but if --
24 if that's your definition of an emergency, it's going
25 to cover an awful lot of situations.

1 MR. FISHER: Well, I think it's -- the -- the
2 moment to consider is not just the moment when the
3 officers are present, but in fact, what would happen if
4 the officers were to do nothing, which is one of the
5 choices that, I suppose, the officers had. They could
6 find out what was going on and address the situation,
7 or they could withdraw, doing nothing, and then leave
8 Amy Hammon to her own devices in a highly explosive
9 situation.
10 They -- we don't know exactly what -- what
11 Officer Mooney said when he went back into the living
12 room, but what we know is that there was no apparent
13 interrogation of any type. We know that Amy Hammon at
14 that point told him the story of the argument that had
15 taken place and the resulting physical abuse.
16 Now, what we know from -- from the accusation
17 test that is put forth by -- by the petitioner is
18 that the reason that it doesn't apply apparently to all
19 statements to -- to police officers is that it must
20 somehow take account of the co-conspirator statement.
21 But we don't otherwise have any grounding of that test
22 in the history of the Confrontation Clause.
23 The test that we are proposing, the broader
24 test that we are proposing, the resemblance test, flows
25 directly from statements in Crawford suggesting

1 that the way that we know what is testimonial and what
2 is not is by examining the lessons of history. What
3 we're proposing is that in any particular context, if
4 the statement resembles one of those historical abuses
5 in the civil law tradition, then in that circumstance
6 it's testimonial. But if the --
7 JUSTICE SOUTER: Isn't -- isn't the problem,
8 though -- I mean, as Crawford said, those examples
9 defined the core. They were the paradigms, but they
10 didn't purport to cover the whole ground. And it seems
11 to me that your argument is to turn the core into the
12 exclusive examples, in which case the Confrontation
13 Clause in the real world is never going to apply.
14 MR. FISHER: Your Honor, I think the
15 important lesson from Crawford in that regard is -- is
16 the methodology, and the methodology was let's look at
17 history. What does history tell us the Founders were
18 concerned about? And the Court listed the specific
19 examples of affidavits, depositions, pretrial hearings,
20 and -- and expanded that even to include interrogation.
21 And in -- excuse me -- particular cases coming --
22 coming up, if there is evidence that -- that the
23 statements do correspond to historical abuses, even if
24 those abuses were not listed in Crawford, then that
25 would be a different situation. That would be testimonial.

1 JUSTICE SCALIA: Well, I'm not sure that that
2 was the only concern of the Founders, I mean, the --
3 the -- you know, the -- the fact that -- that the State
4 could corrupt the -- the statement through the
5 interrogation. I'm not sure that was the only concern.
6 I -- I think the Founders believed in a judicial
7 system, at least in criminal cases, where the person
8 has a right to cross examine his accuser. Whether the
9 fact that the -- I am -- I'll put it this way.
10 I am quite sure that it would have been held
11 a violation of the Confrontation Clause if, as the
12 prior example I gave, someone wrote out an affidavit
13 and sent it directly to the court, no intervening
14 police interrogation at all, just wrote out an
15 affidavit from -- from France, mailed it to the court,
16 and the court has this affidavit. I am sure that would
17 be a smack-bang violation of the Confrontation Clause.
18 And there's none of the -- the abuse that -- on -- on
19 which you -- you would hinge the entirety of the
20 violation.
21 MR. FISHER: Well, except that we do know
22 that -- that affidavits, I agree, would have been
23 prohibited, and that's one of the classic forms of
24 testimony, indeed, that was enumerated in Crawford and
25 that was kept out at the founding. And that falls into

1 a very well-defined category.

2 JUSTICE KENNEDY: But one of the reasons for

3 that is -- let's assume you had a completely honest

4 police officer. You may have a motive on the part of

5 the witness to frame the defendant. I mean, that's

6 another reason.

7 MR. FISHER: Well, I think it ostensibly

8 could be. I think what we know, though, looking back

9 at what -- at the -- at the Raleigh trial and at -- at

10 the -- at the trials even in the colonial period, was

11 that the Founders were concerned about abuses by the

12 State, in -- in particular, in interrogations and in

13 eliciting these affidavits and in using pretrial

14 testimony.

15 JUSTICE KENNEDY: But I'm suggesting to you

16 that it often happens that there are false charges made

17 that the -- that the police believe to be true.

18 MR. FISHER: The false charges scenario is --

19 JUSTICE KENNEDY: And this is fully

20 consistent with prohibiting testimonial statements.

