24-5411 ORIGINAL

No. _____

FILED
AUG 19 2024
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Mario Chavez — PETITIONER
(Your Name)

vs.

Vincent Horton, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mario Chavez
(Your Name)

P.O. Box 639
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Las Cruces, NM
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505.441-9299
(Phone Number)

QUESTION(S) PRESENTED

This Court deemed it prudent to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" when it determined in Crawford to make a course adjustment on Confrontation Clause jurisprudence. In the wake of its decision courts across the nation, both state appellate and federal circuit, have charted different courses in determining when, if ever, out-of-court statements such as excited utterances are testimonial for animating Confrontation Clause protections guaranteed by the Sixth Amendment. These differing courses are inconsistent, at best, and, in general, counterintuitive to the general understanding and this Court's ruling that "leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." Which is precisely why this Court is urged to weigh in and settle the dispute on: can a criminal defendant be convicted on the out-of-court accusation of a non-testifying codefendant determined by the trial court to be an excited utterance?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATE CASES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at Chavez v. Horton, 23-2084 (10th Cir. May 24, 2024); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at Chavez v. Horton, 1:19-CV-01151-KWR-LF (D.N.M. May 15, 2023); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 5-24-2024.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution
Fourteenth Amendment to the U.S. Constitution
28 U.S.C. Sec. 2254

STATEMENT OF THE CASE

Petitioner was convicted of murder, armed robbery, and five counts of tampering with evidence. The State's Case-in-Chief was entirely circumstantial and built around the testimonial statements of the first individual taken into custody for questioning based on information received from a crime-stoppers hotline tip. The man taken into custody immediately shifted the blame to the petitioner throughout three recorded testimonial statements given to detectives throughout their investigation. The challenge, however, for the State's case was that the more they investigated the more lies from their "witness" they discovered; and the more lies they discovered the less likely it became that the witness's testimony would prove beneficial if passed through the "crucible of cross-examination" as the Crawford Court required. This created a quandary for the State's case, in that, its witness had no credibility and due to the high profile nature of the case, through the media, and the familial connections of the victim "justice" needed to be done.

Based on a followup conversation with the witness's wife nearly a year after the crime had taken place, the State discovered that its witness (not yet codefendant) had apparently made the same accusation against the

petitioner, that was made to police, to his wife hours after the crime had taken place. The wife never mentioned this statement to police when she was originally questioned days after the crime when her husband was taken into custody, but nevertheless the State captured her new statement as an opportunity to introduce the witness's accusation against the petitioner without having to adhere to Crawford's demands, so long as the trial court agreed that the declarant's accusation was an excited utterance under Rule 11-803(B) NMRA. The witness was then charged with a fourth degree felony based on his own self-inculpatory statements and proven lies, and in that moment became the "codefendant."

This case-dispositive issue is the basis of the Question presented for this Court's consideration. An issue where state appellate and federal circuit courts are divided on whether an accusation, as described herein, is "testimonial" for the purpose of triggering the constitutional protections of the Sixth Amendment's Confrontation Clause.

Trial counsel to the State's "opening the door" to the codefendant's accusations through what was questionably deemed an "excited utterance" by the court on the grounds of hearsay and the Confrontation Clause,

objections that the court overruled.

The trial court's ruling started a domino or cascade effect that led to an even more egregious Confrontation Clause violation when the defense attempted to counter the prosecution's stratagem of evading Crawford's dictates. Defense counsel motioned in limine to be permitted to cross-examine the lead detective on the codefendant's aforementioned lies that had been discovered throughout the official investigation (see, Ex. E, 11-13)[1], given the defense's theory that the codefendant was the actual murderer.

