1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - -X

3 ADRIAN MARTELL DAVIS, :

4 Petitioner :

5 v. : No. 05-5224

6 WASHINGTON. :

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 10:02 a.m.

13 APPEARANCES:

14 JEFFREY L. FISHER, ESQ., Seattle, Washington; on behalf

15 of the Petitioner.

16 JAMES M. WHISMAN, ESQ., Senior Deputy Prosecuting

17 Attorney, Seattle, Washington; on behalf of the

18 Respondent.

19 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

20 Department of Justice, Washington, D.C.; on behalf

21 of the United States, as amicus curiae, supporting

22 the Respondent.

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 JEFFREY L. FISHER, ESQ.

4 On behalf of the Petitioner 3

5 JAMES M. WHISMAN, ESQ.

6 On behalf of the Respondent 28

7 MICHAEL R. DREEBEN, ESQ.

8 On behalf of the United States,

9 as amicus curiae, supporting the Respondent 43

10 REBUTTAL ARGUMENT OF

11 JEFFREY L. FISHER, ESQ.

12 On behalf of the Petitioner 56

13

14

15

16

17

18

19

20

21

22

23

24

25

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

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first today in Davis v. Washington.

5 Mr. Fisher.

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF THE PETITIONER

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

9 please the Court:

10 Michelle McCottry's statements here were

11 testimonial for the simple reason that she knowingly

12 told a governmental agent associated with law

13 enforcement that someone had committed a crime.

14 Prosecutions based on such ex parte statements in place

15 of live testimony strike at the very heart of the evil

16 the Confrontation Clause is designed to prevent:

17 trials on the basis of out-of-court accusations.

18 Indeed, the trial here really can't be

19 described as anything other than inquisitorial in

20 nature. The sole proof that Mr. Davis was at Ms.

21 McCottry's house and assaulted her that day was the 4-

22 minute, tape-recorded 911 police incident interview

23 that the State played at Mr. Davis' trial and that it

24 itself described as Ms. McCottry's testimony on the day

25 this happened.

1 JUSTICE GINSBURG: Counsel, when you say --
2 JUSTICE KENNEDY: How does the fact that it's
3 sole proof mean that it's testimonial?
4 MR. FISHER: It --
5 JUSTICE KENNEDY: I -- it -- it adds to the
6 general appeal of your case I -- I suppose, but what
7 does that have to do with whether or not it's
8 testimonial?
9 MR. FISHER: It doesn't -- it doesn't answer
10 one way or another whether it's testimonial. What it
11 does and what I'm trying to do for this Court is,
12 first, draw back the lens for a moment and look at the
13 kind of trial that we end up with when statements of
14 the -- like fresh accusations in this case, are able to
15 be used in place of live testimony.
16 JUSTICE GINSBURG: But you did use the word
17 inquisitorial, and there's one large difference, it
18 seems. This is not a magistrate judge or a police
19 officer coming to a person for an interview. This is
20 initiated by the caller, by the victim, and it's
21 initially a cry for help.
22 MR. FISHER: Let -- let me address that
23 question in two parts. The first part you've
24 mentioned, Justice Ginsburg, is whether it matters that
25 the -- that the operator is not a police officer, and

1 we submit no.

2 JUSTICE GINSBURG: No, I didn't say that.

3 MR. FISHER: I'm sorry.

4 JUSTICE GINSBURG: I said that the call was

5 initiated by the victim. It wasn't a -- a police

6 officer coming to interview her.

7 MR. FISHER: I see. Well, we don't believe,

8 under the proper conception of the Confrontation

9 Clause, it matters who the accusatory statement is

10 initiated by. Certainly we believe the Confrontation

11 Clause should apply if Ms. McCottry had simply walked

12 out of her house and walked down the street to the

13 police station and voluntarily walked into the

14 sheriff's office and said, I want to report what Mr.

15 Davis just did. What we -- what we suggest here today

16 is there's no difference if she simply calls on the

17 telephone to a 911 operator, which the State itself in

18 its brief calls a conduit to the police, and so when

19 the -- when the police and when the State have set up a

20 system for people to report calls more expeditiously --

21 I'm sorry -- report crimes more expeditiously, we don't

22 think the answer is any different.

23 JUSTICE GINSBURG: You're splitting up two

24 things that I think go together. That is, this is not

25 just a call. This is a cry for help.

1 MR. FISHER: Well, there -- in -- in a sense,
2 of course, Ms. McCottry is seeking help at the same
3 time she's reporting a crime, but the -- the mere fact
4 that the two are intertwined does not take us outside
5 the Confrontation Clause. Of course, in the Indiana
6 case that you're going to hear, you're going to hear
7 the same thing, that the person is asking for help in
8 the same way. So when somebody makes a call, which we
9 might call a mixed motive or a dual purpose call, the
10 question that we think this Court should ask is whether
11 -- whether that's the kind of a statement, first of
12 all, that historically would have been viewed as
13 implicating the Confrontation Clause. And if you look
14 at the hue -- the old hue and cry practice that we've
15 referred to in our briefs, Sir Matthew Hale in his
16 treatise explains that when somebody went and got the
17 local constable, what they were doing is they were
18 seeking help, first and foremost, to apprehend a felon,
19 and more than that, they were also reporting the crime
20 in the first instance.
21 JUSTICE ALITO: Is it your argument that any
22 statement made to law enforcement is testimonial?
23 MR. FISHER: Well, you certainly don't have
24 to go that far in this case, Your Honor, but -- but we
25 believe --

1 JUSTICE ALITO: I thought that's what you
2 said in your argument when you started off.
3 MR. FISHER: Certainly any statement
4 describing criminal activity to a law enforcement
5 officer would be testimonial.
6 JUSTICE BREYER: Well, you started out by
7 saying that the purpose of the Confrontation Clause was
8 to keep out the accusations made out of court, but I
9 would have thought that was the purpose of the hearsay
10 rule. And if that's the purpose of the hearsay rule,
11 how does the Confrontation Clause differ?
12 MR. FISHER: The purpose of the hearsay rule,
13 Justice Breyer, is to police the reliability of out-of-
14 court statements. What this Court said in Crawford is
15 the Confrontation Clause is something much different.
16 It regulates the manner of taking testimony in criminal
17 trials.
18 JUSTICE BREYER: Ah, so it's not the purpose
19 of the Confrontation Clause to keep out out-of-court
20 accusations. Only some, and which, and what's the
21 rule?
22 MR. FISHER: Well, we believe the rule is, is
23 that any accusatory statement to a law enforcement
24 officer or to an agent of the law -- of law enforcement
25 --

1 JUSTICE BREYER: I know you do believe that,
2 but I want to know why in terms of the purposes of not
3 the hearsay --
4 MR. FISHER: Well, the --
5 JUSTICE BREYER: -- rather the confrontation.
6 MR. FISHER: -- the history of the
7 confrontation right, going back even prior to the
8 framer, was to bring the accuser and the accused face
9 to face so that the accuser made his or her accusation
10 in the presence of the accused and subject to cross
11 examination. And the very heart of the Confrontation
12 Clause, which this Court has said itself over and over
13 again is to require the accuser to -- to deliver the
14 accusation in court, and so accusatory statements,
15 those that say he did it, this is what happened, this
16 is what I saw, are different than ordinary hearsay.
17 And -- and I -- to take an example from -- that we
18 talked about in the Crawford argument, Justice Breyer,
19 when somebody says pass the -- pass the pewter urn from
20 the mantle, that's where Bob keeps the drugs, that's
21 the kind of a statement that is very different than
22 pointing the finger at somebody to a law enforcement
23 agent.
24 JUSTICE SCALIA: Suppose I point the finger
25 in an affidavit, and I just send the affidavit, you

1 know. I -- I don't want to get involved. I'm in a
2 foreign country. I sign my name. I even do it under
3 oath, and I send it right to the judge that's trying
4 the case, not to a law enforcement officer, to the
5 judge. You don't think the Confrontation Clause would
6 cover that?
7 MR. FISHER: Absolutely, Justice Scalia, I --
8 JUSTICE SCALIA: So your -- your thesis that
9 it applies to just accusatory statements to a law
10 enforcement officer has to be expanded a little.
11 MR. FISHER: It does, and what I'm giving you
12 is a -- a rule that I think is the kernel, the heart of
13 the confrontation right. You don't have to say much
14 more than that if it's --
15 CHIEF JUSTICE ROBERTS: Well, what about --
16 what if you -- what if somebody runs out of the -- the
17 house? There are two people standing in the yard, a
18 law enforcement officer and the next-door neighbor.
19 She yells at the next-door neighbor, he's trying to
20 kill me, and then he comes out. Is that covered by
21 your rule? It's not to a law enforcement officer.
22 It's to the next-door neighbor, but the law enforcement
23 officer overhears it.
24 MR. FISHER: I think statements that law
25 enforcement officer merely overhear may not be