21 MR. FISHER: Again, I think what Crawford was

22 talking about, in terms of trying to understand the

23 Confrontation Clause, was not simply to hypothesize

24 various problems that different types of evidence could

25 present if it weren't cross examined, but instead to

1 examine more particularly what the Founders were
2 concerned about. And that was not one of the -- of the
3 categories simply --
4 JUSTICE STEVENS: May I ask this, Mr. Fisher?
5 What is your answer to Justice Scalia's hypothetical,
6 an entirely volunteered affidavit by the accuser? Is
7 that admissible or not?
8 MR. FISHER: I think that -- well, certainly
9 it's testimonial, and so --
10 JUSTICE STEVENS: So that would be prohibited
11 by the Confrontation Clause. Yet, that was clearly not
12 an example that would fall within the Marian practice.
13 MR. FISHER: Well, whether it would have come
14 in --
15 JUSTICE STEVENS: I mean, it doesn't resemble
16 it is what I'm saying.
17 MR. FISHER: Whether it would have been a
18 problem under the Marian practice I think is only part
19 of the story. And certainly Crawford recognized that
20 affidavits as a category were part of the -- of the
21 tradition that led to the abuses that the Founders were
22 concerned about. So Marian is, again, part of the
23 story but not necessarily the whole thing.
24 Now, when we articulate this resemblance --
25 JUSTICE SCALIA: Before you leave that,

1 surely the affidavit isn't -- isn't what's magical. I
2 mean, I'm going to change my hypothetical. The person
3 recites his accusation on a tape recorder and mails the
4 tape to the court. Now, are you going to say, well,
5 it's not an affidavit? You'd exclude that as well,
6 wouldn't you?
7 MR. FISHER: Well, I -- I don't know that I
8 would because, again, you've got the -- you've got the
9 form that Crawford was concerned about. The affidavit
10 is the classic form.
11 JUSTICE SCALIA: That would make no sense at
12 all. I mean, that -- that is just the worst sort of
13 formalism. If you do it in an affidavit, it's -- it's
14 bad, but if you put it on a tape, it's -- it's good. I
15 -- I cannot understand any reason for that.
16 MR. FISHER: Well, I don't know that the
17 analysis has to end there. I think, for example, there
18 were other circumstances where other types of
19 communications were problematic. In -- in Raleigh's
20 trial, for example, Cobham had submitted a letter, and
21 that was recited as part of the -- the concern. Now,
22 if the Court were to determine that a recording of that
23 sort was similar enough, it resembled enough that sort
24 of abuse, then yes, it could be testimonial.
25 JUSTICE STEVENS: Mr. Fisher, let me again be

1 sure I understand your position. Would the unsworn
2 letter that Justice Scalia describes be admissible or
3 inadmissible under your view?
4 MR. FISHER: I think that there is evidence
5 historically that a letter would be testimonial,
6 certainly coming out of Cobham's case and -- and other
7 circumstances.
8 JUSTICE STEVENS: So then you don't rely on
9 the affidavit point.
10 MR. FISHER: Well, I think it's -- it's a
11 matter of what -- what is covered, what is mentioned in
12 history. Affidavit is one of those -- those
13 categories. Letters, in particular, in Raleigh's trial
14 was another area that may have been problematic. And I
15 think --
16 JUSTICE SOUTER: If that's your criterion,
17 are you going to draw the distinction between the
18 letter and the tape recording?
19 MR. FISHER: Well, I think that that is the
20 -- whether we have the resemblance test doesn't require
21 us to answer that question because I think that the
22 examination the Court would undertake would again --
23 JUSTICE SOUTER: Well, let's answer it. Is
24 -- is the tape recording like the letter so that it --
25 it's inadmissible?

1 MR. FISHER: I think it's -- I think it is
2 very similar to the letter and -- and could well be
3 inadmissible, but I don't know that it's -- if the
4 Court adheres to the test that it set forth in
5 Crawford, that it's looking for forms of testimony that
6 were prohibited at common law, certainly that would not
7 have been one of them.
8 CHIEF JUSTICE ROBERTS: A videotape -- a
9 videotape of a crime scene is admissible. Right?
10 MR. FISHER: I think that's -- that's right.
11 Now, if it's -- if you have a videotape of someone
12 that -- that's responding to an interrogation, that's
13 an entirely different thing.
14 CHIEF JUSTICE ROBERTS: No.
15 MR. FISHER: But a videotape of a crime scene
16 again would be -- would be not testimonial.
17 CHIEF JUSTICE ROBERTS: But a tape recording
18 by the same person who videotaped the crime scene,
19 describing what he saw, you agree would be excluded.
20 MR. FISHER: I think that there's a high
21 chance that could be -- be excluded.
22 JUSTICE BREYER: So what's the test?
23 MR. FISHER: It's the resemblance test, and
24 the question --
25 JUSTICE BREYER: Resemblance to?