The defense reasoned before the court that since the codefendant's lies were not being introduced for the truth-of-the-matter asserted there was no Confrontation violation at risk, and the court agreed and ruled accordingly. However, during the defense's cross-examination of the lead detective, while being questioned on the individual lies the detective had discovered throughout his investigation from the codefendant the court stopped the cross-examination and informed the parties that it intended ~~to~~ to reverse the court's

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Footnote 1: For citation purposes to the state court record that are not part of the requirements of the Appendix citations are made to exhibits established in the Federal District Court by the State in Doc. 30.

previous in limine ruling and not permit any further cross-examination on the codefendant's lies because it seemed "unfair" to the state. And obviously, the state agreed with this determination.

The court offered the defense a choice, if it intended to continue cross-examining the detective on the codefendant's lies, to do so the defense would have to motion to introduce the entirety of the codefendant's testimonial statements (approximately 4 hours of video) in order to resolve the court's concerns about "unfair[ness]" to the State's case.

In the words of defense counsel in the filed Statement of Issues, id., at 13, the following occurred:

> The Defendant objected to the presentation of all of the three statements because not all of the three statements were lies. The Defendant argued that the Court would be forcing the Defendant to accept the hearsay statements (the non-lies) of the [codefendant] if the Defendant wanted to demonstrate and prove the lies. The Court stated that that was the only way that the Court would allow Defense counsel to continue cross-

examination of [the detective]. In the end, Defense counsel stated that the defendant was not waiving its hearsay objections and specifically not waiving its Crawford objection in accepting the Court's compromise.

The petitioner's Confrontation Clause issues were raised in the docketing statement (Statement of Issues, (Ex. E)) for the direct appeal to the state supreme court, however, even though appointed counsel had given petitioner both written and verbal assurances that the Confrontation Clause issues would be presented (see, Exhs, FFF, III, LLL) in petitioner's Brief-in-Chief, without notifying the petitioner, appellate counsel omitted the Confrontation Clause issues and notified the petitioner after the fact.

Appellate counsel did present the issue of the codefendant's excited utterance, but only on the grounds that the statement was hearsay and ineligible for the categorization as an "excited utterance" because the Wigmore rule was not followed in accordance with state law. No mention of the Confrontation Clause was made in petitioner's Brief-in-Chief, and for obvious reasons the state supreme court likewise made

no mention of the Confrontation Clause or any analysis performed related to the same.

Through a series of state habeas petitions, both pro se and with appointed counsel, and during the pendency of the underlying federal habeas petition (under 28 U.S.C. sec. 2254) at issue in this Petition for Writ of Certiorari, petitioner raised his challenges alone, and alternatively, under his claims that trial and appellate counsels were ineffective for failing to adequately raise and argue these issues. At all stages of petitioner's state and federal habeas pleadings he has repeatedly argued that the state courts denied him relief based on their misunderstanding that his Confrontation Clause claims had already been decided by the state appellate courts when they had not, and, as the state courts determined, were instead strategic choices by his trial and appellate counsels to waive. A state court determination made without ever providing petitioner with an evidentiary hearing on these claims.

The federal district court adopted the state court's pattern of misstating and misinterpreting petitioner's claims when it adopted the Magistrate Judge's PFRD (Doc. 36), in its entirety, and the Circuit Court did the same when it affirmed.

The Circuit Court reasoned (App. A, at 6) that since "[petitioner] hasn't cited any Supreme Court opinions suggesting that a codefendant's statement to a spouse, prior to any contact from law enforcement, would be characterized as testimonial," the state court did not violate clearly established Supreme Court precedent.

This case and petition presents this Court with a case-dispositive opportunity to further curtail the "flagrant inquisitorial practices" that the Framers would never have tolerated when they drafted the Sixth Amendment. Crawford, 541 U.S., at 51.

REASONS FOR GRANTING THE PETITION

This Court in Crawford v. Washington, 541 U.S. 36 (2004) sought to redirect the nation's judicial interpretation of the Confrontation Clause back to how it existed at the founding. The Crawford Court presented numerous instances where courts throughout the nation had adopted a laissez faire approach to "[L]eaving the regulation of out-of-court statements to the law of evidence," that effectually "[r]endered the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." Id., at 51. This Court undoubtedly recognized, however, that defining for posterity what was "testimonial" for the purpose of triggering the Confrontation Clause would potentially be counterintuitive, if not impossible, when considering the infinite instances under which a statement could potentially be deemed "testimonial."