1 testimonial, and one of the reasons for that is this
2 Court's Bourjaily decision, which it cited with
3 approval in Crawford, is if somebody make -- if
4 somebody makes statements that tend out -- that turn
5 out to be incriminating in a criminal case, the mere
6 fact that they're overheard by law enforcement officers
7 or even an undercover officer eliciting the statement
8 is in a different scenario, Mr. Chief Justice, than
9 somebody making a statement to law enforcement or even
10 -- and I want to make sure I understand your
11 hypothetical. If the person realized that a police
12 officer was standing there and hearing what she was
13 telling her neighbor, we may then have a testimonial
14 situation.
15 But in this case what we have is not simply a
16 blurting out or a cry for help. In fact, Ms. McCottry
17 never asked for help. She said she didn't need an aid
18 car. What we have are a series of 26 questions that
19 the 911 operator asked Ms. McCottry that established
20 every element of the crime the court -- I'm sorry --
21 that the State ultimately proved.
22 JUSTICE SCALIA: What was she calling 911 for
23 if she didn't want help?
24 MR. FISHER: Well --
25 JUSTICE SCALIA: I mean, she -- she wanted

1 something from 911. What did she -- what did she want?
2 Did she want the police to come over and arrest her
3 husband? Was that -- or --
4 MR. FISHER: I think that's a fair inference,
5 Justice Scalia. Of course, we don't know because she
6 was never -- she's never herself submitted to cross
7 examination. But there are mandatory arrest laws in
8 the State of Washington. She had a no-contact order
9 against Mr. Davis, both of which a reasonable person
10 would understand that a call for 911 would be
11 tantamount to a call for arrest.
12 JUSTICE GINSBURG: You said -- you said we
13 don't know, but you -- that's slightly in conflict with
14 what you said earlier. They asked 26 questions. How
15 long was this telephone conversation between the 911
16 operator and the victim?
17 MR. FISHER: It's about 4 minutes, Justice
18 Ginsburg. And it's not -- what we submit is -- of
19 course, we've given you in the joint appendix the
20 structured protocol that the 911 operator was following
21 in this case, and we submit that it's not mere
22 happenstance that the 911 call was able to establish
23 every element of the crime, right down to Mr. Davis'
24 birth date that the prosecutor referred to in her
25 closing argument that the 911 operator elicited from

1111 14th Street, NW Suite 400 Alderson Reporting Company Washington, DC 20005
1-800-FOR-DEPO

1 Ms. McCottry. And, indeed, the only question --
2 CHIEF JUSTICE ROBERTS: Well, I thought that
3 was -- I thought that was to determine if there were
4 outstanding orders and warrants against the individual.
5 MR. FISHER: It may be, and that may be
6 another example, Mr. Chief Justice, of a -- of a --
7 CHIEF JUSTICE ROBERTS: But that's related --
8 that's related to sending people to prevent crime as
9 opposed to gathering evidence to be used to convict.
10 MR. FISHER: I don't want to dispute that 911
11 operators in this situation, just like responding
12 officers, are gathering information for dual purposes.
13 They may well be trying to resolve an ongoing threat
14 of a felon at large. At the same time, of course, all
15 of the information and training manuals that we've
16 provided to you in the reply brief make it clear that
17 from the initial contact with the alleged victim, they
18 are gathering evidence all the while.
19 And in fact, the only thing you can think of
20 -- at least, I can't think of a single question that a
21 prosecutor might have asked at a trial that the 911
22 operator didn't ask here. The only questions that
23 really immediately come to mind are ones that might
24 have been asked in cross examination. For example --
25 JUSTICE ALITO: Well, what if the only

1 question -- what if a 911 caller says nothing more
2 than, in a very excited way, someone is attacking me,
3 send a police officer right away to make the person
4 stop attacking me? Is that testimonial?
5 MR. FISHER: To the extent that the person is
6 saying someone is attacking me, that kernel may -- may
7 well be testimonial, Justice Alito. However, if
8 somebody calls 911 and says, please send help to 911
9 Main -- or 3312 Main Street, that may well not be
10 testimonial. And that -- a mere cry for help -- and
11 this goes to Justice Ginsburg's question as well. A
12 simple cry for help may -- may not be testimonial.
13 JUSTICE GINSBURG: But a simple cry for help
14 that doesn't say I'm being battered may not elicit an
15 immediate response on the part of the police. This
16 kind of call, I need help now, and the information that
17 comes with it is likely to be given priority attention
18 as this very call was.
19 MR. FISHER: I think that's a fair inference,
20 but the -- the priority attention, in terms of going
21 and apprehending Mr. Davis, is exactly what triggers
22 criminal justice system and exactly what makes the kind
23 of a statement, the one that the -- one that the
24 Confrontation Clause should care about.
25 JUSTICE SOUTER: Do you have any --

1 CHIEF JUSTICE ROBERTS: Well, they're not
2 sending someone -- they're not sending someone to
3 apprehend Mr. Davis. They're sending someone to
4 prevent him from attacking his wife.
5 MR. FISHER: I'm not sure it's easy to
6 separate one from the other, Mr. Chief Justice. The
7 way that they are doing that is by arresting him. They
8 have a mandatory arrest law in Washington that says
9 that the way that the police must respond to a call
10 like this is to arrest --
11 JUSTICE STEVENS: May I ask this question? I
12 -- I guess in an awful lot of these cases there's a
13 mixed motive: protection and enforcement. Is it
14 your view that whenever there's a mixed motive, it
15 becomes inadmissible?
16 MR. FISHER: No, Justice Stevens. It's our
17 view that you really ought not be looking or focusing
18 on the police officer motive or on the governmental
19 agent's motive for the very reason that you start to
20 get into these knotty questions of what exactly were
21 they trying to accomplish. And we believe a better
22 -- a better default than -- if you can't simply answer
23 it by looking at history and precedent, is to look more
24 towards the declarant's reasonable expectation. And
25 that's what this Court does in the Fifth Amendment when

1 it --

2 JUSTICE SOUTER: Well, in doing that, do you

3 distinguish, for example, between the -- the

4 expectation that lies behind a merely excited

5 utterance, on the one hand, and the expectation or lack

6 of expectation that would qualify -- that would be the

7 case in a -- in a true res gestae statement in the very

8 strict sense? So that, you know, if -- if the attack

9 had occurred 30 minutes beforehand and -- and the

10 victim is saying on the telephone to the police, Adrian

11 is trying to kill me, that would be -- that -- that

12 wouldn't -- would not be admissible, I take it, on --

13 on your view under the Confrontation Clause. And yet,

14 if in the course of the 911 call, Adrian was battering

15 the -- the -- you know, the victim over the head with

16 something and she blurted out the same statement, he's

17 trying to kill me, would the -- would the latter be

18 admissible in your case --

19 MR. FISHER: The latter --

20 JUSTICE SOUTER: -- under your theory?

21 MR. FISHER: I'm sorry.

22 JUSTICE SOUTER: I'm sorry. I misspoke. On

23 your theory.