1 MR. FISHER: To the historical abuses that
2 the Founders were trying to address. And the --
3 JUSTICE BREYER: Which were?
4 MR. FISHER: Well, which were in particular,
5 we know, affidavits. We also know something about
6 letters, and the question with the tape recording is,
7 is it enough like, does it resemble those enough?
8 JUSTICE GINSBURG: Do you accept the
9 Government's --
10 JUSTICE STEVENS: I think the problem with
11 the examples is that none of these are abuses. As I
12 see it, the examples of the tape recording mailed in
13 and the volunteer statement, I don't see how you can
14 call those abuses.
15 MR. FISHER: Well, I think the abuse comes
16 not simply in how they were created, but -- but then in
17 how they were later used. And -- and again, we're
18 talking about trying to -- to craft a rule in part that
19 has some bright lines to it based on -- on just what
20 was -- what forms were not used --
21 JUSTICE GINSBURG: Why isn't the -- the
22 bright line that the Government asserts that this is a
23 crime made in an urgent situation, when one doesn't --
24 the declarant doesn't think rationally will this be
25 used eventually in a trial, where the declarant wants

1 to stop an imminent threat?

2 MR. FISHER: I certainly think that that

3 follows from the -- the overall test we propose.

4 JUSTICE GINSBURG: But that's a different

5 test than the resemblance test that you're proposing.

6 MR. FISHER: Our position is it's a corollary

7 to it. And certainly it's a narrower test and applies,

8 I think, here in -- in both cases to that, and it

9 provides the opportunity resolve both cases on the

10 notion that when the officers were at the scene, they

11 were in no way behaving like inquisitors. They showed

12 up. They were -- they could -- they were in the middle

13 of -- of an abusive situation that could explode at any

14 time, and they needed to know what -- what was going on

15 in order to diffuse the situation. So this case could

16 be resolved on that -- on a much narrower ground.

17 It's -- it's important here also to -- to

18 recognize that what the -- what the prosecution did has

19 no -- no similarity to what would happen at the common

20 law. We have here the government issuing a subpoena to

21 Amy Hammon to come and testify and, obviously, showing

22 that they would have preferred the live testimony in

23 this case.

24 JUSTICE GINSBURG: Was there -- was there any

25 showing at all of whether they made the police -- or

1 the prosecutor made any effort to enforce the subpoena?

2 MR. FISHER: There was no such effort, Your

3 Honor. But, well, here, if I may be permitted to go

4 beyond the record just a little bit, what we -- what we

5 do know is that the case was continued one time because

6 Amy Hammon did not show up in response to a subpoena,

7 and that the second time, the -- the trial proceeded.

8 But there was no effort to send someone out to -- to

9 enforce it or to bring any sort of contempt sanction.

10 JUSTICE SCALIA: Well, let's assume your --

11 you have here a woman who's sitting down in the kitchen

12 with the police officer, talks to the police officer,

13 and then signs an affidavit. Did she sign the

14 affidavit at that time?

15 MR. FISHER: That's right, yes.

16 JUSTICE SCALIA: And that affidavit was not

17 admissible because it's an affidavit.

18 MR. FISHER: Correct.

19 JUSTICE SCALIA: But the police officer who

20 testified to what she said and what he wrote down in

21 the affidavit that she signed, that does get in.

22 MR. FISHER: Correct.

23 JUSTICE SCALIA: I -- I can't see why that

24 makes any sense at all. I mean, she -- she was either

25 testifying when she spoke and then signed the

1 affidavit, as evidence of her testimony, or -- or else
2 she wasn't testifying, in which case both the affidavit
3 and the oral statement should be in. I can't -- I
4 can't see drawing the line between those two. It
5 really seems very strange to me.
6 MR. FISHER: Well, I think whether you look
7 at it from her perspective or from the officer's
8 perspective, that something did change in the moment
9 between the oral statement and the affidavit.
10 If you look at it from -- from the officer's
11 perspective, once Amy Hammon disclosed to him what had
12 happened and -- and gave him information that he needed
13 to handle the situation, then he could go about
14 handling the situation. He didn't need the affidavit
15 to do that. Once he turned to get the affidavit, he --
16 he was transitioning to -- less from an emergency mode
17 and more to an evidence-gathering mode.
18 If you're -- if you are looking at it from
19 the standpoint of Amy Hammon, then at that point, when
20 -- when Officer Mooney is -- is in the house and has
21 her husband, you know, in another room and she's trying
22 to just describe what's going on so that she can be
23 protected, that's a far different mind set.
24 CHIEF JUSTICE ROBERTS: Well, but it's a --
25 it's a classic mixed motive case. We don't know when