That being said, although this Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" id., at 68, it left us with a detailed reasoning of its intent on extricating the principal evils, such as the ancient ex parte examination approach as evidence against the accused, as in the notorious treason case of Sir Walter Raleigh. The Court also included the extrajudicial statements contained in formalized testimonial materials, and, in general, "statements that were made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial," id., at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

Furthermore, the Crawford Court looked to the previous opinions that addressed Confrontation and its importance to the legitimacy of the fact-finding process of our criminal justice system, id., at 52. The Court also looked to what the Framers would have allowed as "testimonial," and also looked to the reasonings of legal academics A. Amar and J. Friedman.

It is crucial to note that despite strong suggestive language on how the Court expected future courts to analyze and assess whether a statement is in fact "testimonial" there was no real clarity given in the Crawford opinion as to the application of "testimonial" to statements that have been labelled by rules of evidence as "excited utterances," other than to make it clear that the Framers did not intend "to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" Id., at 61. That being said, courts in a post-Crawford world have taken a variety of paths to the assessment and determination on whether a particular statement is "testimonial" and, if not, quickly returning to the reliability determinations performed pre-Crawford under Ohio v. Roberts, 448 U.S. 56 (1980).

the Crawford Court, however, laid the groundwork for what would become established as the "primary purpose" test when this Court revisited the testimonial assessment in Davis v. Washington, 547 U.S. 813 (2006). Nevertheless, in assessing whether an excited utterance is ever "testimonial" for Confrontation Clause purposes courts across the nation have adopted three methods for making this determination, which has obviously led to some inconsistent and unpredictable outcomes.

As presented in State v. Maclin, 183 S.W. 3d 335 (Tenn. 2006), in addressing the same question on whether an excited utterance is testimonial, id., at 349, it presents an extensive list of courts that have determined "that an excited utterance cannot constitute testimonial hearsay." See United States v. Brun, 416 F.3d 703, 707 (8th Cir. 2005); Anderson v. State, 111 P.3d 350, 354-55 (Alaska Ct. App. 2005); People v. Corella, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770, 776 (2004); Key v. State, 173 S.W.3d 72, 76 (Tex. Ct. App. 2005).

A second approach has been held by other courts, in addressing the same question, that "the excited nature of the utterance has no bearing on whether a particular statement is testimonial. Instead, the focus is entirely on the declarant's objectively reasonable expectations," id., 183 S.W. 3d, at 350. The same points to State v. Parks, 211 Ariz. 19, 116 P.3d 631, 639 (App. 2005); Lopez v. State, 888 So. 2d 693, 698-700 (Fla. App. 2004);

Commonwealth v. Williams, 65 Mass. App. Ct. 9, 836 N.E. 2d 335, 338 (2005).

Finally, the third and most popular approach by other courts has been to "consider [] the totality of the circumstances under which the excited utterances were made to decide whether they are 'testimonial.'" Id., 183 S.W.3d, at 350. In considering the totality of the circumstances these courts considered both the testimonial hearsay analysis and the excited utterance analysis independently of one another. See, e.g., Drayton v. United States, 877 A.2d 145, 150 (D.C. 2005); State v. Wright, 701 N.W.2d 802, 811-14 (Minn. 2005); and People v. Coleman, 16 A.D.3d 254, 791 N.Y.S.2d 112, 114 (N.Y. App. Div. 2005).