24 MR. FISHER: The latter is a very close case,

25 Justice Souter. I think you're right insofar as it --

1 it can be important to distinguish between a modern-day
2 excited utterance and what would have been considered a
3 res gestae type statement at common law.
4 Certainly if you take away the 911 call from
5 your hypothetical and she says, please don't hurt me,
6 Adrian, that may well be the kind of a statement that
7 would be inside the res gestae. Once somebody picks up
8 the phone to call 911, that, by my reading of the
9 historical cases, turns it into a report or a
10 narrative.
11 JUSTICE SOUTER: So that the answer to my
12 question is there would be no distinction between the
13 merely excited utterance 30 seconds later and the
14 utterance in the course of in -- in my hypo.
15 MR. FISHER: We believe that as long as it is
16 making a report to a third party, there ought not be a
17 distinction. Now, of course, you don't have to wrestle
18 with that in this case because --
19 JUSTICE SCALIA: You say according to your
20 reading of the cases, but you really don't have a case
21 like this. You -- you have a case where, after the
22 fact, the -- the victim went to a constable or to some
23 other official to report the event, and perhaps to seek
24 help against the person who -- but you don't have
25 anything where really, in the course -- in the course

1 of the attack or -- or while the person is still at
2 least under threat, a -- a constable is -- is called,
3 do you?
4 MR. FISHER: Well, Justice Scalia, of course,
5 we didn't have telephone technology, so --
6 JUSTICE SCALIA: You could have -- you could
7 have somebody walking by -- a policeman walking by
8 outside.
9 MR. FISHER: Yes.
10 JUSTICE SCALIA: And the victim shouting, you
11 know, please, somebody help me, Harry is beating me.
12 You don't have a case like that. So -- so I don't know
13 why we should flop one side rather than the other on
14 this -- on this case that -- that doesn't seem covered
15 by -- by the old jurisprudence. Why should we go your
16 way on it and say that it -- it falls within the
17 prohibition rather than say it falls outside the
18 prohibition?
19 MR. FISHER: Well, for two reasons, Justice
20 Scalia. One is we do have the hue and cry scenario
21 that we've talked about.
22 JUSTICE SCALIA: Yes, but that's not this
23 case.
24 MR. FISHER: And we think the fair --
25 JUSTICE SCALIA: That --

1 MR. FISHER: It's not exactly on all fours
2 with this case, but we think the fair inference, when
3 you read the treatises and the reasons why those kinds
4 of statements were kept out, is that if they simply --
5 if the police or their agents were able to get the
6 statement just a little bit sooner, the answer would
7 have been the same.
8 And we do have cases, Justice Scalia, where
9 people made fresh accusations or cry-outs to private
10 parties to -- to another -- to a witness who wasn't
11 even associated with law enforcement, and we have a
12 whole section of our brief pointing out that for
13 decades after the founding, even those kinds of
14 statements were kept out of evidence in criminal trials
15 for the reason --
16 JUSTICE SCALIA: Because of the -- because of
17 the Confrontation Clause you think?
18 MR. FISHER: Well, I -- I think it's a fair
19 inference, Justice Scalia, from reading the historical
20 precedent and the treatises that describe it. They --
21 they describe these as, in -- in a sense, second-class
22 testimony. They say the problem with statements like
23 this, if they're made even seconds after the event in
24 place, is that they're -- at that point they're nothing
25 more than a narrative and require us to give credit to

1 a statement -- and this is the words the treatise
2 writers used to use -- that was not given under the
3 ordinary tests for determining the accuracy of
4 testimony. And when they used the word like testimony
5 and they talk about the usual tests and the customary
6 way of testing out-of-court statements, I think the
7 fair inference is they're referring to the right to
8 confrontation.
9 Perhaps another way to think about this is to
10 take a step back and say, what if we decide that
11 statements like this are not testimonial? The
12 practical -- the practical impact of that is not simply
13 that these statements won't -- will come in, but that
14 prosecutors and -- prosecutors, Federal and State
15 government, will have no incentive whatsoever to ever
16 bring 911 callers into court. It -- it is -- across
17 State hearsay law across the country, these are deemed
18 excited utterances. So if this Court were to say --
19 CHIEF JUSTICE ROBERTS: Well, that's not --
20 that's not true at all. I mean, if -- if the -- the
21 witness may be a good witness and compelling on the
22 stand, they may have every incentive to bring her in in
23 person. This is only addressed to the situations where
24 the witness is unwilling or unable to testify.
25 MR. FISHER: Mr. Chief Justice, I think you

1 got to the heart of the matter when you said that if
2 it's a good witness, the prosecutor will put them on.
3 The flip side of that is that if the witness isn't so
4 good, the prosecutor would have every incentive at
5 least not to put them on the stand. Why would somebody
6 put on a stand -- put somebody on a stand that doesn't
7 seem perhaps credible or maybe subject to impeachment
8 when they have, in a sense, testimony in a sealed tape
9 recorder already?
10 JUSTICE SCALIA: Well, I assume the defendant
11 could summon that -- that witness if -- if that
12 witness' location was known. No?
13 MR. FISHER: Well, the defendant --
14 JUSTICE SCALIA: And could find out from the
15 prosecution where that witness was, I assume.
16 MR. FISHER: The defendant might be able to
17 do that. But, of course, that would -- treating the
18 case this way would collapse the confrontation right
19 into the Compulsory Process Clause. The confrontation
20 right is a right not to be able to bring witnesses into
21 court. It's to be confronted with the witnesses
22 against --
23 CHIEF JUSTICE ROBERTS: But Justice Scalia's
24 question raises the -- the point. The reason these
25 witnesses are not there is not because of anything that

1 the government has done. It's -- it's the concern they
2 have, the particular domestic abuse situation. It's
3 not the government that is keeping these witnesses out.
4 They're not relying on the 911 calls as a matter of
5 preference.
6 MR. FISHER: Well, Mr. Chief Justice, I think
7 your assumption may not be entirely correct. There's a
8 -- there's a portion from, for example, the San Diego
9 prosecutor's office decided, and I believe in the NACDL
10 brief, that says oftentimes they do prefer to -- to
11 leave the witness off the stand because they have a
12 better case just using the -- the excited utterance
13 type statements.
14 JUSTICE GINSBURG: Is there -- is there --
15 suppose the defendant procured the witness' absence by
16 a threat.
17 MR. FISHER: Yes.
18 JUSTICE GINSBURG: Then the 911 statement
19 could come in. Right?
20 MR. FISHER: That's right. That's right.
21 And perhaps -- and this gets back to the Chief
22 Justice's question as well. It helps maybe to separate
23 these kinds of cases into three categories.
24 We first have the category that the
25 prosecution would prefer not to put the person on the

1 stand. We think there the Confrontation Clause ought
2 to require them to do so.
3 We -- we next have the category where the
4 defendant, as you say, procures the witness' absence.
5 We don't dispute that in that scenario the forfeiture
6 doctrine kicks in, which this Court reaffirmed in
7 Crawford. We don't have any forfeiture question in
8 this case.
9 And then we have perhaps the gray area, where
10 a witness goes missing through no fault of anybody's,
11 and this Court has said over and over again that there
12 the confrontation right puts the onus onto the
13 prosecution.
14 JUSTICE GINSBURG: But those are -- those are
15 three neat legal categories. The practical reality, is
16 it not so, is that many women in these situations are
17 scared to death of what will happen to them or they're
18 so insecure financially that they think they have to
19 put up with the battering? So your neat legal
20 categories really don't conform to what happens in
21 people's lives who are in this situation.
22 MR. FISHER: Justice Ginsburg, I don't want
23 to be insensitive to -- to witnesses in this situation.
24 Of course, reluctant witnesses is nothing new, but --
25 but in domestic violence, it's an acute problem.

1 However, we believe the proper way to deal
2 with that situation is by this Court developing its
3 forfeiture doctrine. The Sixth Amendment applies
4 across the board to all criminal cases, Justice
5 Ginsburg, and we've cited, for example, in the appendix
6 to our reply brief about 30 cases from the last couple
7 years that have been handled in a victimless fashion
8 like this that are not domestic violence cases --
9 JUSTICE BREYER: How would you do that? How
10 would you do that forfeiture?
11 MR. FISHER: Pardon me?
12 JUSTICE BREYER: How would you do that? I'm
13 interested in that because I thought it sounded good.
14 Then I thought about it. I thought to have forfeiture,
15 you'd have to show that this defendant, in fact, forced
16 the wife not to testify. It's a crime to do that. So
17 you'd have to prove another crime against the defendant
18 in order to prove the first crime. And I thought
19 perhaps that doctrine is not very practical. You tell
20 me why it is.
21 MR. FISHER: Well, that's already what
22 happens under the Federal Rules of Evidence and under
23 the evidence of many States, that there is a rule of
24 forfeiture by wrongdoing. And so --
25 JUSTICE BREYER: I understand that. My point

