NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEROME TA'AFULISIA,

Petitioner,

v.

STATE OF WASHINGTON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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*David B. Koch
Jennifer J. Sweigert
NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

*Member, Supreme Court Bar
Counsel of Record

QUESTION PRESENTED

The Confrontation Clause of the Sixth Amendment guarantees accused persons the right to cross-examine witnesses who make testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). To determine whether a statement is testimonial, the critical question is whether the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). To determine the "primary purpose," courts consider both the purpose of the speaker and that of the listener/questioner. *Bryant*, 562 U.S. at 367.

Is a statement testimonial for purposes of the Confrontation Clause of the Sixth Amendment when the speaker talks with a trusted family member who is intentionally soliciting incriminating information and secretly recording the conversation at the behest of the police in order to create evidence for trial?

TABLE OF CONTENTS

Page

INTRODUCTION……1

OPINIONS BELOW……..2

JURISDICTION……..2

CONSTITUTIONAL PROVISIONS INVOLVED……2

STATEMENT OF THE CASE……3

REASONS FOR GRANTING THE WRIT……5

1. The Court should clarify whether a statement is testimonial under the Confrontation Clause when law enforcement solicits the statements from an unwitting declarant for use at trial……..5

2. The primary purpose test creates a "glaringly obvious problem" when police secretly elicit un-confrontable witness testimony for use at trial……6

3. The dilemma highlighted by Justice Scalia has led to conflicting results and reliance on dicta when the state intentionally elicits statements from unwitting declarants…8

4. The Washington Court of Appeals relied on "hints" from this Court to find the brothers' statements were not testimonial despite the clear police purpose of obtaining evidence that would be admissible in court……16

CONCLUSION……..21

APPENDIX A – Decision of the Court of Appeals of Washington…….1A

APPENDIX B – Order Denying Petition for Review……..32A

TABLE OF AUTHORITIES

Page

Cases

Bobadilla v. Carlson,
575 F.3d 785 (8th Cir. 2009)……11, 15

Bourjaily v. United States,
483 U.S. 171 (1987)……..13, 16, 17, 18

Brown v. Epps,
686 F.3d 281 (5th Cir. 2012)……..11, 12, 13, 15

Commonwealth v. Cheng Jie Lu,
2019 PA Super 339, 223 A.3d 260 (2019)……9, 15

Crawford v. Washington,
541 U.S. 36 (2004)……2, 5, 6, 10, 16, 17, 19, 20

Davis v. Alaska,
415 U.S. 308 (1974)……6

Davis v. Washington,
547 U.S. 813 (2006)……..9, 10, 11, 12, 13, 16, 17, 18

Dutton v. Evans,
400 U.S. 74 (1970)……13

McCarley v. Kelly,
801 F.3d 652 (6th Cir. 2015)……9, 10, 15, 19

Michigan v. Bryant,
562 U.S. 344 (2011)……..1, 5, 6, 7, 8, 11, 13, 14, 15, 16, 18

Ohio v. Clark,
576 U.S. 237 (2015)……..7, 8, 13, 14, 16, 18, 19

People v. Ramirez Ruiz,
56 Cal. App. 5th 809, 270 Cal. Rptr. 3d 702 (2020)……10, 15

People v. Sharp,
155 P.3d 577 (Colo. Ct. App. 2006)……11, 15

State v. Nieves,
376 Wis 300, 897 N.W.2d 363 (2017).....13, 15

State v. Patel,
342 Conn. 445, 270 A.3d 627 (2022).....13, 14, 15

State v. Smith,
161 Idaho 782 (2017).....13, 15

United States v. Dale,
614 F.3d 942 (8th Cir. 2010).....12

United States v. Smalls,
605 F.3d 765 (10th Cir. 2010).....12

United States v. Vasquez,
234 Fed. Appx. 310 (5th Cir. 2007).....12

United States v. Veloz,
948 F.3d 418 (1st Cir. 2020).....13, 15

United States v. Volpendesto,
746 F.3d 273 (7th Cir. 2014).....14, 15

Statutes

28 U.S.C. § 1257(a).....2

Constitutional provisions

U.S. Const. amend. VI.....2

U.S. Const. amend. XIV.....2

INTRODUCTION

The police intended to create a substitute for live testimony when they sent family members, secretly wearing a recording device, to elicit incriminating statements from Ta'afulisia and his brothers. The brothers' out-of-court confessions, which also implicated Ta'afulisia, were admitted at trial and used to convict Ta'afulisia. In short, the police purposefully created unconfrontable testimony for use at trial.