Moreover, the petitioner acknowledges that not all excited utterances are equal, further complicating the assessment. For instance, who the statement was made to, or whether the statement was made under duress or in seeking help in an emergency are all factors that contribute to the testimonial analysis and determination. Was the statement made spontaneously or in response to a question? Was the statement casual, formal, or otherwise made under circumstances, as outlined and reiterated in Crawford but established in White v. Illinois, 502 U.S. 346, 365 (1992) where "an objective witness [would] reasonably [] believe that the statement would be available for use at a later

trial." And finally, in instances where the declarant is a codefendant, as in the instant case, the assessment should include whether there is blame shifting or an outright accusation being made against the criminal defendant, in agreement with this Court's opinions in Mattox v. United States, 156 U.S. 237 (1895); Douglas v. Alabama, 380 U.S. 415 (1965); Bruton v. United States, 391 U.S. 123 (1968); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Chambers v. Mississippi, 410 U.S. 284 (1973); Ohio v. Roberts, 448 U.S. 56 (1980); Lee v. Illinois, 476 U.S. 530 (1986); Cruz v. New York, 481 U.S. 186 (1987); Idaho v. Wright, 497 U.S. 805 (1990); Maryland v. Craig, 497 U.S. 836 (1990); Williamson v. United States, 512 U.S. 594 (1994); Gray v. Maryland, 523 U.S. 185 (1998); and where the above cases were analyzed in this Court's plurality opinion in Lilly v. Virginia, 527 U.S. 116 (1999), of unique importance because it was here where this Court reiterated and, made several relevant determinations, about the "inherent unreliab[ility]" of statements made by accomplices or codefendants that "incriminate a criminal defendant." Id., 527 U.S. at 131, 119 S.Ct. 1887.

However, momentarily returning to Crawford, in particular to the consideration this Court gave to the academic opinions of Professors Akhil Reed Amar and Richard Friedman, as pointed out in State v. Davis, 613 S.E.2d 760, 364 S.C. 364 (S.C. 2005), may be unclear, but,

the differing views do provide further guidance in assessing a statement's "testimonial" nature in a post-Crawford world.

Though this Court reiterated in Crawford that some of Professor Amar's suggestions had already been rejected in White, 502 U.S., at 352-53, related to the specific facts surrounding Sylvia Crawford's statement, because her statement was testimonial under any definition, what he published in Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L.J. 1045 (1998), at 1042-43, we come to know that Professor Friedman gave a broader definition of "testimonial" for this Court to consider. In that, "a declarant should be deemed to be acting as a witness when she makes a statement if she anticipates that the statement will be used in the prosecution or investigation of a crime." He also gave five rules of thumb, the second of which is relevant to the instant case, where he determined that "[a] statement made by a person claiming to be the victim of a crime is usually testimonial, whether made to the authorities or not."

In the instant case, as detailed in the Statement of the Case, at 4-5, the codefendant was responding to an inquiry from his spouse, who he had phoned approximately an hour prior and demanded that she return home, and when she did arrive, entered their shared residence, placed her infant in its

crib, then returned to where the codefendant was pacing back and forth nervously, she inquired as to the matter for which she had been summoned and, the codefendant's response was, "He set me up, he set me up, that fu**er set me up?" (referring to the petitioner), which means that he was claiming to be the victim of the crime of being "set up" and was responding to an inquiry at the same time (see, Ex. Hlt, at 18). An assessment, that, when added to this Court's determination in Lilly, on this Court's condemnation of codefendant accusations introduced by the State where the criminal defendant is prevented from submitting that accusation to cross-examination, "the greatest legal engine ever invented for the discovery of truth," id., Green, 399 U.S., at 158, it is clear that this Court has never agreed with any set of factual circumstances, such as those clearly established in the instant case, where such an egregious violation of the Confrontation Clause is sanctioned as constitutional.

Granted, the petitioner acknowledges that there are ample examples of courts in various jurisdictions in a pre-Crawford world having consistently rejected Confrontation Clause challenges to statements by codefendants inculpating a defendant where the statements were admissible under the "firmly rooted" excited utterance exception and were statements made to friends or acquaintances rather than law enforcement. See, e.g., Martinez v. McLaughlin,

951 F.2d 130, 134 (7th Cir. 1991); McLaughlin v. Vinzant, 522 F.2d 448, 449-51 (1st Cir. 1975); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173, 178 (1999). But, even prior to Crawford, courts were far from unanimous on this issue.