1 is that to prove the wrongdoing would probably be even
2 harder than to prove the original crime. All we know
3 is the wife isn't there.
4 MR. FISHER: I'm not --
5 JUSTICE BREYER: And we suspect that she's
6 afraid of her husband. He may have offered to cut off
7 financial aid, said goodbye, no money, or he may have
8 done worse. I'm just saying you're telling us that
9 because the prosecution can prove that in court and
10 only then will it be able to introduce the testimony
11 given beforehand by the missing wife.
12 MR. FISHER: Well, I think --
13 JUSTICE BREYER: How does it work?
14 MR. FISHER: Well, I think we have -- Justice
15 Breyer, like in lots of other scenarios, you have a
16 pretrial hearing, and at that pretrial hearing, of
17 course, the rules of evidence don't strictly apply the
18 way they would in the guilt phase. So in this very
19 case, if you look at the joint appendix, when -- when
20 on the eve of trial Ms. McCottry is no longer going to
21 show up for trial, the prosecutor says, I want to
22 subpoena the jail records and I want to talk to the
23 victim's advocate to find out whether she's been
24 intimidated or kept away. So the prosecutor herself
25 tells the court how she's going to look for this

1 evidence. If she had found anything, presumably she
2 would have presented it and she could have presented it
3 that way. And it's --
4 JUSTICE SCALIA: Maybe we should just -- just
5 suspend the Confrontation Clause in spousal abuse cases
6 instead of designing the entire application of the
7 Confrontation Clause everywhere on the basis of what
8 seems to be a special problem in spousal abuse cases.
9 MR. FISHER: Well, of course, Justice Scalia,
10 the Sixth Amendment says all criminal prosecutions --
11 JUSTICE SCALIA: I understand.
12 MR. FISHER: -- and domestic violence cases
13 are criminal prosecutions. So we don't think --
14 JUSTICE SCALIA: And I suppose we could also
15 have said that the Sixth Amendment, like some other
16 amendments, doesn't apply to State prosecutions --
17 MR. FISHER: That's right, but we've --
18 JUSTICE SCALIA: -- or the Confrontation
19 Clause portion of it, anyway --
20 MR. FISHER: Yes.
21 JUSTICE SCALIA: -- which would exempt spousal
22 abuse cases, by and large, until we -- until we enact a
23 Federal spousal abuse statute, which -- which may well
24 occur. It seems to me there -- there are better ways to
25 -- to solve this problem than to design the whole

1 Confrontation Clause jurisprudence on the basis of what
2 happens in spousal abuse cases.
3 MR. FISHER: I think that's a fair comment.
4 And let -- let me say there are two -- there
5 are many ways that you can do that, Justice Scalia, and
6 two of them were readily available to the State in this
7 case. One is even when a witness goes missing or is
8 unwilling to testify in a hard case, there may well be
9 other ways to prove the case. Here, the caller said --
10 JUSTICE BREYER: This is true, but the reason
11 I thought spousal abuse cases are relevant --
12 MR. FISHER: Pardon me?
13 JUSTICE BREYER: A reason I thought they were
14 relevant is just what you're about to address. They're
15 evidentiary of the problem that exists when you bring
16 something within the Confrontation Clause. Prior to
17 Crawford, even though it was within the clause, if it
18 fell within a well-recognized exception to the hearsay
19 rule, it could come in. So you could bring in co-
20 conspirators before the conspiracy ended. You could
21 bring in, for sure, excited utterances. You could
22 bring in all kinds of things that now, no matter how
23 reliable, you have to keep them out.
24 MR. FISHER: That's right, Justice Breyer,
25 but --

1 JUSTICE BREYER: And so that is a problem
2 that you have to address in respect to drawing a fairly
3 narrow line, and I want to know what that narrow line
4 is with spousal abuse and other cases in mind.
5 MR. FISHER: Let me give you two ways this
6 case, if -- if we assume the State's version of
7 events is correct, could have easily been proved.
8 One is that the caller said that a man named
9 Mike was at her house during the entire event. When
10 the police showed up at her house some 5 minutes later,
11 they never even got Mike's last name. And, of course,
12 Justice Breyer, the reason why is because they were
13 probably thinking of the Roberts framework and that
14 they wouldn't need this witness, but good old-fashioned
15 police work would have presumably found a witness that
16 witnessed the whole event that they could have put on
17 the stand.
18 The second thing the State could have done in
19 this case is they could have filed the case in a way
20 that they obtained a preliminary hearing. If what the
21 State says is correct that Ms. McCottry was cooperating
22 up until the last minute, that's a classic scenario
23 where, by way of having a preliminary hearing and
24 subjecting her to cross examination at the preliminary
25 hearing, they could have preserved her testimony. This

1 Court in California against Green and Roberts itself
2 said that those kinds of prior pretrial cross
3 examination scenarios are good enough to satisfy the
4 Confrontation Clause.
5 And if the Court has no further questions,
6 I'll reserve the remainder of my time.
7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Fisher.
9 Mr. Whisman.
10 ORAL ARGUMENT OF JAMES M. WHISMAN
11 ON BEHALF OF THE RESPONDENT
12 MR. WHISMAN: Mr. Chief Justice, may it
13 please the Court:
14 In this 911 call, the operator asked a short
15 series of questions, nearly all phrased in the present
16 tense. Each question was objectively and reasonably
17 necessary to respond to an apparent emergency.
18 JUSTICE SCALIA: Like what is his name? I
19 mean, that's the present tense. Not what was his name
20 or what will be his name. What is his name? You think
21 that's the present tense. So that shows that this is
22 all seeking help.
23 MR. WHISMAN: No, a number of other
24 questions, Justice Scalia, were answered -- were asked
25 in the present -- present tense too. And, in fact, the

1111 14th Street, NW Suite 400 Alderson Reporting Company Washington, DC 20005
1-800-FOR-DEPO

1 operator, shortly after asking the first questions, one
2 of the first things that she said was help was on the
3 way and then continued with a series of questions. But
4 as the interview continued, of course, every single
5 question and every single answer was captured on the
6 tape for a jury or a judge to later hear. The call
7 ended after the operator knew that Ms. McCottry had her
8 door locked, that Davis had left, and that the
9 officer's arrival was imminent.
10 We ask -- respectfully ask this Court, under
11 these circumstances, to hold that the use of this
12 powerful evidence, without live testimony from the
13 declarant, was constitutionally permissible.
14 JUSTICE SCALIA: You know, powerful is part
15 of the problem. This -- this kind of telephone call
16 evidence is even more powerful than -- than the kind of
17 a signed affidavit that used to be banned because it
18 was testimonial. I mean, to hear -- to hear the voice
19 on the phone makes it, if it is -- if it is
20 impermissible under the Confrontation Clause, it makes
21 it even a more damaging violation than the kind of
22 violation that -- that occurred in -- in Sir Walter
23 Raleigh's case, for example.
24 MR. WHISMAN: Well, I'd respectfully
25 disagree, Your Honor, although I'd -- I'd first note

1 that -- that I think the if clause in Your Honor's
2 question is telling. And I think if that -- that
3 doesn't necessarily define whether it's testimonial or
4 not. But to address --
5 JUSTICE SCALIA: Would you -- would you
6 rather put the woman on -- if you had a choice, would
7 you rather put the woman on the stand?
8 MR. WHISMAN: Absolutely, Your Honor, and --
9 and --
10 JUSTICE SCALIA: Rather than have her -- her
11 voice on the telephone call --
12 MR. WHISMAN: Well, if I had to --
13 JUSTICE SCALIA: -- when she is -- she is in
14 -- in -- supposedly in great fear of -- of her husband
15 and -- and -- I'm sure you'd rather have the telephone
16 call.
17 MR. WHISMAN: If you're asking me which would
18 I chose --
19 JUSTICE SCALIA: As a prosecutor.
20 MR. WHISMAN: Well, if I had to chose, that
21 would be a difficult choice, obviously, but our plan,
22 of course, was to --
23 JUSTICE SCALIA: I think it would be an easy
24 choice.
25 MR. WHISMAN: Our -- our plan was to do both,

1 and it wasn't until the eve of trial that we learned
2 that the complaining witness, Ms. McCottry, wasn't
3 going to appear. And I think that the circumstances --
4 JUSTICE SOUTER: Did -- did you subpoena her
5 at that point?
6 MR. WHISMAN: She was already subpoenaed,
7 Your Honor, and the prosecutor brought in the
8 detective. The detective attempt -- made numerous
9 attempts to get a hold of her, checked her last known
10 address. The person there didn't know where she was.
11 We had one phone number for her. She wasn't responding
12 to the telephone calls pursuant to our calls to that
13 number. So we made a number of efforts that are
14 documented in the record to get her to court, once we
15 learned that -- that she didn't appear.
16 Now, at that point --
17 CHIEF JUSTICE ROBERTS: Counsel, your -- your
18 position is not that anything that she says or anything
19 anyone says in a 911 call is -- is consistent with the
20 Confrontation Clause.
21 MR. WHISMAN: That's right, Your Honor. It's
22 conceivable that you could have statements made in the
23 course of a 911 call that wouldn't be testimonial.
24 CHIEF JUSTICE ROBERTS: So what is your --
25 what is your test? We have your friend saying any