This case presents the dilemma contemplated by Justice Scalia in his dissent in *Michigan v. Bryant*, 562 U.S. 344, 383 (2011). The Sixth Amendment's Confrontation Clause applies to testimonial statements that are intended as a substitute for live testimony. *Id.* at 358. Whether a statement is testimonial depends on the primary purpose of both the speaker and the interrogator. *Id.* at 367. A "glaringly obvious problem" is presented, however, when, as here, those purposes are at odds. *Id.* at 383 (Scalia, J., dissenting).

A conflict has arisen in cases involving opposing purposes and unwitting declarants. In some cases, when the questioner interrogates an unwitting declarant at the behest of law enforcement to gather evidence for trial, courts recognize the statements as testimonial and subject to the Confrontation Clause. In others, such as in Ta'afulisia's case, courts are

dismissive of the law enforcement purpose to create evidence. Courts focus instead on the duped declarant's obliviousness to find that the primary purpose was not testimonial. In short, the latter condone an end-run around the protections of the Sixth Amendment's Confrontation Clause and *Crawford v. Washington*.

Review is necessary to resolve the dilemma of conflicting primary purposes and to protect the right of accused persons to confront those who create testimony to be used against them.

OPINIONS BELOW

The Washington State Court of Appeals decision, reported at 21 Wash. App. 2d 914, 508 P.3d 1059 (2022), is attached as Appendix A. The Washington Supreme Court order denying discretionary review, reported at 518 P.3d 213 (2022), is attached as Appendix B.

JURISDICTION

The Washington Supreme Court issued its order denying discretionary review on October 12, 2022. This petition is timely filed within 90 days of the denial of review. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Fourteenth Amendment, section one, to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

1. Ta'afulisia and his two brothers believed they were speaking to family members in confidence. Pet. App. 3-4, 13-14. Unbeknownst to them, their family members were acting at the behest of the police. *Id.* The police hoped to elicit and record incriminating statements by the brothers that would be admissible against them at trial. Pet. App. 19.

Shortly after a shooting at a homeless encampment, police received a tip from Faoi Tautolo, known as "Lucky," claiming his nephew James Ta'afulisia (the petitioner's older brother) had confessed to the shooting. Pet. App. 3. Police asked Lucky, and another family member known as "Reno," if they would speak to James Ta'afulisia, wearing a wire to record the conversation. *Id.* Lucky and Reno agreed. *Id.* The result was the "encampment video," a recording of a conversation at a homeless encampment between Lucky, Reno, James Ta'afulisia, petitioner Jerome Ta'afulisia, and their youngest brother.

Pet. App. 3-4. Ta'afulisia's brothers made statements that incriminated Ta'afulisia. *Id.*

All three brothers were charged with multiple counts of murder and assault. Pet. App. 4. None of the three testified. *Id.* Before trial, Ta'afulisia moved to suppress the recording, arguing the admission of his brothers' statements would violate his Sixth Amendment right to confront the witnesses against him. *Id.* The trial judge denied the motion to suppress and admitted the encampment video. *Id.*

2. On direct appeal, Ta'afulisia argued admission of the encampment video violated his Sixth Amendment right to confront witnesses. Pet. App. 5. The Washington Court of Appeals held the statements were not testimonial because the brothers were unaware their uncles were acting as police informants. Pet. App. 19, 23-24. In reaching this conclusion, the Washington Court of Appeals relied on what it described as "hints" it found in the Court's decisions in Confrontation Clause cases over the past 20 years. Pet. App. 15-19. It also relied on circuit and state court opinions mostly decided before Bryant made clear that the primary purpose test encompasses both declarants and their interrogators. Pet. App. 19-20. The Washington Supreme Court denied discretionary review. Pet. App. 32.