Two years prior to Crawford a New Jersey court addressed for the first time whether a hearsay statement, both self-inculpatory and inculpatory of defendant, made by a codefendant to police officers was properly received into evidence as an excited utterance, and concluded that "even assuming that [the statement] meets the requirement of the evidence rule, it is so inherently unreliable that its admission in this case violated defendant's right to [C]onfrontation." State v. Rivera, 797 A.2d 175, 176, 351 N.J. Super. 93 (N.J. Super. 2002). An opinion that echoed the wisdom from this Court's holding in Lilly.

Chief Justice Finney of the South Carolina Supreme Court in a dissenting opinion, pre-Crawford, demonstrated why Lilly so adamantly condemned the reliability of accusations from codefendants. Specifically, he said:

> The majority holds that the brother's "excited utterance," inculpating only the appellant, made only one to two minutes after the shooting, and made to a witness who observed the brother leaving the scene while attempting

> to secrete the murder weapon, is so inherently reliable that its admission is constitutionally permissible. The suggestion that this statement is reliable because the brother did not have time to concoct a blame-shifting story is naive, as is any assertion that the context in which the statement was made provides a substantial guarantee of its trustworthiness. To characterize all "excited utterances" as "firmly rooted" hearsay exceptions exempt from the strictures of the Confrontation Clause is an oversimplification similar to that made ... in Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

In the Lilly plurality opinion, the Court explicitly reiterated, "It is clear that our cases consistently have viewed an accomplice's statements that shift or spread blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversial testing can be expected to add little to [the statements'] reliability.'" 527 U.S. at 133, 119 S.Ct. at 1898 (internal citation omitted).

See, State v. Dennis, 523 S.E.2d 173, 337 S.C. 275 (S.C. 1999)

Accordingly, as established in Lilly, the only arguable exception to this Court's unbroken line of cases where a

codefendant's excited utterance that inculpated a defendant was deemed to not violate the Confrontation Clause was in Dutton v. Evans, 400 U.S. 74 (1970). A very unique case where the facts and context suggested to the majority that there was ample indication of reliability in that the codefendant "had no apparent reason to lie." Id., 400 U.S., at 86-89. However, the analogous facts and circumstances needed to apply this exceptional holding to the instant case do not exist, and, its hard to imagine that the statement in Dutton would have qualified as "testimonial" in a post-Crawford anyway.

However, as previously established, Crawford and its progeny have altered how Confrontation Clause challenges are assessed by trial courts and reviewed on appeal, as can be seen from the way in which an appellate court in Texas submitted an excited utterance to a "testimonial" analysis post-Crawford.

> Although we defer to the trial court's determination of historical facts and credibility, we review a constitutional legal ruling, i.e., whether a statement is testimonial or non-testimonial, de novo. This is particularly so because the legal ruling of whether a statement is testimonial under Crawford is determined by the standard of an objectively reasonable

> declarant standing in the shoes of the actual declarant. On that question trial judges are no better equipped than are appellate judges, and the ruling itself does not depend on demeanor, credibility, or other criteria peculiar to personal observation. By contrast, appellate courts review a trial court's determination of whether evidence is admissible under the excited utterance exception to the hearsay rule only for an abuse of discretion. In part, the distinctive standards of review for hearsay objections and Confrontation Clause objections to the admission of excited utterances arise because the hearsay exception depends largly upon the subjective state of mind of the declarant at the time of the statement, whereas the issue of whether an out-of-court statement (excited or otherwise) is "testimonial" under Crawford depends upon the perceptions of an objectively reasonable declarant.