1 accusatory statement made to a law enforcement officer.
2 What -- what is your proposal?
3 MR. WHISMAN: Our focus, Your Honor, is, as I
4 think this Court focused in Crawford on whether or not
5 the government's practice resembles the inquisitorial
6 abuses. In other words, did you have -- in the modern
7 sense, did you have a structured police interrogation
8 such that the interrogator or the questioner might have
9 in some way shaped the witness' testimony.
10 CHIEF JUSTICE ROBERTS: Mr. Fisher tells us
11 that's exactly what happens, that the 911 operator goes
12 through the elements of the crime in a very structured
13 way.
14 MR. WHISMAN: Well, I -- I think if you
15 listen to the tape itself, you'll conclude that's not
16 the case. I mean, in fact, each question that the --
17 that the operator asked was reasonably and objectively
18 designed to facilitate a quick response and to solve
19 the emergency that was apparent.
20 JUSTICE SCALIA: Let's -- let's not overread
21 Crawford. Crawford didn't say that the only thing the
22 Confrontation Clause was directed at was the kind of
23 abuse that -- that occurred in the case of Sir Walter
24 Raleigh. It said that that was the principal abuse at
25 which it was directed. I doubt very much, unless you

1 think otherwise, that if somebody, without provocation
2 from the police, wrote up an affidavit, signed the
3 affidavit, and gave it to the police, I doubt whether
4 that would have been allowed under the Confrontation
5 Clause. Do you think it would have?
6 MR. WHISMAN: Well, it may not have, Your
7 Honor, but the -- under the test that we're proposing,
8 the -- we're placing the focus on situations like this,
9 situations roughly analogous -- situations that are
10 distinguishable from what you had with Sylvia Crawford.
11 And I think that although -- although our test may not
12 cover every conceivable hypothetical, I think that, as
13 this Court recognized in Crawford, defining testimonial
14 was going to be a -- a task that was going to take some
15 time, and --
16 JUSTICE SCALIA: Your test wouldn't cover the
17 example I just gave.
18 MR. WHISMAN: Yes, right -- that's right, Your
19 Honor. Our test would not --
20 JUSTICE SCALIA: And you think that that
21 should be admissible in a criminal trial?
22 MR. WHISMAN: No, I don't. I think it --
23 JUSTICE SCALIA: Well --
24 MR. WHISMAN: -- that should be inadmissible,
25 but it should be inadmissible because of the rules of

1 hearsay. And I think in most States in the Union, it
2 would be inadmissible. I can't think of a hearsay
3 example that would permit it.
4 JUSTICE SCALIA: Oh, now the person disappears
5 afterwards, is unavailable.
6 MR. WHISMAN: Fair enough. But it's not an
7 excited utterance. It's not a present sense
8 impression. I can't imagine a hearsay exception that
9 would admit it, which is really what brings us back to
10 the core of our theory, too, and that is that -- that
11 under the Confrontation Clause, as defined in Crawford,
12 we now have an absolute rule covering a finite --
13 JUSTICE SCALIA: I can't imagine that that
14 wouldn't have been covered by the Confrontation Clause
15 --
16 MR. WHISMAN: Well --
17 JUSTICE SCALIA: -- such -- such an obvious
18 violation of your right to confront your accuser, and
19 just because it was presented to the police without --
20 without an initial interrogation by the police, I don't
21 think that would have made any difference at common
22 law.
23 MR. WHISMAN: And -- and, Your Honor, it may
24 be that at some point the Court expands the definition
25 in -- in Crawford of testimonial -- formalized

1 testimonial materials to include something like that,

2 but I think that in situations where you have an

3 encounter between police and citizen and statements

4 result, then I think it's fair to focus on the

5 interaction and whether or not the -- the person was

6 trying to shape the testimony.

7 JUSTICE SCALIA: I agree that that's the

8 extreme, but you're urging us to -- to adopt a test

9 that embraces only the extreme and does not embrace the

10 hypothetical I just gave you. And you -- you can

11 accept that hypothetical without saying that you lose

12 this case, but it seems to me the test you're proposing

13 is -- is really quite extreme.

14 MR. WHISMAN: Well, Your Honor, as I say, the

15 test we're proposing I think would cover the majority

16 of cases. The hypothetical that Your Honor posed was

17 -- is -- is itself I think somewhat unusual. We -- we

18 do not get statements of that nature. We do not see

19 them being offered into evidence. And as I say, I

20 think that if -- if we saw cases like that, if we saw

21 statements that were admitted, there may be other ways

22 under the clause that the Court could interpret the

23 Confrontation Clause to exclude them.

24 I'm not arguing for the admissibility of that

25 evidence. Quite frankly, I've never in my life even

1 seen a piece of evidence like that offered. All I'm
2 saying is that I don't believe it falls under this
3 narrow definition of the Confrontation Clause that you
4 outlined in the Crawford case.
5 JUSTICE GINSBURG: Why don't you incorporate
6 what the Solicitor General has suggested, that is, you
7 draw the line at urgent emergency statements that are
8 calling for -- for immediate help?
9 MR. WHISMAN: We certainly don't have any
10 objections to the Solicitor General's approach, Your
11 Honor, and -- and in fact, in some ways, because we're
12 analyzing a case like this that arose in an emergency
13 circumstance, I think that it's clear that -- that
14 statements that are made in those circumstances, just
15 by their very nature, aren't going to be testimonial.
16 People don't testify in an emergency. We chose not to
17 take that approach doctrinally just because we didn't
18 think it was as closely tied to the approach the Court
19 took in Crawford. But I think it's certainly
20 consistent with the strategy outlined by the Solicitor
21 General.
22 JUSTICE SCALIA: What -- what do we do about
23 the -- about the fact, which I don't think you -- you
24 deny and -- and the -- the other side points out in
25 both of these cases that, in fact, police departments

1111 14th Street, NW Suite 400 Alderson Reporting Company Washington, DC 20005
1-800-FOR-DEPO

1 have their responders to the 911 number intentionally
2 ask a series of questions that gives them all the
3 information they need to conduct a prosecution? In
4 other words, they are using 911 as a -- as a
5 prosecutorial device.
6 MR. WHISMAN: Well, I think that overstates
7 the empirical evidence, Your Honor. I think that if
8 you look at the training manual in this case that we
9 attached to our briefing in the Supreme Court and refer
10 to our briefing, if you look at the way that this
11 interview was conducted, it's clear that these
12 operators are not, as a routine matter, using the 911
13 process to develop evidence.
14 In fact, in this case you'll note that --
15 that after the short 4-minute period, the operator
16 didn't say, well, stay on the line with me a little bit
17 more and let's talk about the background situation
18 here. And she didn't do that because her training, as
19 documented in the training materials from the Valley
20 Communications Center, said don't get caught up in the
21 background information that led to this event because
22 it can distract you in getting the information that
23 needs to be transferred to the police department right
24 away. And I think that that is a perfectly reasonable
25 and really the -- the better approach for a 911

1111 14th Street, NW Suite 400 Alderson Reporting Company Washington, DC 20005
1-800-FOR-DEPO

1 operator. So even though --

2 JUSTICE KENNEDY: Did -- did she wait until

3 after the 4 minutes to call the police, or did she --

4 she have the police on the way after the first minute?

5 MR. WHISMAN: It sounds as though that she

6 dispatched them immediately, Your Honor, because --

7 JUSTICE KENNEDY: She -- she's just typed

8 that out on the computer or something like that?

9 MR. WHISMAN: That's right. And, in fact,

10 there are some times when you can hear all three voices

11 on the 911 tape, not in this instance. But as I said,

12 almost immediately after the call began, she said, help

13 is on the way, that's because you can dispatch but

14 still obtain information, for example, the date of

15 birth. And as Mr. Chief Justice indicated, date of

16 birth of the defendant and name, et cetera are

17 extremely important so that in those 4 minutes that it

18 -- coincidentally, it was also 4 minutes before the

19 police officer arrived -- they can be determining

20 whether or not the defendant has criminal history.

