

No. 15-824

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IN THE  
**Supreme Court of the United States**

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RICK CARPENTER,  
Petitioner,

v.

STATE OF CALIFORNIA,  
Respondent,

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**On Writ of Certiorari to the  
United States Supreme Court**

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**BRIEF SUPPORTING RESPONDENT**

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PHILIP MAURIELLO, JR.  
1155 Island Avenue  
San Diego, CA 92101

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## **SUMMARY OF THE ARGUMENT**

The Confrontation Clause regulates only a narrow subset of out-of-court statements, and is thus distinct from the general rules against hearsay. The question in this case is whether the statements made by Derek Hayes were “testimonial” and such that he is a “witness against” the accused. Because initial fact finding procedures executed by law enforcement do not resemble the ex parte communications that the Confrontation Clause was meant to exclude, the State respectfully urges this Court to hold that Derek Hayes statements are not testimonial and thus not subject to the Confrontation Clause of the Sixth Amendment.

When evaluating whether an interrogation is custodial or non-custodial in nature, the court has adopted a non-exclusive, six-factor test, developed under *U.S. v. Griffin*, 922 F.2d 1343 (8th Cir. 1990). The first three factors are positive indicators for a non-custodial interrogation in that the presence of these factors leads toward a determination of a non-custodial interrogation. The last three factors from the Griffin test are negative factors, indicating the interrogation to be more likely one custodial in nature.

Each of these factors, when applied to the facts of this case, demonstrates the non-custodial nature of the library interview. Additionally, the policies already in place to protect the warnings developed in *Miranda v. Arizona*, 384 U.S. 436 (1966) are sufficient and effective and require no extension or additional safeguards.

The primary concern for the court is two-fold: to protect the rights of the individual inmate against coerced confessions and to protect the rights of the

incarcerated inmate to take responsibility for their actions and confess to their crimes. We believe the Court is able to marry these two, as it has historically done. By affirming the ruling of the appellate court, the Court will recognize the lack of necessity to overrule substantial case law while continuing to protect the rights of inmates. Thus, under the Griffin test and recent case law, we ask the Court to confirm the non-custodial nature of the library interview and affirm the ruling of the appellate court.

## **ARGUMENT**

### **I. The Statement By Derek Hayes During The Prison Riot Is Non-Testimonial And Thus Not Subject To The Confrontation Clause**

The statement by Derek Hayes falls within this Court's consistently held precedent of what is considered non-testimonial. Since *Davis v. Washington*, this Court continually holds that statements made to assist law enforcement during an emergency are not testimonial, and thus not subject to the Confrontation Clause.

#### **A. The Trial Court Did Not Violate Carpenter's Sixth Amendment Rights By Admitting Derek Hayes Statement Under The Resemblance Test From *Crawford***

The text of the Confrontation Clause suggests no intent to regulate hearsay in general, and the common law confrontation right that gave rise to the Clause illustrates an acute concern with a specific type of out-of-court statement commonly used as a substitute for live testimony in the 16th and 17th centuries.

In *Crawford v. Washington*, this Court reviewed the long standing common law history of the Confrontation Clause and found that over the years it's application had become too broad. This Court then set forth a new test to be used when determining if a statement is testimonial called the "resemblance test"<sup>1</sup>.

Therefore this Court should use the "resemblance test" to determine whether Derek Hayes' made a testimonial statement to Sergeant Daget:

- First, a testimonial statement occurs when a governmental agent, whose primary goal in his investigative role, conducts a structured interrogation, under circumstances where the investigator manipulates or shapes the witness's statements into something that resembles trial testimony.
- Second, probe the nature of the investigator's inquiries to determine whether an attempt to create witness statements for latter use in trial through investigatory questions posed in a structured, targeted, and formal manner.
- Third, the circumstances of the interrogation must be such that the interrogator had the opportunity and the ability, judged objectively based on the totality of the circumstances, to manipulate or shape the witness's statement into something that resembles trial testimony.

First, when Sergeant Daget approached Derek Hayes, he inquired about what the current situation was. The facts do not indicate that Sergeant Daget conducted a structured interrogation, but rather a fact finding conversation with Hayes. Sergeant Daget also did not have the goal in creating statements for trial testimony.