REASONS FOR GRANTING THE WRIT

1. The Court should clarify whether a statement is testimonial under the Confrontation Clause when law enforcement solicits the statements from an unwitting declarant for use at trial.

The Court's jurisprudence makes clear that the Confrontation Clause applies only to testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). It also makes clear that, to determine whether a statement is testimonial, courts must consider both the purpose of the speaker and that of the listener to determine the "primary purpose." *Bryant*, 562 U.S. at 367. The Court has not explained how to determine the primary purpose when the speaker and the listener have diametrically opposed purposes leading to opposite conclusions regarding the testimonial nature of the statements.

The Court should grant review because the Washington Court of Appeals "has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). The Washington Court of Appeals held the speaker/declarant's purpose is of "greater weight than the conflicting motivations" of those eliciting the statements. Pet. App. 23. It came to this conclusion based on what it described as "hints" in this Court's jurisprudence. *Id.* at 930.

Courts across the country have split on whether statements are testimonial when the declarant is unaware that his interrogator has

been sent by police to gather evidence for the prosecution. This Court should resolve this important and unsettled question of federal law to protect accused persons from being convicted by un-confrontable testimony purposefully elicited by law enforcement for use at trial.

2. The primary purpose test creates a "glaringly obvious problem" when police secretly elicit un-confrontable witness testimony for use at trial.

Accused persons enjoy the right to confront the witnesses against them under the Sixth Amendment. The essential purpose of the Confrontation Clause is "to secure for the opponent the opportunity of cross examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Since *Crawford*, it is clear that the Confrontation Clause requires an opportunity to cross-examine the declarant of any "testimonial" statements. *Crawford*, 541 U.S. at 53-54. Once a statement is determined to be testimonial, the Constitution requires its reliability be tested in the crucible of cross-examination at trial unless the witness is unavailable and the accused has had a previous opportunity for cross-examination. *Bryant*, 562 U.S. at 354.

At minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." *Crawford*, 541 U.S. at 68. Testimonial statements are those that are "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358-59. Until *Bryant*, this Court had not clarified whose

purpose, the speaker or the questioner's, governs the primary purpose analysis. *Bryant*, 562 U.S. at 381 (Scalia, J., dissenting). The answer, under *Bryant*, is both. *Ohio v. Clark*, 576 U.S. 237, 247-49 (2015); *Bryant*, 562 U.S. at 367. The primary purpose test is an "objective analysis of the circumstances of an encounter and the statements and actions of the parties to it." *Bryant*, 562 U.S. at 360. The test encompasses both the speaker's purpose in making the statements and the listener's purpose in eliciting the statements. *Clark*, 576 U.S. at 247-49; *Bryant*, 562 U.S. at 367-69.

The primary purpose is not necessarily dispositive of whether a statement is testimonial. *Clark*, 576 U.S. at 246 ("[T]he primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause."). Courts consider all relevant circumstances, including the formality of the statement, whether the statement is made to a law enforcement officer or, by contrast, a casual acquaintance, and whether the statement is an attempt to establish the fact of a prior occurrence. *Clark*, 576 U.S. at 244-46; *Bryant*, 562 U.S. at 369. However, the critical question remains whether "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 576 U.S. at 245 (quoting *Bryant*, 562 U.S. at 358).

In his dissent in *Bryant*, Justice Scalia opined that, in determining this primary purpose, the speaker's intent should be dispositive. *Bryant*, 562 U.S. at 381 (Scalia, J., dissenting). He then pointed out the "glaringly obvious problem" that arises in applying a combined analysis of both parties when the police and the declarant have conflicting motives. 562 U.S. at 383 (Scalia, J., dissenting).

3. The dilemma highlighted by Justice Scalia has led to conflicting results and reliance on dicta when the state intentionally elicits statements from unwitting declarants.