1 the officer is sitting down with her and asking the
2 questions, whether his primary motive is to make sure
3 the guy doesn't come back or if his primary motive is
4 to help make the case against the guy. It's both.
5 MR. FISHER: Well, I think it's reasonable to
6 assume that officers, faced with an emergency
7 situation, are primarily going to be working for --
8 from a concern of safety, for their own and for others.
9 And so even if it is a mixed motive, I think that the
10 point is that particular circumstance, it's reasonable
11 to infer where there's an emergency -- ongoing
12 emergency, an ongoing immediate safety concern, that
13 safety and security are going to be the primary motive.
14 JUSTICE SCALIA: Why does his motive matter?
15 I mean, the -- the issue is whether she is testifying,
16 whether she is a witness, and I don't see how that
17 changes when she tells him these things orally and when
18 she signs the affidavit afterwards. It seems to me
19 she's testifying as to what events had occurred.
20 MR. FISHER: Well, let me be clear that we're
21 not suggesting a subjective inquiry into the officer's
22 motive, but what we are saying is that whether a
23 statement is testimonial depends on whether the
24 government is -- is purely collecting evidence, making
25 someone undergo an interrogation, for example, or

1 whether they are performing tasks that really were not
2 part of -- of any type of police function at the
3 founding, which is sort of a community caretaking,
4 public safety function, so that by definition in
5 eliciting statements concerning the immediate safety
6 issue, the police officer could not have been engaged
7 in the kinds of abuses that gave rise --
8 JUSTICE BREYER: All right. This is helpful,
9 very helpful to me, but I'm trying to see what you're
10 driving at. I'm imagining the woman saying, he's
11 hitting me, he's just hit me. She's in tears. That's
12 excited utterance. Not. Then suddenly the officer, 5
13 minutes later, says I've heard what you said. Let's
14 reduce it to writing. Here's the formal affidavit, et
15 cetera, that is -- but to prevent Mr. Friedman's
16 problem, we're going to have to say as to the second,
17 that is even if you don't have the formality, you see,
18 everything is the same, but not the formality. Now,
19 how do we do that?
20 MR. FISHER: I'm not sure if I'm following.
21 Not formality --
22 JUSTICE BREYER: I'm making the distinction
23 you're making between she's in tears, excited utterance
24 or res gestae, around there, just what you were talking
25 about. Now think of the second affidavit -- when he

1 reduces it to writing. That's different, calmer,
2 clearly motive to testify, et cetera. Fine. But now
3 what Mr. Friedman pointed out is if we make it turn
4 solely on the formality, the piece of paper, the stamp,
5 et cetera, they'll just avoid that. So we're going to
6 have to sweep into the second the circumstance where
7 everything is the same but the formality, and that's
8 where I have the difficulty.
9 MR. FISHER: Well, again, the -- the
10 difficult task of understanding the Confrontation
11 Clause is to figure out what limits there might be, and
12 -- and in Crawford, the methodology was what does
13 history tell us the Framers were concerned about. And
14 certainly the formal affidavit was something that they
15 were very concerned about. The less formal forms they
16 were not.
17 And certainly when it comes to something as
18 -- as recent, you know, relatively speaking, as -- as
19 the community caretaking function of the police, that
20 was in no way part of -- of the abuses that the Framers
21 were concerned about. And so I think even if the Court
22 were to limit its decision to that part of the test,
23 resolving the other instances, according to the
24 resemblance test or -- or trying to figure out where to
25 draw that -- you know, that line, could come later,

1 consistent with its decision in this case.

2 JUSTICE SOUTER: But your answer, I take it,

3 assumes that the Framers had no concern with the

4 capacity of the court to test the -- the validity or

5 the truth of the statement.

6 MR. FISHER: Well, I'm not entirely sure if

7 that's the case. I mean, I -- of course, they were

8 operating in a -- in a circumstance where -- where

9 hearsay rules were -- were part of trial process.

10 Certainly also, to the extent that -- that a particular

11 procedure is -- is outrageous, the -- a due process

12 concern might arise, but --

13 JUSTICE SOUTER: Well, but -- no. But I'm --

14 I'm not talking about outrageous circumstances in which

15 the -- the statement was taken. I'm talking about the

16 capacity of the court, by whatever means, to test the

17 truth of that statement once it is placed before the

18 court. And I understood your argument to Justice

19 Breyer to assume that that testing function was not

20 within the contemplation of the Framers.

21 MR. FISHER: I think it was with respect to

22 -- to the abuses that -- testimony elicited through the

23 abuses that gave rise to the clause, the -- the common

24 -- or I'm sorry -- the civil law type abuses. They did

25 want to test that, but the concern --

1 JUSTICE SOUTER: So that your -- your -- you
2 would then say they want a -- they want to test certain
3 -- in certain cases where they think there may have
4 been an abuse in the elicitation of the statement, but
5 if there is -- there is no reason to suspect that the
6 statement was taken under untoward circumstances, they
7 were not concerned to test its validity.
8 MR. FISHER: I think that -- that that's
9 largely accurate, but they were dealing with, I think,
10 a rather set form.
11 JUSTICE SOUTER: But is that your position?
12 MR. FISHER: Well, yes, but -- but if I may
13 add a clarification, which is to say, the reason I
14 think that we could circumscribe affidavits, regardless
15 of whether the elicitation abuses are present, is
16 simply for ease of administration, that abuses known to
17 the Framers would have been arising in a circumstance
18 where there would have been those abuses, and -- and as
19 a form --
20 JUSTICE SOUTER: Don't -- don't you think the
21 Framers were aware of the fact that although there were
22 law enforcement abuses, Raleigh's case and so on, there
23 were also abuses every day of the week on the part of
24 people who gave false testimony because they had
25 grudges against the defendant? Do you think that was