Further, there is little to no evidence that the conversation between Sergeant Daget and Derek Hayes possessed any of the elements of a formalized interrogation in which an objective view would see a police interrogation. The inquiries made by

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<sup>1</sup> *Crawford v. Washington*, 541 U.S 36 (2004)

Sergeant Daget lacked any of the qualities of a formalized, structured, and targeted police investigation.

In observing the totality of the circumstances, the Court should see that this conversation between Daget and Hayes is not a formal police interrogation, but merely a casual conversation to help assess the situation at hand.

These factors will seldom be satisfied when governmental agents are in the initial stages of responding to a public safety threat, as those circumstances simply do not lend themselves to the production and manipulation of testimonial statements.

In examining these factors, it is conclusive that Hayes statement was not testimonial. Instead, we have a situation where the intent of the Sergeant was only to fact find in order to help assist in matters of safety.

## **B. The Statement By Derek Hayes To Sergeant Daget Is Non-Testimonial Under This Court's Precedent In *Davis v. Washington***

Following the precedent in *Crawford*, this Court constructed a new test to further determine whether a statement is testimonial during emergency situations. When applying the "primary purpose" test from *Davis*, this Court should find that Derek Hayes' statement to Sergeant Davis was non-testimonial.

### **i. The Primary Purpose Of Derek Hayes Statement To Sergeant Daget Was To Procure Safety During An Emergency Situation And Thus Non-Testimonial Under *Davis***

In *Davis v Washington*, this Court found that statements made to law enforcement to help procure safety are not considered testimonial. In *Davis*, this Court

held that statements made by one during a 911 call were non-testimonial. This Court found that the “primary purpose” of such statements were to assist law enforcement to meet an ongoing emergency<sup>2</sup>.

When Hayes made the statement to Sergeant Daget there was a prison riot in progress that required the assistance of the corrections officers to procure safety. The statement by Hayes assisted Sergeant Daget in meeting the emergency. Similar to the rationale in *Davis*, statements made in the course of an emergency possess only one purpose, to inform law enforcement how to help.

Hayes’ statement to Sergeant Daget will pass the “primary purpose” test set forth in *Davis* because the primary purpose of the statement was to inform Sergeant Daget about an ongoing emergency.

**ii. Carpenter Wrongly Argues That Sergeant Daget Does Not Fall Under The Precedent Of *Davis* Because Daget Is A Correction Officer And Not A Police Officer**

The Petitioner wrongly argue that the case precedent in *Davis* narrowly applies to police officers, and not corrections officers. This Court in *Ohio v. Clark* has not agreed with that position and should decline to create a stringent categorical rule that *Davis* should apply to.

This Court held in *Ohio v. Clark* that statements made to a child’s teacher regarding the safety and health of an abused child, are not subject to the Confrontation Clause<sup>3</sup>. This Court found, similar to the situation in *Davis*, that statements made to

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<sup>2</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006)

<sup>3</sup> *Ohio v. Clark*, 135 S. Ct. 2173, 2181, 192 L. Ed. 2d 306 (2015)

another to help procure safety during an emergency are not subject to the Confrontation Clause<sup>4</sup>. The Court declined to restrict the ruling in *Davis* to just law enforcement and found that when applying the “primary purpose” test, the statements made to the child’s teacher were solely to help the child and not create evidence for the defendant’s prosecution<sup>5</sup>.

Contrary to Petitioner’s argument, this Court has expanded the category of whom one can make a non-testimonial statement to. Instead of arguing that Sergeant Daget’s position as a corrections officer precludes him from the precedent in *Davis*, this Court’s ruling in *Ohio* expands it to a point that unarguably includes Sergeant Daget.

Therefore, this Court should find that the statements made by Derek Hayes to Sergeant Daget were to help procure safety during an emergency situation and thus are non-testimonial.

**iii. This Court Should Follow Persuasive Authority With Facts Very Analogous To The Present Case And Find That Derek Hayes Statement Was Non-Testimonial**

Further, persuasive authority from the California Supreme Court has agreed with the positions of the Respondent in a case nearly identical in facts and legal issues to the case in front of us.