21 They can determine whether or not, from their records

22 available to them in their police car, whether or not the

23 defendant has a history of assaults against police

24 officers, whether or not he has a -- a history of

25 carrying weapons, et cetera. So that's all information

1 that the operators are trained to -- to obtain and then
2 to transfer to the police as soon as possible.
3 CHIEF JUSTICE ROBERTS: And she's -- she's in
4 ongoing -- the operator is in ongoing contact with the
5 people she's -- the operator has dispatched. Right?
6 MR. WHISMAN: Correct, Your Honor, and that's
7 why -- that's why ordinarily the operator doesn't
8 terminate the call until the police have arrived on the
9 scene. Here it appears that she terminated the call
10 somewhat contemporaneously with their arrival. She --
11 she indicates that the police are there and they'll
12 look around for him quickly and then come and check
13 her.
14 JUSTICE STEVENS: What do you have to say
15 about the failure to inquire about Mike?
16 MR. WHISMAN: Your Honor, I -- I don't think
17 that's as significant as Petitioner suggests. If you
18 look at the record, in the pretrial testimony of
19 Officer Jones, he asked Ms. McCottry, upon arrival,
20 repeatedly did she know who this other person was, and
21 her answer was she didn't know the person's last name.
22 The record isn't fully developed on that point, but it
23 sounds like that -- that Mike was a friend of the
24 defendant's. And we know for sure that Mike left with
25 the defendant. I think it's reasonable to infer he

1 also came with the defendant, but we didn't have any
2 particular contact or handle on this person Mike.
3 And in fact, if it was a friend of the
4 defendant, you'd think that the Compulsory Process
5 Clause would have given the defendant some basis on
6 which to bring him before the court. I don't think
7 that that includes any of the -- that -- that doesn't
8 somehow shift the burden on the defendant in the same
9 way it might if were to force him to bring the
10 declarant in. If he knew Mike, he -- he certainly had
11 the ability to bring Mike in. So I don't think it's as
12 significant as Petitioner suggests.
13 Your Honor, I -- I do want to return for just
14 one moment to this notion that we don't want witnesses
15 to testify and that we are satisfied with proceeding
16 just on -- on the basis of other pieces of evidence.
17 At least in my practice and at least in our county,
18 that's definitely not true. In fact, even if we have a
19 recanting witness in, for example, the domestic
20 violence abuse scenario -- situation, it is often just
21 as effective for us to go ahead and put -- put the
22 witness up on the stand, let her tell whatever story
23 she's presently telling, and then play the 911 -- 911
24 tape also in conjunction with the testimony of the
25 officers who can describe what -- what condition she

1 was in when they arrived. And I think when you
2 juxtapose the 911 tape, even with the recantation from
3 the witness, frankly sometimes the jurors find it even
4 more illuminating than -- than if she didn't appear.
5 So we do not spend our time trying to put together
6 cases purposely without the victim testifying. It just
7 so happens that sometimes, at the last minute like this
8 case, we're not able to bring the person in.
9 But I think --
10 JUSTICE SOUTER: How -- how often does this
11 happen? In other words, are we being asked to, in
12 effect, on your part to -- to recognize or to derive a
13 special rule for cases which, at least numerically, are
14 sports?
15 MR. WHISMAN: Your Honor, I do -- I cannot
16 answer in a percentage terms how often this happens.
17 But, you know, that you have a reluctant witness in
18 domestic violence cases is a -- is a not unusual
19 occurrence in any event. But I don't think that --
20 JUSTICE SOUTER: But -- but I'm talking about
21 the witness who is not merely reluctant, but simply
22 doesn't show up and you make reasonable efforts and you
23 -- and you can't find the witness. How often does that
24 happen?
25 MR. WHISMAN: As I say, I'm -- I'm hard-

1 pressed to give a -- a percentage number. But it's
2 not, as I said --
3 JUSTICE SOUTER: Has it happened to you
4 before?
5 MR. WHISMAN: I believe it has.
6 JUSTICE SOUTER: But you don't know how many
7 times.
8 MR. WHISMAN: I can't say, no, Your Honor. I
9 can't say. I think it's maybe happened once to me, but
10 --
11 JUSTICE SOUTER: So we're not -- I take it
12 we're not in a position whereby if we hold against you,
13 we are, in effect, nullifying the possibility of
14 enforcing domestic violence laws by criminal process.
15 MR. WHISMAN: Well, I -- I think the other
16 factor that has to be considered, Your Honor, is as soon
17 -- as soon as defendants realize that merely pressuring
18 the victim into not appearing will put an end to the
19 case, then it gives the defendant the increased
20 incentive to put the pressure on the victim and cases
21 that otherwise would have pled won't. So I think it
22 will have --
23 JUSTICE SCALIA: Disappearing. Not just not
24 appearing. Disappearing.
25 MR. WHISMAN: Yes. I --

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 MR. WHISMAN: Thank you, Your Honor.
3 CHIEF JUSTICE ROBERTS: Mr. Dreeben.
4 ORAL ARGUMENT OF MICHAEL R. DREEBEN
5 ON BEHALF OF THE UNITED STATES,
6 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT
7 MR. DREEBEN: Mr. Chief Justice, and may it
8 please the Court:
9 A panic-stricken call for help, which can
10 occur on a 911 call, is not a form of bearing witness
11 within the meaning of the Confrontation Clause that
12 activates the rule in Crawford. Emergency statements,
13 statements that are made to 911 operators and to
14 officers at the scene investigating an urgent need to
15 protect a person's safety, do not resemble the classic
16 forms of testimonial evidence that were generated under
17 the Marian statutes and the civil law practice that
18 formed the impetus for the Confrontation Clause. In
19 three significant respects, statements that are made in
20 emergency questioning differ from the kind of testimony
21 that prompted the rule in Crawford and the
22 confrontation right that it rests on.
23 First of all, in the classic examples of
24 someone giving testimony, which this Court noted means
25 a solemn declaration or affirmation for the purpose of

1 proving a fact, people who are on 911 calls or seeking
2 help at the scene of an -- an urgent situation are not
3 making statements for the purpose of providing evidence
4 in a case. They are making statements for the purpose
5 of obtaining help, and that distinguishes them
6 significantly from the kinds of subtle desires to shape
7 and influence their statements that occur --
8 CHIEF JUSTICE ROBERTS: Well, maybe. I mean,
9 it's easy to imagine a 911 call that doesn't fit your
10 description. You know, the person is trying to get in
11 the door. The call is -- you know, this is the fourth
12 time. I keep calling and I've talked to you about
13 this. You don't do anything. He's got to be locked up
14 so this will stop. I mean, that's not -- that sounds
15 more like testimony than an immediate call for help.
16 MR. DREEBEN: Mr. Chief Justice, we would
17 distinguish between those kinds of 911 calls where
18 someone is seeking protection from an imminent or
19 present threat to their safety and a 911 call that's
20 making a more generalized report of criminal activity
21 or a desire for safety and maybe speaking in a
22 narrative form about the past.
23 JUSTICE SCALIA: Well, the husband had left
24 the house here, as I understand it, when this -- when
25 this call occurred.

