No. 24-330

IN THE

Supreme Court of the United States

Cid C. Franklin

Petitioners,

v.

New York,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a document containing defendant's own statements regarding his address testimonial under the Confrontation Clause when made for the primary purpose, indeed the sole purpose, of informing the arraigning judge of defendant's community ties and not to collect or create evidence for use at trial?

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INTRODUCTION AND SUMMARY OF ARGUMENT

Wanted in connection with a road rage incident in which he threatened nearby motorists with a gun, petitioner barricaded himself in the basement of his home. The police eventually arrested petitioner and recovered a loaded handgun in his basement, resulting in the filing of a weapon possession charge against him.

Before appearing in court, petitioner provided information to a non-profit organization under contract with New York City to establish his ties to the local community. The organization, called the "Criminal Justice Agency," or CJA, routinely interviews defendants for the express purpose of advising the arraigning judge about defendants' community ties, as related by those defendants and as confirmed by a person the defendant designates, with a view toward "assist[ing] the courts and the City in reducing unnecessary pretrial detention." *NYC Criminal Justice Agency*, https://www.nycja.org (accessed Oct. 20, 2024).

CJA provides an uncertified, unsigned document to the arraignment court, after which that court makes the bail determination and files the document in the court file. The information a defendant provides is not collected or used for any other purpose, although, on rare occasions, it may become relevant to an issue at trial. This occurrence is so rare that it has resulted in only four reported decisions in the more than 50 years in which CJA has been interviewing defendants throughout New York City. *See* Pet. at 14a, n.9.

This, however, was one of those rare cases. Petitioner's statement that he lived in the basement of

his residence was used at trial to establish his control over the basement where the gun was found. In addressing the Confrontation Clause issue, both the trial court and the Court of Appeals applied the primary purpose test, adopted by this Court in *Davis v. Washington*, 547 U.S. 813 (2006), *Michigan v. Bryant*, 562 U.S. 344 (2011), and *Ohio v. Clark*, 576 U.S. 237 (2015), and referenced as the test for the lower court to apply on remand in this Court's recent decision in *Smith v. Arizona*, 602 U.S. 779 (2024). Applying that test, the trial court and the Court of Appeals determined that the primary purpose of the statements in the report was not to produce evidence at trial, but rather simply to inform the arraigning judge about his community ties.

In this Court, petitioner objects to the use of the primary purpose test, points to purported mass confusion in lower courts about the proper test and urges this Court to make good on its promise in *Crawford* to enunciate a rule for determining when a statement is testimonial. But petitioner espouses no alternative, purportedly better test, instead simply citing what he alleges are a myriad of lower court rules. The result is that adopting petitioner's position would create more confusion rather than less. It would derail the by-now firmly established primary purpose test and offer no real substitute. Granting certiorari then, while it might or might not affect the outcome here, would do little to resolve the purported larger dispute the petitioner identifies as the reason for granting review.

Moreover, petitioner's portrayal of mass confusion and irreconcilable outcomes in the courts

below is simply not supported by the case law. As the Court of Appeals noted, 11 Federal Circuit Courts of Appeals have expressly adopted the primary purpose test. Pet. at 7a n.3. Similarly, the vast majority of state jurisdictions petitioner references have also adopted the primary purpose test, some in decisions petitioner cites and others in ones he does not. Added to this are 20 more jurisdictions that petitioner fails to acknowledge that have relied on the primary purpose rationale, for a total of 42 states. Indeed, of all the cases referenced in the petition to show the purported mass confusion below, only a single court refused to apply the primary purpose analysis. And while there are some differences in phraseology in some of the decisions, these are overwhelmingly linguistic in nature, as they do not result in irreconcilable outcomes except in rare cases not relevant here.

But even taking petitioner's characterizations at face value, the supposedly disparate lower court tests he purports to identify do little to advance his arguments here. Adopting petitioner's loose "core class" comparative analysis would in no way "complete the job" of defining the term "testimonial" (Pet. at 23); it would bring the Court's jurisprudence back to 2004, as that method of inquiry was first penned in C*rawford v. Washington*, 541 U.S. 36 (2004). Nor would that analysis assist petitioner here as he has failed to cite a single "core class" decision that precluded defendant's *own* statements from being admitted at trial. *Crawford*, after all, precluded the use of *ex parte* affidavits and statements, and petitioner's own statements here were hardly *ex parte*.

Similarly, petitioner's reliance on the supposedly distinct test that finds a statement testimonial if the declarant "reasonably expects" that it would be "available for later use at trial" is of no avail here. First, petitioner never raised this alternative test in the trial court, and, as a result, there is an insufficient record to resolve the issue. Had petitioner relied on, or even mentioned, this test at trial, the prosecution could have elicited testimony from the CJA supervisor regarding CJA employees' expectations. And given the rarity with which CJA reports have been admitted at trial, one could reasonably doubt whether a CJA employee would ordinarily "expect" such a document, invariably prepared solely for arraignment, to be used as evidence at trial. This Court should thus decline to grant certiorari to review an issue as to which the record is critically incomplete.

Second, this test would range far too broadly, at least as petitioner appears to understand it. Loosely construed, the test would preclude the statements of the victims in *Ohio v. Clark*, 576 U.S. 237, as the teachers who elicited them undoubtedly understood that the statements were likely to be "available for later use" in a criminal prosecution, particularly since the teachers were mandated reporters. Such an over-inclusive interpretation would stand in stark contrast to the way in which this Court used the phrase in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009): chemists who certify the results of testing of seized contraband "reasonably expect" that their certificates "will be available for later use at trial" because the certificates are created for that very purpose. *Id.* at 311.