The combined perspective analysis required by *Bryant* and *Clark* has led to a morass of different approaches and outcomes when considering unwitting statements to police or those working on their behalf. Some courts have deemed such statements testimonial because of the clear police purpose to obtain a substitute for live testimony. Other courts have found such statements nontestimonial, relying either on dicta from this Court, ignoring the combined perspective analysis required under *Bryant* and *Clark*, or using a purportedly objective analysis to focus solely on the appearance of the interaction to a person unaware of the hidden law enforcement purpose.

For example, the Pennsylvania Court of Appeals held such statements were testimonial because of the interrogator's intent to create evidence for trial. *Commonwealth v. Cheng Jie Lu*, 2019 PA Super 339, 223 A.3d 260 (2019). Speaking to an undercover police

officer posing as a potential prostitution customer, an employee at a house of prostitution identified the defendant as the manager of the establishment. *Id.* at 263-64. The court applied the primary purpose test to find the statement was testimonial because the primary purpose, viewed objectively, was "'to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 265 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006). Despite the unwitting declarant, the police purpose was the primary purpose.

The intentions of the questioners, rather than the declarants, were also dispositive in cases involving children as declarants. *Clark* makes clear that the small children being interviewed in these cases are unlikely to have had subjectively testimonial intent. 576 U.S. at 247-48 (finding it extremely unlikely a three-year old would understand his statements to be a substitute for trial testimony). Courts have relied instead on the obvious intent of their interrogators to deem their statements testimonial.

For example, in *McCarley v. Kelly*, 801 F.3d 652 (6th Cir. 2015), a psychologist questioned a child at the request of police with the goal of obtaining the child's statement for use at trial. The psychologist was attempting to extract information on behalf of the police, for the purpose of using the information in the police investigation. *Id.* at 664-65. The Sixth Circuit concluded there was no doubt the statements

were testimonial under *Crawford* and *Davis* because the psychologist was effectively interrogating the child on behalf of the police. *McCarley*, 801 F.3d at 664-65. The court did not mention the child's level of awareness that her statements would be used in court. "[F]airminded jurists would agree that D.P.'s statements constitute testimonial evidence where they were deliberately elicited in an interrogation-like atmosphere absent an ongoing emergency and used to prove past events in a later criminal prosecution." *Id.* at 665. The court noted that the recently decided *Clark* decision, (finding a child's statements to a teacher nontestimonial), was distinguishable because, unlike the teacher in *Clark*, the officer's primary intention in *McCarley* was to obtain evidence. *McCarley*, 801 F.3d at 662 n. 1.

The California Court of Appeals similarly relied on the questioner's intent to create evidence for trial in *People v. Ramirez Ruiz*, 56 Cal. App. 5th 809, 270 Cal. Rptr. 3d 702 (2020), *cert. denied sub nom*. *Ruiz v. California*, 142 S. Ct. 219 (2021). In that case, the child was interviewed by a social worker who was unaware that the police officer who accompanied her was secretly recording the conversation in case it was needed as evidence. *Ramirez Ruiz*, 56 Cal. App. 5th at 820-21. The court explained that the mere fact of recording the interview tends to suggest a testimonial purpose. *Id.* at 827. The court also suggested that an agreement between police and social

workers to conduct interviews for dual purposes would implicate the Confrontation Clause. *Id.* The court found the statements were not testimonial but suggested the outcome might have been different if the social worker (not the child declarant) had been aware of the recording and its accusatory purpose. *Id.* at 826-27.

Courts reached similar conclusions pre-*Clark*. *See Bobadilla v. Carlson*, 575 F.3d 785, 791-92 (8th Cir. 2009) (holding children's statements to social worker were testimonial because initiated by police to obtain statements for use in criminal investigation to confirm prior abuse); *People v. Sharp*, 155 P.3d 577, 581-82 (Colo. Ct. App. 2006) (child's statements to forensic interviewer acting on behalf of police were product of functional equivalent of police interrogation and therefore testimonial).