1 MR. DREEBEN: Actually, Justice --
2 JUSTICE SCALIA: She -- she wanted the man
3 arrested, but he was no longer in the house, was he?
4 MR. DREEBEN: Actually, Justice Scalia, I
5 believe when the call begins, the caller is speaking in
6 the present tense and says, he's here jumping on me
7 again. And the 911 operator then begins to elicit
8 information to find out what is the level of the threat
9 to her safety and what actions need to be taken and
10 says, okay, I've got help started. Help is on the way.
11 Now, tell me what his name is, and she -- the -- the
12 caller tells what the name is of the defendant and, at
13 that point, says, he's running now. And so, it's only
14 after critical information is imparted at the beginning
15 of the call that the caller says that he's leaving.
16 But even --
17 JUSTICE KENNEDY: And then what -- what's your
18 position if she says he beat me 2 minutes ago, he's
19 left, and he's running down the block?
20 MR. DREEBEN: I think in that situation,
21 Justice Kennedy, there is still an imminent threatened
22 potential of a recurrence. The person could come back.
23 There's no protection on the scene. The reason that
24 she's calling 911 and not a friend or -- or a health
25 care provider is that she believes she needs protection

1 right then. And the -- the nature of an emergency is
2 such that it exerts a pressure both on the person who
3 is seeking help, as well as the official responder from
4 the government, to solve that urgent problem. Any
5 evidentiary benefit that may come from that is really
6 an incidental --
7 JUSTICE KENNEDY: Well, suppose -- suppose
8 it's a thief, and she said he's taken the diamond
9 necklace and he's running -- and he's running away. We
10 know he's not going to come back.
11 MR. DREEBEN: That -- that situation would
12 not fall within the emergency rule that the Government
13 is arguing for today. What we're arguing for is a rule
14 that deals when people's safety is --
15 JUSTICE KENNEDY: So the -- the jewelry store
16 owner who reports to the -- the police is fleeing on a
17 911, that -- that's not -- that's not admissible under
18 your view?
19 MR. DREEBEN: No. I'm not saying that,
20 Justice Kennedy. I'm saying that the Court isn't
21 confronted in this case with a situation in which
22 threats not to the person but to property or the need
23 to obtain or try to apprehend a fleeing felon are
24 present.
25 JUSTICE KENNEDY: Well, what -- what about

1 the -- my hypothetical?

2 MR. DREEBEN: We would submit that that is

3 not testimonial within the meaning of Crawford for many

4 of the same reasons that -- that are present in this

5 case. But it is a different case from this.

6 JUSTICE SCALIA: What do you mean by seeking

7 help? I mean, it seems to me you're saying seeking

8 help means trying to get somebody arrested, trying to

9 get somebody who has harmed you arrested. In this

10 case, he was gone out of the house. She had gone and

11 locked the door before she came back to the phone and

12 gave most of this testimony.

13 MR. DREEBEN: Well --

14 JUSTICE SCALIA: And -- and in the -- in the

15 jeweler case, the guy is running down the street. What

16 is the jeweler -- is the jeweler really worried about

17 the guy turning around and coming back to rob some

18 more? He wants the man arrested.

19 MR. DREEBEN: The urgency certainly in -- in

20 the jewelry thief hypothetical does deal with

21 apprehending the person who has just stolen the goods.

22 And that's why I say that it falls outside of the rule

23 that the Government is arguing for today.

24 But, Justice Scalia, I think --

25 JUSTICE KENNEDY: But I'm concerned about the

1 rule you're arguing today because it -- it seems to me
2 there's a good case for allowing the -- the statement
3 by the jewelry store operator.
4 MR. DREEBEN: I think there is a good --
5 JUSTICE KENNEDY: And -- and I want to know
6 what your position is so that you don't come back next
7 week and say, well, now we want the jewelry store --
8 MR. DREEBEN: Well, I'm not going to say that
9 we wouldn't, depending on how the Court analyzes this
10 case, argue for a submission that that's not --
11 JUSTICE KENNEDY: We'd rather you analyze
12 the case now and then we'll analyze it later.
13 (Laughter.)
14 MR. DREEBEN: What the Court needs to analyze
15 today is whether an emergency statement where somebody
16 is seeking protection and there is a threat of imminent
17 recurrence of the very violence that has triggered the
18 call is testimony. And it's not testimony because the
19 sort of risks of government shaping and the declarant
20 focus on providing evidence for use in a criminal case
21 are not present, and the information has, as Justice
22 Scalia pointed out, a unique probative value that's
23 very different from the kind of submission of an
24 affidavit or submitting to a civil law deposition that
25 prompted the confrontation right.

1111 14th Street, NW Suite 400 Alderson Reporting Company Washington, DC 20005
1-800-FOR-DEPO

1 The Framers were thinking about things that
2 we all would recognize as testimony, being deposed,
3 submitting an affidavit, appearing before a -- a
4 magistrate in a pretrial proceeding, and they used the
5 word witness in the Confrontation Clause not only to
6 refer to the kinds of statements that were covered, but
7 in connection with knowledge that the same word appears
8 in the Fifth Amendment and in the Sixth Amendment
9 Compulsory Process Clause, where in all of those
10 contexts, its most natural application is to the formal
11 acquisition of evidence.
12 JUSTICE BREYER: What do you say in that
13 respect about the blue brief's reference to 17th
14 century cases, the hue and the cry where someone went
15 out and told the sheriff, help, I'm being beaten up,
16 and that that evidence wasn't admissible?
17 MR. DREEBEN: Well, I think what's really
18 striking, Justice Breyer, is that there is no 17th
19 century case law that reflects that. There's really a
20 virtual, complete absence on the other side of this
21 case of an affirmative argument supported by decided
22 cases that says that evidence of that character was
23 even known to the Framers, let alone excluded.
24 If you look closely at their constable cases,
25 which is the closest cases that they -- they submit,

1 one of them is a report from the Old Bailey online
2 source which contains transcripts of criminal trials in
3 -- in England, and one of them, the Radbourne case, is
4 right around the time of the framing, and there's a
5 little line in the transcript where the constable says,
6 well, I bent down and I asked the victim something and
7 then the judge says, well, don't say that. There's no
8 evidence that that was regarded as a -- a legal ruling
9 under confrontation principles. There's no evidence
10 that the Framers were aware of the Radbourne Old
11 Bailey report, and there's additional statutory basis
12 in the treason statute, which was applicable there,
13 which said that all evidence had to be given face to
14 face. So that's their primary authority.
15 Their next authority --
16 JUSTICE SCALIA: Well, it's -- it's -- it may
17 be not a lot, but it's something. You don't have
18 anything to the contrary.
19 MR. DREEBEN: What we have --
20 JUSTICE SCALIA: You don't have anything
21 which shows that these hue and cry reports were
22 admitted, and there were a lot of them. They -- they
23 were done regularly.
24 MR. DREEBEN: The hue and cry reports,
25 Justice Scalia, as I think your earlier questioning

1 suggested, do not necessarily involve the kind of
2 emergency situation what -- that we have here where a
3 person is reaching out from an ongoing present criminal
4 act against them and seeking help. And the fact that
5 we have very little evidence at all of how 17th century
6 British law handled this is really, I think, persuasive
7 evidence that the Court should not deem the
8 confrontation right as a response to some sort of
9 abuses in this area.
10 JUSTICE SCALIA: I would say that a hue and
11 cry report is not the same as a woman being beaten and
12 -- and picking up the phone while the crime is in
13 progress. But I think it's quite similar to the -- the
14 jewelry hypothetical that Justice Kennedy gave you
15 which you're unwilling to say is -- is not covered by
16 the -- is covered by the Confrontation Clause, and I
17 think it's quite similar to a woman, where the husband
18 has left and she's locked the door and she wants the
19 husband arrested. I think it's quite similar to that.
20 But for the telephone, it's -- it's someone who's been
21 the victim of a crime who goes to a public official, as
22 soon as possible, and says, I've been -- I've been
23 subject to a crime. I want to report the crime and
24 have the person arrested. I think it's very similar.
25 MR. DREEBEN: Justice Scalia, first of all,

1 there is evidence that the hue and cry practice
2 existed. There is not evidence about how hue and cry
3 reports were viewed as a matter of evidence law. It is
4 very difficult to transpose into 17th and 18th century
5 English practice what we are dealing with now, in part
6 because the system of public prosecutions that we have
7 today where an official prosecutor representing the
8 State carries the ball in a criminal case did not
9 exist. The accuser had to appear in court as the
10 private prosecutor. If the accuser did not appear,
11 there was no prosecution, and these prosecutions were
12 simply dismissed because there was no one official on
13 the scene to carry the ball. So the -- the speculation
14 that's required requires a number of inferential leaps
15 that Petitioners have to make in order to draw an
16 analogy.
17 And at the same time, there really is an
18 intuitive difference between the kinds of statements
19 that people make in emergencies and the kind of core
20 testimonial statements that we know prompted the
21 confrontation right, the Sir Walter Raleigh case
22 involving affidavits and letters, the Marian practice
23 under which testimony was formally taken in the calm of
24 a magistrate's rooming house rather than in the
25 immediate aftermath or time when a crime was actually

1 ongoing.

2 CHIEF JUSTICE ROBERTS: Mr. Dreeben, you say

3 focus on the emergency nature. Very little of what

4 took place in the 911 call is emergency. He's beating

5 me. He's jumping on me. Yes. What's his name? I

6 mean, it's not like they'll send help if his name is

7 Joe but they won't if it's Mike. It doesn't matter.

8 Which direction is he running? That's not related to

9 the emergency nature of the -- of the call.