1 totally out of the minds of the Framers so as to
2 support the distinction that -- that as a general rule
3 you were suggesting?
4 MR. FISHER: We don't know exactly all of the
5 details that would have -- that they were
6 contemplating.
7 JUSTICE SOUTER: But why would -- why would
8 we impute that -- that unconcern to the Framers about
9 the -- the need to test statements which may very well
10 have -- have been given because of envy, grudge, and so
11 on?
12 MR. FISHER: Because of -- of what we do know
13 and what Crawford said that we do know, which is that
14 we know that they were responding to things like
15 Raleigh's trial and to Stamp Act, you know,
16 enforcement, other --
17 JUSTICE SOUTER: Well, but doesn't -- doesn't
18 that get us back to the fact that those examples were
19 given in Crawford as paradigm examples, if, you know,
20 those were -- I think the word poor was used. But --
21 but Crawford was not limited to that, and if it's not
22 limited to that, why, in effect, does the -- does the
23 -- should we conclude that the concern of the clause
24 stops short of the self-interested witness even though
25 he didn't make an affidavit?

1 MR. FISHER: Again, if I may be permitted to
2 finish. The methodology -- the methodology of Crawford
3 is to look for known circumstances of abuse, about
4 which the Framers were concerned, and we don't have
5 that sort of historical evidence more generally.
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Gornstein.
8 ORAL ARGUMENT OF IRVING L. GORNSTEIN
9 ON BEHALF OF THE UNITED STATES,
10 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT
11 MR. GORNSTEIN: Mr. Chief Justice, and may it
12 please the Court:
13 We are asking the Court to apply the same
14 standard to statements made to officers at the scene as
15 to statements made during a 911 call. If the statement
16 is made in response to police questions that are
17 reasonably necessary to determine whether an emergency
18 exists --
19 JUSTICE STEVENS: May I ask, under your view,
20 was the affidavit admissible?
21 MR. GORNSTEIN: The affidavit is not
22 admissible.
23 JUSTICE STEVENS: Why not?
24 MR. GORNSTEIN: The affidavit is -- is not
25 admissible because, by that point, the officer had the

1 information that he needed to resolve the emergency,
2 and what he was soliciting at that point --
3 JUSTICE STEVENS: I would suggest the reason
4 it was not admissible is it's very clear that the
5 affidavit is the testimonial statement by a witness
6 that the defendant had a right to confront. The
7 constitutional right is the right to confront the
8 witnesses against him.
9 MR. GORNSTEIN: I was just getting to that,
10 Justice Stevens --
11 JUSTICE STEVENS: Oh.
12 MR. GORNSTEIN: -- that the -- the emergency
13 was resolved, and at that point, he was --
14 JUSTICE STEVENS: But you say if the officer
15 independently repeats what is said in the affidavit,
16 then he's the witness against rather than the --
17 MR. GORNSTEIN: No, not -- no. He's -- he's
18 not -- if he was repeating what was said in the
19 affidavit, that's a different point. He's repeating
20 the statement that was made before the affidavit was
21 given. That was at a point at which the -- there was
22 still an immediate danger and that he was asking a
23 question that was reasonably necessary to determine
24 whether that danger existed and, if so, how to resolve
25 it.

1 JUSTICE SCALIA: What was the immediate
2 danger?
3 MR. GORNSTEIN: When -- the immediate danger
4 was --
5 JUSTICE SCALIA: I mean, there's the
6 policeman in the room across the kitchen table from --
7 from the woman.
8 MR. GORNSTEIN: The --
9 JUSTICE SCALIA: He's not on the end of a
10 phone line. He's in the room across the kitchen table.
11 MR. GORNSTEIN: That's correct. And -- and
12 the problem here is what the danger was what would
13 happen if the officers left. When -- when the officer
14 came in and saw a frightened Ms. Hammon, he saw
15 wreckage on the floor, he had reason to be concerned
16 that there was a very recent attack on her and that if
17 he left the scene, that attack would be renewed.
18 Asking Ms. Hammon what happened was reasonably
19 necessary to determine whether that emergency existed
20 and, if so, how to resolve it.
21 Now, once he had that information, he had
22 what he needed to resolve the emergency, and at that --
23 JUSTICE ALITO: In a situation like that,
24 what was needed to resolve the situation, if he
25 believed what Mrs. Hammon said, was to arrest Mr.