By contrast, in *Brown v. Epps*, 686 F.3d 281 (5th Cir. 2012), the court relied on dicta from *Davis* to hold that unwitting statements to government informants were not testimonial. *Brown*, 686 F.3d at 287 (citing *Davis*, 547 U.S. at 825). In that case, a confidential informant working with police called the declarant to arrange a drug deal, and the calls were recorded. *Id.* at 283. While the court cited the *Bryant* decision, the analysis focused exclusively on the declarant's purpose, without regard to the confidential informant's purpose, or that of the police who orchestrated the entire interaction. *Id.* at 287-89.

The court relied on dicta from *Davis v. Washington*, 547 U.S. 813 (2006), noting that an unwitting statement to a confidential informant would not be testimonial. *Brown*, 686 F.3d at 287 (citing *Davis*, 547 U.S. at 825). The court also cited an unpublished decision finding a co-conspirator's statements nontestimonial because the co-conspirator was unaware he was being recorded. *Brown*, 686 F.3d at 287 (discussing *United States v. Vasquez*, 234 Fed. Appx. 310, 314 (5th Cir. 2007)). In addition to dicta and an unpublished decision, the Fifth Circuit relied on precedent from before 2011 when *Bryant* made clear that the primary purpose test encompasses both parties to the conversation. *Brown*, 686 F.3d at 288 (citing *United States v. Dale*, 614 F.3d 942 (8th Cir. 2010); *United States v. Smalls*, 605 F.3d 765, 777-79 (10th Cir. 2010)). The court reasoned that the statement in *Brown* was not solemnly made for the purpose of establishing a past fact; on the contrary, it was casually made with the purpose of furthering a conspiracy by arranging a drug deal in the future. 686 F.3d at 288. The statements were deemed nontestimonial because "no witness goes into court to proclaim he will sell you crack cocaine in a Wal-Mart parking lot." *Id.* at 288-89 (internal quotes omitted).

The same dicta from *Davis*, relied on in *Brown*, formed the basis for the cursory analysis in *United States v. Veloz*, 948 F.3d 418 (1st Cir. 2020): "Because Romero's statements set forth in the revised

transcript were not testimonial, Veloz's Confrontation Clause challenge necessarily founders -- even under the de novo standard of review -- on that threshold question." *Veloz*, 948 F.3d at 431 (citing *Davis*, 547 U.S. at 825; *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987)). The Wisconsin Supreme Court similarly relied on the *Davis* court's dicta indicating the statements made to a cellmate in *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970), were not testimonial. *State v. Nieves*, 376 Wis 300, 325, 897 N.W.2d 363 (2017) (quoting *Davis*, 547 U.S. at 825). The Idaho Supreme Court in *State v. Smith*, 161 Idaho 782, 789-90 (2017), also followed the *Brown* court's lead in citing both *Bryant* and *Clark* but nevertheless focusing exclusively on the declarant's lack of testimonial purpose in finding statements by a co-conspirator to an undercover government agent to be nontestimonial.

The Connecticut Supreme Court took a third approach, sidestepping the dilemma created by *Bryant*. *State v. Patel*, 342 Conn. 445, 270 A.3d 627 (2022). It did so by focusing on the "objective" nature of the primary purpose test in order to disregard the police informant's true purpose. The issue was a co-defendant's statement to a fellow jail inmate who was acting as a police informant. 342 Conn. at 448. The court emphasized the objective nature of the primary purpose test as explained in *Bryant*, "'the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter,

but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.'" *Patel*, 342 Conn. at 461 (quoting *Bryant*, 562 U.S. at 360).

The Connecticut Supreme Court viewed *Bryant* and *Clark* as affirming that statements made to persons harboring secret intentions to obtain evidence were not testimonial. *Patel*, 342 Conn. at 460-64 (discussing *Clark*, 576 U.S. at 249; *Bryant*, 562 U.S. at 360). Therefore, the court concluded that the declarant's statement, made in the informal setting of his prison cell, in response to his cellmate's active, but casual, questioning, was nontestimonial because the declarant had no plausible expectation of bearing witness against anyone. *Patel*, 342 Conn. at 465. Under the guise of an "objective" analysis, the *Patel* decision essentially adopts the subjective (and oblivious) mental state of the declarants to the exclusion of the true, but hidden, purpose of the law enforcement who orchestrated the encounter.