10 MR. DREEBEN: It is, Mr. Chief Justice, in

11 the sense that it's information that's needed to

12 respond to and resolve the imminent threat to this

13 woman's safety, which would certainly occur if the

14 individual decided to come back and finish what he'd

15 started. And if a law enforcement authority set up its

16 911 calls so as not to gather adequate information and

17 this individual had come back and actually beaten or

18 killed the victim, it would certainly be regarded as an

19 inadequate response to the emergency situation of an

20 ongoing violent attack. And so for that reason, the

21 rule that we're describing here for the Court would

22 deal with not only the present emergency but also its

23 imminent, threatened recurrence.

24 JUSTICE BREYER: Well, rather than build that

25 into the law, it might be wiser to deal with Justice

1 Kennedy's case, in whatever system we come up with,
2 explaining it. So what is your full explanation of the
3 diamond necklace?
4 MR. DREEBEN: My -- my view on that is that
5 the kinds of statements that are made in the immediate
6 report of a crime are really in the form of excited
7 utterances that are much different from the kind of
8 dispassionate testimony that occurs after the fact that
9 prompted the confrontation right.
10 Now, the Court could accept that line and say
11 that jewelry thief reports are not testimony within the
12 meaning of the Confrontation Clause, or it could
13 disagree and say that no, when there's not the
14 immediate threatened, imminent potential for a
15 recurrence of the violence, then we're going to treat
16 that as closer to simply a report of a crime and treat
17 it as testimonial. Court could go either way on
18 that without touching the core of what's at issue
19 today, which is namely emergency situations that pose a
20 threat to the safety of the person who's making the
21 call or who's encountered by a law enforcement officer
22 on the scene in the immediate aftermath of an attack.
23 JUSTICE SCALIA: And you wouldn't say that
24 every question asked in that context. Don't we have to
25 do it question by question? I mean, what if one of the

1 questions was, you know, has he beaten you before? How
2 many times before? You know, are you going to allow
3 that in too --
4 MR. DREEBEN: I think that --
5 JUSTICE SCALIA: -- as an excited utterance?
6 MR. DREEBEN: -- the more that the -- the
7 questioning begins to delve into a past narrative of
8 past criminal activity, the more there is a reason to
9 think that it serves, in addition to its protection
10 purpose, an evidentiary purpose.
11 I'd hasten to add, Justice Scalia, that that
12 kind of information is very important for the officers
13 to know to gauge the seriousness of the threat, to get
14 the kind of idea of who they are dealing with, and to
15 respond effectively. So it is reasonably necessary for
16 those kinds of questions and that information to be
17 elicited.
18 But I also agree with Your Honor's suggestion
19 that not everything that occurs in a 911 call should be
20 regarded as per se non-testimonial. Not everything
21 that happens at the scene of a crime should be regarded
22 as per se non-testimonial. And naturally, the Court is
23 going to have to apply a certain degree of analysis to
24 the actual questions and answers that are given. But
25 if you look at the protocol in this case for the 911

1 call, if you look at the kinds of questions that were
2 asked and the information that was given, it is all
3 reasonably necessary to resolve an emergency by a
4 person who has really called in a state of extreme
5 stress. Thank you.
6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Dreeben.
8 Mr. Fisher, you have 4 minutes remaining.
9 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
10 ON BEHALF OF THE PETITIONER
11 MR. FISHER: Thank you.
12 Let me say a word about the record and then
13 two things about the emergency exception that we've
14 been talking about.
15 First, in the record it's always been
16 accepted in this case that Mr. Davis had left the house
17 when the 911 call started. In the joint appendix, page
18 117, that's what the Washington Supreme Court said, and
19 at page 30 of the evidentiary hearing in the trial
20 court, the prosecutor submitted the case that way as
21 well.
22 Now let me address the history here because
23 it's important. And Justice Scalia is exactly right.
24 There's not a single case historically where a
25 statement to a law enforcement agent accusing someone

1 of a crime was admitted in a criminal case. We're not
2 aware of one.
3 JUSTICE BREYER: That may be hearsay. That
4 may all be hearsay.
5 MR. FISHER: It -- it is what it is, Justice
6 Breyer. The -- the oldest case that is in the briefs
7 on the other side is White v. Illinois in 1992. So for
8 some 500 years before that. And -- and perhaps when we
9 have to draw an inference, we do have -- to a certain
10 degree we acknowledge the dog that doesn't bark. We
11 have evidence that was out there and simply wasn't
12 used.
13 Let's look at the history of the Marian
14 statutes. And I'm -- and I want to refer the Court
15 specifically to page 101 of Sir Matthew Hale's
16 treatise. He talks about the -- both the problem with
17 the hue and cry and then the reason we have the Marian
18 statutes. The reason we have the Marian statutes was
19 because for pretrial bail and committal hearings, the
20 courts were not prepared to simply go on the initial
21 reports. They wanted a formal examination of the
22 witness to use at even the pretrial hearing, to detain
23 the person pending trial. And Sir Matthew Hale at page
24 101 says the problem with the fresh reports the hue
25 and cry, is that -- is that they're not under oath.

1 They don't -- they don't even answer all the questions
2 that we would want answered.
3 So what the United States is asking you to
4 accept is that the kind of evidence that the Framers
5 would not have even been prepared to allow at a
6 pretrial bail hearing -- rather, they wanted to have
7 something more formal -- they would now accept to be
8 used in the trial itself. And what we think is that
9 this turns everything on its head. The reason the
10 Marian statutes were abused is because, of course, in
11 continental Europe that was an accepted form of
12 evidence, and so there was some reason to believe these
13 formal statements could be used. No one ever suggested
14 the hue and cry could be used.
15 Finally, let me say a word about police
16 incentives. If you accept the rule that the -- that
17 the United States and -- and the State is asking you to
18 accept, think about the incentives you put on 911
19 operators. They're not supposed to ask too many
20 questions. They're not supposed to get too much
21 information. The same would go for the responding
22 officer. They don't want to ask too many questions,
23 structured questions, make sure who did it, make sure
24 they have the details because then somehow these
25 statements become testimonial.

1 What our rule says is it frees the 911
2 operators, it frees the police officers to do what
3 they're supposed to do, which is immediately start
4 responding and both help people and start gathering
5 evidence from the moment that a crime is reported. And
6 that's what we think the Confrontation Clause is all
7 about. It's not -- it's about the way the case is
8 proved at trial. The Confrontation Clause -- as
9 opposed to other emergency doctrines this Court has in
10 the Fourth Amendment area, for example, the
11 Confrontation Clause has zero to say about the way
12 police officers do their jobs or the way the 911
13 operators do their jobs. If they go out and collect
14 structured affidavits under oath, if the 911 operator
15 put the caller under oath, there's nothing wrong with
16 that. If the 911 operator says, I want to be sure I
17 have this right, describe to me exactly what he looks
18 like, and tell me more about him, that's what we would
19 want somebody to do. And we shouldn't put a perverse
20 incentive for these first responders that, all of a
21 sudden, once they start gathering useful information
22 for the criminal justice system, that some sort of new
23 rule triggers.
24 All we're saying is that these are the kinds
25 of statements that were -- that the Framers would have

1 cared about and that they did care about, and that
2 nowadays if the State or other prosecutors want to use
3 them, they should be duty-bound to bring the witness
4 into court as well to submit the witness to cross
5 examination.
6 If there are no further questions, I'll
7 submit the case.
8 JUSTICE STEVENS: I have one last question.
9 How do you think Professor Wigmore would have decided
10 this case?
11 (Laughter.)
12 MR. FISHER: Well, this Court noticed that
13 Professor Wigmore had the view that the Confrontation
14 Clause applied only to witnesses that actually took the
15 stand. So he would have thought the Confrontation
16 Clause didn't apply at all. But he would have
17 acknowledged to you -- and this is interesting from his
18 treatise -- that these were testimonial statements. He
19 said as soon as somebody starts -- as soon as in a
20 criminal trial we use a statement narrating a past
21 event, it's testimonial. However, Professor Wigmore
22 just didn't quite have the Confrontation Clause right.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.
25 (Whereupon, at 11:04 a.m., the case in the

1 above-entitled matter was submitted.)
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25