1 Hammon. Right?

2 MR. GORNSTEIN: That's correct.

3 JUSTICE ALITO: So he could -- you think he

4 could gather as much evidence as was necessary to

5 arrest Mr. Hammon.

6 MR. GORNSTEIN: I do not. At some --

7 JUSTICE ALITO: Why -- why not? Why doesn't

8 that follow?

9 MR. GORNSTEIN: Well, at some point, what --

10 what turns into emergency resolution moves over into

11 interrogation, and once you reach interrogation, then

12 you have reached the core of what Crawford talks about

13 --

14 JUSTICE GINSBURG: How do we know when that

15 line is crossed? You said reasonably necessary to

16 protect safety. That's okay. Interrogation is not

17 good. But how -- how does one tell when one stops and

18 the other starts?

19 MR. GORNSTEIN: I -- I think this is going to

20 be a line-drawing question, but when you have a

21 situation like this one where you have an officer who's

22 just on the scene in the immediate wake of a -- of a

23 domestic dispute, he asks a single question, what

24 happened, in -- in circumstances in which he needed to

25 know the answer to that question to make sure he could

1 leave and leave her there safely. That's not
2 interrogation. If he sat around for a half hour with a
3 back-and-forth and give-and-take and trying to press
4 and get to the situation in that kind of back-and-
5 forth, that would be interrogation colloquially. And
6 it's -- it's that kind of line that the Court is going
7 to need to draw.
8 JUSTICE BREYER: Why? Because he might be
9 interrogating with no idea at all primarily in his mind
10 of later court appearance. He wants to find out if
11 there are guns in the house. He wants to find out if
12 there are other people in the house. He wants to find
13 out if somebody is being held captive. He wants to
14 find out if these are the same people who did some
15 other crime that's immediately taking place, what's the
16 relationship. There are all kinds of interrogation.
17 You're saying that all that interrogation by a
18 policeman can't come in under the Confrontation Clause.
19 MR. GORNSTEIN: The Confrontation Clause bars
20 under Crawford police interrogation. And the -- the
21 situation is one in which we are not going to be able
22 to examine the individual motives of officers in every
23 case and individual declarants in every case.
24 What we are looking for is a categorical rule
25 that is going to capture the likely motivations in both

1 cases, and when you have emergency question, you're
2 likely dealing with the situation with -- both from the
3 officer's side and from the declarant's side, you're
4 going to be having people attempting to resolve an
5 immediate danger of harm. And you get --
6 JUSTICE SCALIA: That -- that assumes -- this
7 -- your -- your focus on whether the -- you know, the
8 -- it's an interrogation or not -- it -- it assumes
9 that the only focus of the Confrontation Clause is on
10 prosecutorial abuse somehow. And -- and as -- as
11 Justice Souter was suggesting, I don't think that was
12 the exclusive --
13 MR. GORNSTEIN: No, we don't -- we don't
14 think that's the exclusive focus either, and we think
15 interrogation can capture both, too, that when you get
16 to the point of interrogation, what's happening with
17 the witness is getting an increasing understanding that
18 what this is being sought for is to build a case.
19 I think the biggest problem with the -- the
20 two rules that are proposed on the other side, that is,
21 the accusation rule and the reasonable anticipation
22 rule, is it captures within a -- these emergency
23 statements that really don't have -- fall within any
24 ordinary understanding of what testimony is. If I go
25 to my house and it's late at night, I hear suspicious

1 noises, and I see somebody and get a partial
2 description of him, and I call 911, I'm seeking to
3 avert an immediate danger to myself. I don't think
4 under any stretch of the imagination anybody would
5 refer to that as testimony. Yet, under his rule --
6 CHIEF JUSTICE ROBERTS: Of course, the Sixth
7 Amendment doesn't use the word testimony, does it?
8 MR. GORNSTEIN: No, it does not. But what
9 the Court said in Crawford was that the term witness
10 was referring to -- that people can make testimonial
11 statements --
12 CHIEF JUSTICE ROBERTS: And maybe that -- and
13 maybe you're not a witness when you make the call, but
14 when that same call is admitted into court, then --
15 then it strikes me that you are a witness.
16 MR. GORNSTEIN: But -- but that's not the
17 definition of witness that -- that Crawford adopted.
18 That would be --
19 JUSTICE SCALIA: As it happens in the other
20 -- in the companion case today, the prosecution itself,
21 in its summation to the jury, referred to the 911 call
22 and said, you have heard the testimony of -- of the
23 victim and referred to it as testimony.
24 MR. GORNSTEIN: Justice Scalia, if he --
25 JUSTICE SCALIA: I mean, it's not beyond the

1 pale to consider this testimony.