Like Connecticut, the Seventh Circuit also relied on a purported objective analysis to focus solely on the subjective intent of the declarant in *United States v. Volpendesto*, 746 F.3d 273, 289-90 (7th Cir. 2014). In that case the court held, "*Bryant* mandates that we not evaluate the purpose [of the secretly recorded conversation] from the subjective point of view of Hay, who knew he was secretly collecting

evidence for the government. Instead, we evaluate their conversation objectively. And from an objective perspective, Hay and Volpendesto's conversation looks like a casual, confidential discussion between co-conspirators."

In summary, the dilemma highlighted by Justice Scalia's dissent has led to inconsistent application of *Bryant's* formulation of the primary purpose test and inconsistent results when the government intentionally, but secretly, elicits statements for use at trial. In the Sixth and Eighth Circuits as well as Pennsylvania, California, and Colorado, such unwitting statements would be held testimonial based on the clear law enforcement purpose of creating evidence for trial. *McCarley*, 801 F.3d at 664-65; *Bobadilla*, 575 F.3d at 791-92; *Ramirez Ruiz*, 56 Cal. App. 5th at 820-21; *Sharp*, 155 P.3d at 581-82; *Cheng Jie Lu*, 223 A.3d at 265. The same statements would be non-testimonial and therefore admissible in the First, Fifth and Seventh Circuits, as well as Idaho, Wisconsin, and Connecticut, despite the interrogators' clear intent to create a substitute for live testimony at trial. *Veloz*, 948 F.3d at 431; *Brown*, 686 F.3d at 287; *Volpendesto*, 746 F.3d at 289-90; *Patel*, 342 Conn. at 460-64; *Smith*, 161 Idaho at 789-90; *Nieves*, 376 Wis at 325. In Ta'afulisia's case, the conflict deepened, with Washington joining this latter group.

4. The Washington Court of Appeals relied on "hints" from this Court to find the brothers' statements were not testimonial despite the clear police purpose of obtaining evidence that would be admissible in court.

The Washington Court of Appeals in this case followed an approach unseen in any of the prior cases discussed above. The court acknowledged this Court's precedent requiring consideration of both the declarant's and the interrogator's purposes and acknowledged the contradictory nature of those purposes in this case. Pet. App. 12-15. However, the court largely dismissed the government's dominant role in orchestrating the statements. Pet. App. 23-24 (reasoning that "an objective viewer, aware of all the circumstances, would reasonably credit the utterer's motives as having greater weight than the conflicting motivations of others"). It did so based on what it described as "hints" from this Court's decisions in *Davis*, *Bryant*, and *Clark*. Pet. App. 15-19. Unfortunately, by discounting the dominant role of the government in obtaining these statements, the Washington Court of Appeals also failed to fully apply this Court's precedent and arrived at a result inconsistent with the goals of the Confrontation Clause described in *Crawford*.

The first hint was this Court's continued approval of the result in *Bourjaily*. Pet. App. 15 (discussing *Crawford*, 541 U.S. at 58 and *Davis*, 547 U.S. at 825). In *Bourjaily*, a confidential informant working with police secretly recorded several conversations discussing and

arranging a future sale of cocaine to two friends. 483 U.S. at 173-74. When they arrived for the sale, police arrested them both. *Id.* at 174. The friend's statements in the phone calls with the informant were admitted under the evidence rule allowing admission of hearsay statements made by co-conspirators in furtherance of a conspiracy. *Id.* *Crawford* described *Bourjaily* as hewing closely to the traditional line, and *Davis* cited it noting that statements made unwittingly to a government informant were clearly nontestimonial. *Davis*, 547 U.S. at 825; *Crawford*, 541 U.S. at 58.