In *People v. Thomas*, the court convicted the inmate of rape and first degree murder. A witness, who had their throat cut by the defendant, identified the defendant

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<sup>4</sup> *Id* at 2180

<sup>5</sup> *Id* at 2180

to a corrections officer on duty<sup>6</sup>. The defendant argued that his Sixth Amendment rights were violated under the Confrontation Clause<sup>7</sup>. The Supreme Court of California held the statement non-testimonial under the “spontaneous statement” exception<sup>8</sup>.

In *Thomas*, the Court held the rule for spontaneous statements as a statement that:

- (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
- (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.<sup>9</sup>

The present case possesses many analogous facts to those in *Thomas*. Derek Hayes’ statement described the situation occurring in front of him at that time. Second Hayes made the statement spontaneously under the stress of being attacked himself.

This rule set forth by the Supreme Court of California follows the precedent continually upheld by this Court. By following the rationale in *Thomas*, the Court should follow the rationale that Hayes’ made a spontaneous statement and thus is not testimonial.

### **C. Carpenter Dangerously Argues That This Court Should Expansively Define The Definition Of Testimonial Statements**

The interpretation of the Confrontation Clause from *Crawford* was based off the historical intent of the Framers. The Framers were well aware of the potential for abuse

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<sup>6</sup> *People v. Thomas*, 51 Cal. 4th 449, 495, 247 P.3d 886, 919-20 (2011)

<sup>7</sup> *Id* at 495

<sup>8</sup> *Id* at 495

<sup>9</sup> *Id* at 499

by the judiciary if not for the Confrontation Clause. Petitioner will make the argument to reject the narrow interpretation from *Crawford*. But, as this Court found in *Davis*, rejection of *Crawford's* narrow view of the Confrontation Clause does not require this Court to accept the broadest application of the Clause<sup>10</sup>.

A ruling in favor of the Petitioner would handicap our law enforcement by subjecting any person with personal knowledge of an on-going emergency to future testimonial proceedings, thus limiting the reliability and effectiveness of such a person to aid law enforcement during a crisis. It is never the case that a “witness” goes into court to warn of an emergency and seek help<sup>11</sup>. Therefore, it would be reckless and irresponsible of the Court to expand the definition of testimonial to anyone providing information to assist law enforcement during an emergency.

Just as for Fifth Amendment purposes, law enforcement officers can almost instinctively distinguish between questions to secure safety during a crisis and questions to elicit testimonial evidence<sup>12</sup>. If it is objectively shown that the primary purpose of the questioning was to respond to an emergency, the statements produced by the questioning are non testimonial.

Petitioner wrongly argues that because the emergency was seemingly over the statements are testimonial. But the test does not seek the subjective view of those revisiting the events after the fact, but rather the surrounding circumstances of the

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<sup>10</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006)

<sup>11</sup> *Id* at 547

<sup>12</sup> *Id* at 547, (quoting *New York v. Quarles*, 467 U.S. 649, 658-659 (1984))

event. When viewed through an objective view at that moment, there was no certainty that the emergency was over and complete safety had not been procured.

Law enforcement bravely enter dangerous situations on a daily basis. If the Court accepts the Petitioner's argument to expand the definition of testimonial, the lives of those who seek to protect us would be put in greater jeopardy. When responding to an emergency, a law enforcement officer must be confident that they can gain the information they need to properly approach the situation. An officer must be able to as best as they can assess the situation in regards to their own safety, the safety of others, and the safety of the victims involved. Such statements procured during an emergency are valuable tools to our law enforcement, to even weaken that tool by one degree, would be a disservice to those who seek to protect us.

## **CONCLUSION**

This Court should affirm the lower court's decision because the court precedent set forth by the State overwhelmingly favors the positions of the Respondent.

On the issue of the Confrontation Clause, the statement made by Derek Hayes is not testimonial for the following reasons:

- The statement was made to assist a law enforcement agent procure safety during an emergency
- The statement's primary purpose was to inform, rather than testify against the witness
- The statement meets the required hearsay exception of a "spontaneous statement" and is not subject to confrontation

Therefore, by all accounts, the Court should agree with the lower court and affirm their decision.