2 MR. GORNSTEIN: -- if -- if he -- he had made

3 a statement about a co-conspirator's statement during

4 the course of the conspiracy and he had said, we have

5 here the testimony of the -- his co-conspirator, that

6 would not make it testimony. And if the -- the 911

7 call --

8 JUSTICE SCALIA: No, but it would prove that

9 -- that it's not beyond the pale to call it testimony.

10 MR. GORNSTEIN: Well, it just does not make

11 it testimony. And if it -- the prosecutor in the 911

12 case had said, I don't have her testimony, I have

13 something better, it's a 911 call --

14 JUSTICE STEVENS: Mr. Gornstein?

15 MR. GORNSTEIN: -- of a cry for help, that

16 wouldn't make it not testimony. And I don't think --

17 JUSTICE STEVENS: Mr. Gornstein, is this a

18 fair summary of your position, if I may? We're really

19 asking who's the witness that's being testified

20 against, and when it's the affidavit, it's clearly the

21 woman that's a witness there where it's inadmissible.

22 But your view, as I understand you, is when it's the

23 officer who is the witness, he's subject to cross

24 examination, and as long as the emergency continues and

25 he's describing what happened during the emergency,

1 he's still the witness. That's what you're saying, I
2 think.
3 MR. GORNSTEIN: He's -- he's still a --
4 JUSTICE STEVENS: He's still the witness
5 we're concerned about.
6 MR. GORNSTEIN: He is the witness --
7 JUSTICE STEVENS: Therefore, he's subject to
8 cross examination.
9 MR. GORNSTEIN: He's the -- he's the -- he is
10 subject to cross examination.
11 JUSTICE STEVENS: And so during the emergency
12 period, he can repeat what she said.
13 MR. GORNSTEIN: But I -- what I'm saying is
14 that she's not a witness during the emergency period
15 itself.
16 JUSTICE STEVENS: I understand what you're
17 saying.
18 MR. GORNSTEIN: It has to be both.
19 JUSTICE STEVENS: That we focus not on
20 whether it's testimony but whether he's the witness at
21 the critical time or whether she's the witness.
22 MR. GORNSTEIN: I -- I think that that's one
23 way of looking at it, Justice Stevens, but --
24 CHIEF JUSTICE ROBERTS: That's not the way
25 the Court looked at it in Crawford.

1 MR. GORNSTEIN: No. I -- I think that what
2 you would look to see is if, at the relevant time, that
3 -- that the declarant was acting as a witness. And at
4 the relevant time, when somebody is answering a
5 question to avert an immediate danger, they're not
6 acting as a witness. They're not making a solemn
7 declaration for the purpose of proving facts to support
8 a prosecution, and so they're not acting as a witness
9 in those circumstances.
10 And -- and it's only later, when the officer
11 turns to soliciting from Ms. Hammon an affidavit, that
12 what he's soliciting at that point is a solemn
13 declaration made for the purpose of proving facts to
14 support a prosecution. Now, that's testimony.
15 JUSTICE SCALIA: I'm not sure that the two
16 were -- were as separated as you -- as you claim. I --
17 I took it that the affidavit -- while he was getting
18 the oral responses, he was writing down what -- what
19 would be put in the affidavit.
20 MR. GORNSTEIN: I don't think that there's
21 any evidence in the record to support that, Justice
22 Scalia. That -- that -- what happened is that he took
23 -- that he listened to her oral statement and then he
24 proceeded to ask for -- her for an affidavit, after he
25 had the information that he needed to resolve the

1 emergency, was to figure out how he was going to
2 protect this person from an immediate renewed attack if
3 he left the scene.
4 JUSTICE STEVENS: But under your test, the
5 whole question is whether the emergency continued at
6 the time the witness' words are being repeated.
7 MR. GORNSTEIN: It's not the whole question
8 because if the statement -- the question has nothing to
9 do with and the answer had nothing to do with the
10 emergency. It does not come in under the rule we're
11 talking about.
12 JUSTICE STEVENS: No, I'm not arguing that.
13 I'm trying to figure out -- I think I have a little
14 different angle on it than you actually said in your
15 brief or actually in the text of Crawford. Of course,
16 Crawford wasn't confronting this problem. It described
17 everything as testimonial, but the real question is
18 who's the witness under the text of the Constitution.
19 MR. GORNSTEIN: Well, Justice Stevens, I'm --
20 JUSTICE STEVENS: And I think your argument
21 is --
22 MR. GORNSTEIN: -- I'm happy to have your
23 approach if it -- if it leads to five votes in this
24 case.
25 JUSTICE STEVENS: I think I'm trying to help

1 you.

2 (Laughter.)

3 JUSTICE STEVENS: I know it didn't start out

4 that way, but it seems to me I'm helping your side of

5 it. Yes.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.