The Washington Court of Appeals' reliance on this hint is problematic because the instant case does not involve statements about future events, in furtherance of a conspiracy yet to be realized. Thus, it is unlike *Bourjaily*, 483 U.S. at 173-74 (and *Brown*, 686 F.3d at 288-89). *Crawford* stated that statements falling under the hearsay exception for statements in furtherance of a conspiracy were not testimonial. 541 U.S. at 56. But, unlike the statements in *Bourjaily* and *Brown*, the statements in the instant case do not fall under that exception. No evidence was presented that the statements made during the encampment video occurred "in the course of and in furtherance of" a conspiracy as would be required for the co-conspirator exception to apply. *Bourjaily*, 483 U.S. at 175.

The second hint was a series of footnotes. In *Davis*, this Court stated that, in an interrogation, "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." Pet. App. 16 (quoting *Davis*, 547 U.S. at 822 n. 1). But the Washington Court of Appeals recognized that in *Bryant*, this Court clarified that the meaning of this footnote was only to point out that the Confrontation Clause is not implicated by the interrogator's questions because they are not offered for the truth of the matter asserted. Pet. App. 17 (quoting *Bryant*, 562 U.S. at 367 n. 11). The *Davis* footnote was not meant to preclude consideration of the questioner's purpose in determining the purpose of the declarant's statements. Pet. App. 17 (discussing *Bryant*, 562 U.S. at 367 n. 11).

The third hint was the focus in *Clark* on the relationship between a teacher and student, as contrasted with the relationship between a citizen and the police. Pet. App. 17-19 (discussing *Clark*, 576 U.S. at 249). The Washington Court of Appeals quoted *Clark* suggesting it was the child's perception of that relationship that mattered. "'At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser.'" Pet. App. 18 (quoting *Clark*, 576 U.S. at 247).

But the instant case is not a case of a conversation, as in *Clark*, that was reported to law enforcement and used as evidence only after the fact. This case presents a clear police purpose to obtain evidence for use at trial. Nearly every aspect of this conversation was orchestrated by law enforcement with the cooperation of Lucky and Reno. In this way, it is more akin to the child interview cases, such as *McCarley*, 801 F.3d at 662 n. 1. where the statements have been deemed testimonial. Like the psychologist in *McCarley*, Lucky and Reno were essentially acting as agents of law enforcement. They orchestrated and elicited statements with the sole purpose of obtaining admissible evidence.

The Washington Court of Appeals' decision to weigh the brothers' lack of awareness greater than the purposefulness of the police runs counter to the heart of the Confrontation Clause discussed in *Crawford*. In determining which utterances were subject to the strictures of the Confrontation Clause, the Court distinguished two ends of the spectrum: on the one hand, "a formal statement to government officers" and on the other "a casual remark to an acquaintance." *Crawford*, 541 U.S. at 51. While declining to provide a definitive test for testimonial statements, the Court noted, "Statements taken by police officers in the course of interrogations are also testimonial even under a narrow standard." *Id.* at 52. The primary object of the Confrontation Clause is testimonial hearsay, and

"interrogations by law enforcement officers fall squarely within that class." *Id.* at 53. In deeming law enforcement interrogations to be testimonial, the Court emphasized the involvement of the government, declaring, "The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." *Id.*

This case involves that very same risk and presents the question of whether a police interrogation ceases to exist merely because police involvement is hidden from the declarant. The contrast between the cases involving unwitting statements to government informants and those involving child witness statements illustrates the inconsistent results accruing under the current state of the law. The difficulty is also illustrated by the contrast between the Washington Court of Appeals dismissing of the government's purpose and the Court's concern that "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Crawford*, 541 U.S. at 56 n. 7. A decision by this Court would provide useful guidance for courts and law enforcement alike in protecting accused persons from such abuse. Police should not be able to intentionally evade the strictures of the Confrontation Clause by creating un-confrontable testimony to be presented at trial.

CONCLUSION

Ta'afulisia respectfully requests this Court grant his petition for a writ of certiorari.

DATED this 28th day of December, 2022.

Respectfully submitted,

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DAVID B. KOCH
NIELSEN KOCH & GRANNIS, PLLC
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
206-623-2373

Member, Supreme Court Bar
Counsel of Record