See, Wall v. State, 184 S.W.3d 730, 742-43 (Tex. Crim. App. 2006) where the Texas court further determined that "[t]he fact that [the declarant's] statement also qualifies as an excited utterance under the Texas hearsay rule does not alter its testimonial nature." Id., at 745.

The determination that a statement can be both

an excited utterance and testimonial seems to be a sound determination given Crawford's specific finding that the Confrontation Clause cannot be left to the "vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" Where "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of Confrontation." Id., 541 U.S., at 61.

In the current case, as presented in the Statement of the Case, at 5-6, the trial court determined, when the state motioned to introduce the accusation of a non-testifying codefendant through the testimony of his spouse as an "excited utterance," it did so only basing its analysis on the first of the three prongs under the Wigmore rule which New Mexico follows. And over the defense's objections the trial court determined that the fact that the codefendant "was crying... trembling," and that "his eyes were red," (Ex. HH, at 18) was all that was necessary for for the trial court to determine that there was (a) no hearsay violation, and (presumably since the trial court never mentioned the Confrontation Clause, despite objections by the defense; nor did the state supreme court in its independent analysis of the same) (b) no Confrontation Clause violation. The state supreme court simply stated that, "[t]he evidence showed that [the codefendant] was pacing, shaking, and crying when [his spouse] came

home and was thus still under the emotion caused by the preceding events when he made the statement." Id., at 19. But ignored the relevant facts that petitioner presented in his Brief-in-Chief on direct appeal.

Petitioner argued in his Brief-in-Chief (Ex. DD, at 23-25) that the second and third prongs of the Wigmore rule were not considered by the trial court. In that, according to Wigmore, "[t]he utterance must have been before there has been time to contrive and misrepresent," and "[t]he utterance must relate to the circumstances of the occurrence preceding it."

Petitioner argued that "[h]ere there was certainly time [for the codefendant] to contrive, he had more than two hours before [his spouse] arrived home and [the codefendant] was certainly someone known for contriving. During the cross-examination of Detective Hix, many instances of [the codefendant] lying to police were brought out. [The codefendant] was worried about protecting himself and would have said anything to do so." Id., at 24.

The above is relevant in the instant petition for Writ because no reviewing court, state or federal, to include the United States Court of Appeals (Tenth Circuit) has ever adjudicated the Sixth Amendment claim that the admission of the codefendant's accusation against the petitioner as an excited

utterance violated the petitioner's rights under the same. Despite the defense's objections under "hearsay" and "confrontation" grounds, in particular, "Crawford" (Ex. Y, 6-7), the trial court never made a testimonial determination as to whether the codefendant's accusation was violating the petitioner's rights under the Confrontation Clause, and, if not deemed "testimonial" under Crawford, then making a determination as to whether the statement could survive Lilly or Roberts. None of which happened in the instant case. Relevant since there is precedent of federal courts reviewing state court findings on the admissibility of statements deemed acceptable under the rules of evidence but not admissible under the Confrontation Clause.

The Ninth Circuit determined that "where a Confrontation Clause violation is alleged, federal courts can go beyond a state court's characterization and analyze whether a factual basis supports the state court's decision." Winzer v. Hall, 494 F.3d 1192, 1198 (9th Cir. 2007)(citing Paxton v. Ward, 199 F.3d 1197, 1207-11 (10th Cir. 1999). Furthermore, the Circuit Court determined that "Paxton relied on the Lee decision not merely to say that hearsay falling under the second prong of Roberts must be supported by particularized guarantees of trustworthiness, but to say that a federal habeas court must consider whether a hearsay statement actually does fall within a firmly rooted exception under the first prong of Roberts —

even if the state court has already determined that it does." Id., at 1198.

The Ninth Circuit further determined that statements or declarations in question had to "fit the Supreme Court's descriptions of the excited utterance ... exception to hearsay, as set forth in Wright and White, [and, if so] then the Confrontation Clause was not violated." Id., at 1199.