7 Gornstein.

8 Mr. Friedman, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF RICHARD D. FRIEDMAN

10 ON BEHALF OF THE PETITIONER

11 MR. FRIEDMAN: I -- I think that whenever

12 there is a -- an out-of-court accusation repeated,

13 there is a witness in court, but that is not the

14 witness that -- or that doesn't satisfy the

15 confrontation right because there's the -- the --

16 JUSTICE STEVENS: No, but you would agree

17 that the officer could testify to some of the things

18 that happened during the emergency, and he's a witness

19 to that extent.

20 MR. FRIEDMAN: Yes, absolutely, the officer

21 was --

22 JUSTICE STEVENS: And the question is whether

23 he can cover this as well.

24 MR. FRIEDMAN: That's -- that, of course, is

25 the -- that -- that's the question. But -- but she was

1 acting as a -- a witness when -- when she made the

2 accusation to -- to the officer, and characterizing it

3 as an emergency I don't think helps anything in -- in

4 this case.

5 The -- the fact is that if we extend the

6 emergency this far it shows -- well, it shows just how

7 capable of expansion the -- the theory is because there

8 is an officer with her and there is an officer with --

9 with him. So the -- the only question is should the

10 officers leave. That means that whenever there's --

11 there's a victim potentially at large there, the

12 confrontation right wouldn't -- wouldn't apply.

13 The -- the whole emergency doctrine really

14 distorts incentives because a -- a police officer who

15 has a -- a dual motive of creating -- of protecting

16 people, protecting the safety of -- of people and

17 gathering evidence -- and I think it's clear that they

18 do -- under an emergency doctrine, would have an

19 incentive to preserve the emergency or the appearance

20 of emergency for -- for as long as -- for as long as

21 possible. And I -- I think the -- the State encourages

22 people to call, which of course they should do, but in

23 part the reason why people are encouraged to call is to

24 -- is to create -- is to pass on -- is to pass on

25 evidence.

1 So I don't think that even if -- even to the
2 extent that the call is a -- a cry for help, well, the
3 help is -- is seeking invitation of the -- of the legal
4 system. In the Davis case, of course, it was an
5 arrest.
6 In -- in this case, the -- the statement was
7 not a cry for help. It was in response to the second
8 inquiry by the police officer. The police officer was
9 -- was pressing. And -- and I -- I think the -- the
10 emergency doctrine simply -- simply can't -- if -- if
11 there were an emergency doctrine, I think it's just
12 badly founded and couldn't apply here.
13 If it please the Court, I believe Crawford
14 has brought us to a remarkable crossroads. If the
15 accusation in this case is allowed to secure a
16 conviction without the State providing an opportunity
17 for confrontation, then the Confrontation Clause will
18 be little more than a charade, easily evated by State
19 officers gathering evidence. But if the Court
20 proclaims that a conviction cannot be based on an
21 accusation made privately to a known police officer,
22 then it will take a long step to ensure that the
23 confrontation right remains robust, as the Framers
24 intended for centuries to come.
25 JUSTICE BREYER: What about the resemblance

1 idea to get around your problem? Of course, it's not
2 purely formal. It's purely formal, plus those things
3 that resemble what's purely formal.
4 MR. FRIEDMAN: I'm not sure I quite
5 understand.
6 JUSTICE BREYER: Listen -- it's purely the formal
7 criteria, plus anything that's the same. Now, same is
8 vague, but it's no vaguer than a lot of other things
9 floating around here today.
10 MR. FRIEDMAN: Well --
11 JUSTICE BREYER: So what do you think of
12 that?
13 MR. FRIEDMAN: I -- I -- not much, Your
14 Honor.
15 (Laughter.)
16 MR. FRIEDMAN: I -- I don't think an
17 accusation to a known law enforcement officer is
18 awfully vague. Any legal term will have some -- some
19 vagueness around the edges, but I don't think there's
20 much.
21 Resemblance is awfully vague. I think what
22 happened here resembled the inquisitorial practices in
23 the key -- in the key -- in a key respect. And I don't
24 think the test Your Honor is proposing handles the
25 message over the Internet or -- or a letter, the -- the

1 tape made at the initiative of the -- of the witness.
2 I think it -- it utterly fails to get that because the
3 -- the prosecutors aren't involved. But clearly the
4 Confrontation Clause was written against the backdrop
5 of private prosecution, the system of private
6 prosecution. So it has to get those clauses.
7 I -- I think that this case can be resolved
8 on those very narrow grounds without trying to
9 establish the broad, general meaning of the
10 Confrontation Clause. I'm -- I'm hoping that the Court
11 is building a framework for hundreds of years to -- to
12 come, and I think it's more important that it be built
13 right than that it be built quickly. And so I think an
14 important first step is to say an accusation to a known
15 police officer, whatever else is testimonial, that
16 clearly must be.
17 If there are no further questions, I'm
18 pleased to submit the case.
19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.
21 (Whereupon, at 12:05 p.m., the case in the
22 above-entitled matter was submitted.)
23
24
25