In looking to the Tenth Circuit case cited by the Ninth Circuit, petitioner directs the Court's attention to that court's pre-Crawford analysis in determining that "[t]he Supreme Court has rejected the argument that a state court determination admitting hearsay under state law is dispositive of a petitioner's habeas claim that his constitutional confrontation rights were violated by the admission. See Lee v. Illinois, 476 U.S. 530, 539 (1986) (admissibility of hearsay evidence as a matter of state law does not resolve Confrontation Clause issue)." Id., Paxton, 199 F.3d 1197, at 1208. Other Circuit Courts agree with this finding: Puleio v. Vose, 830 F.2d 1197, 1207 (1st Cir. 1987); Martinez v. McCaughtry, 951 F.2d 130, 134 (7th Cir. 1991); and Crespin v. New Mexico, 144 F.3d 641, 648 n.4 (10th Cir. 1998). And, ultimately, this Court ruled in Lilly that "the question of whether [a statement] fall[s] within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law." Id., 527 U.S., at 125.

Therefore, in the instant case, petitioner urges the Court to intervene in a case where no consideration or analysis has ever been given or applied to whether or not the petitioner's Confrontation Clause rights were violated when the State introduced the only substantive evidence in its case-in-chief — a codefendant's accusation labeled by rules of evidence as an excited utterance. Furthermore, petitioner implores the Court to consider that had the proper tests been applied to the facts and context of the statement at issue here, given the numerous findings of state courts assessing cases and facts similar to the petitioner's and determining that the statements in question were "testimonial" under Crawford and thereby violated the defendant's Confrontation Clause rights. See, State v. Thorngren, 149 Idaho 729, 240 P. 3d 575 (Idaho 2010) (Mother and son were codefendants where the son made a statement to a friend and the State attempted to introduce that statement as an excited utterance, but in the context of deciding the Confrontation Clause issue the court ruled that the statement wasn't admissible.); Moore v. State, 169 S.W.3d 467 (Tex. 2005) (the court determined that excited utterances could be "testimonial" for Crawford analysis purposes); Hughes v. State, 2022 Ark. App. 453, 655 S.W.3d 312 (Ark. App. 2022) (A defendant's girlfriend makes an excited utterance against defendant and her statement was deemed "testimonial".)

Petitioner acknowledges that not all courts and jurisdictions

agree on this issue. See, e.g., United States v. Reyes, 362 F.3d 536 (8th Cir. 2004) (stating that Crawford does not apply to co-conspirator statements because they are nontestimonial); United States v. Saget, 377 F.3d 223 (2d. Cir. 2004) (the same); Horton v. Allen, 370 F.3d 75, (1st Cir. 2004); United States v. Lee, 374 F.3d 637 (8th Cir. 2004); and People v. Cook, 815 N.E. 2d 879 (Ill App. Ct. 2004). which is why petitioner asks for the Court's intervention in this matter, so that there exists a clear determination for future courts to assess whether, or under what circumstances, is an excited utterance testimonial for the purpose of triggering the Confrontation Clause.

Without this Court's intervention "the increasingly frequent use of the excited utterance exception as the vehicle for introducing past narratives from non-testifying declarants that has created tension with our common law and Confrontation Clause jurisprudence" will continue across the nation. State v. Branch, 182 N.J. 338, 365 (N.J. 2005).

Petitioner reminds the Court of Justice Rehnquist's prophetic admonition in his concurring opinion in Crawford about the perils in "'leav[ing] for another day any effort to spell out a comprehensive' definition of "testimonial", ante, at 68. But the thousands of federal prosecutors and the tens of thousands of state prosecutors

need answers as to what beyond the specific kinds of 'testimony' the Court lists, see Ibid, is covered by the new rule. They need them now, not months or years from now." Id., 541 U.S., at 75. It has now been two decades since this Court's decision in Crawford and this nation's judiciaries are still waiting for a clearer answer on the "testimonial" question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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