Nor will the Court of Appeals' decision release a "torrent of prejudicial evidence" as petitioner alleges. Pet. at 25. CJA operates only inside New York City, and as noted, its reports have produced only four cases in five decades in which such information was used at trial. And petitioner fails to point to a single case from outside New York where similar statements have been admitted at trial. In addition, petitioner's specter of a flood of third-party statements being introduced at trial from prior sentencing reports and treatment court records is unsupported by even a single citation to a case in which this has actually occurred, even though petitioner admits that 16 jurisdictions have adopted the precise same test as the one adopted by the Court of Appeals. Moreover, the primary information at issue here came directly from petitioner and were not third-party statements at all.

In the end, even assuming petitioner's description of chaos in the lower courts were factually accurate, what petitioner fails to explain is why this case, which would directly affect so few proceedings nationwide, would be a better vehicle to resolve the dispute than one in which potential testimonial statements are routinely introduced at trial, such as virtually any case involving DNA testing, autopsy reports, or other forensic evidence. And because petitioner offers no real alternative to the primary purpose test, granting certiorari and adopting petitioner's position would not meaningfully address the larger issue on which he seeks review. For these and other reasons set forth below, this Court should deny certiorari.

STATEMENT

The Crime and Arrest

When police were called to the scene of a road rage incident, they received information about the gun-wielding male driver of a vehicle registered to petitioner. Later watching the car parked outside petitioner's residence from a patrol car, officers observed petitioner attempt to enter the car, look in their direction, and then retreat to his home. When the police came back to watch the location from an unmarked vehicle, petitioner returned and appeared to retrieve an item. When the police approached, he ran into the basement of the house and barricaded himself inside. App. Ct. App. Br. at 9-14.

The police eventually went to the front door, where they encountered petitioner's mother, who consented to a search. Officers recovered a loaded gun from the basement, where they also observed men's clothing strewn about, a couch, a dresser, a TV, and a bathroom. Only petitioner, his child, and his mother lived at that address. Petitioner was charged with possession of the loaded weapon. App. Ct. App. Br. at 14-19.

The CJA Interview and the Trial

After arrest and before arraignment, an employee of CJA interviewed petitioner in Queens Central Booking, standard practice for defendants arrested in New York City. Pet. at 2a. CJA is a not-for-profit entity under contract with New York City not affiliated with either the Police Department or any

District Attorney's Office (A1007).[1] CJA obtains information directly from the defendant "[s]o that we can verify community ties in order to make our recommendation to the Judge that they can be released without paying bail." (A1008).

During a CJA interview, defendants are asked about their residence and other community ties and the interviewer records the defendant's statements contemporaneously on a digital tablet (A1007-10). The information in the resulting "interview report," an uncertified and unsigned document, Pet. at 33a, is given to the arraigning judge, along with an indication as to whether the information has been confirmed by another source whose contact information comes from the defendant (A1014). The document itself clearly delineates what information comes directly from the defendant and warns that the report assesses only defendant's risk of flight through community ties, not the strength of the evidence against the defendant. Pet. at 33a. And defendants receive a copy of the report at arraignment, giving them the opportunity to raise any discrepancy between the report and what they said in the interview.

Here, an extensively redacted version of the report was introduced into evidence at trial through the CJA supervisor as a business record, the interviewer having left CJA. Pet. at 10a. This was to show that petitioner "self-reported" his address as the basement of the home (A988). In a separate section, the report also indicated that petitioner's mother had confirmed this information. Pet. at 33a. The report recommended

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[1] Record refences are to the Appellant's Appendix below.

petitioner's release on his own recognizance. Petitioner did not object to the way the report was redacted (A1109).

The People also introduced evidence concerning the road rage incident, petitioner's consciousness of guilt in approaching the vehicle and retreating, petitioner barricading himself in the basement when the police advanced toward him, and the recovery of the weapon in the basement where men's clothes were strewn about and there was a dresser, a futon, and a bathroom. App. Ct. App. Br. at 9-19. Petitioner was convicted of Criminal Possession of a Weapon in the Second Degree (N.Y.P.L. §265.03).

The Direct Appeal

The Appellate Division reversed the judgment of conviction, finding that the introduction of the report violated the Confrontation Clause. The decision offered little analysis, failing to even mention the primary purpose test, much less explain why it was not relevant. Instead, the court relied on its own decisions holding that any hearsay introduced on an "essential element" of the crime is testimonial. Pet. at 29a.

The Court of Appeals reversed (Pet. at 1a). The Court directly quoted the primary purpose test as this Court had most recently described it in *Ohio v. Clark*, 576 U.S. at 245, "whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony." Pet. at 6a (internal quotation marks omitted). The Court also described, based on *Clark*, the inquiries that go into the analysis,

including the formality of the statement at issue, whether it was made "to establish or prove past events potentially relevant to a criminal trial," and whether the statements were made to someone who is "principally charged with uncovering and prosecuting criminal behavior." Pet. at 7a-8a.

REASONS FOR DENYING THE WRIT

A. The New York Court of Appeals Properly Chose and Applied the Primary Purpose Test, Which this Court Has Expressly Adopted on Four Different Occasions, Including in Its Most Recent Confrontation Clause Decision.

In defining the scope of the Confrontation Clause since *Crawford*, this Court has expressly adopted the primary purpose test on four separate occasions, each time building on its analysis in the previous case. In *Davis v. Washington*, 547 U.S. 813 (2006), *Michigan v. Bryant*, 562 U.S. 344 (2011), *Ohio v. Clark*, 576 U.S. 237 (2015), and *Smith v. Arizona*, 602 U.S. 779 (2024), this Court has held that only statements with the primary purpose of collecting or producing evidence against a defendant at trial are testimonial in nature. Faced with a similar question here, the Court of Appeals correctly chose to use that same test. It also correctly applied that test to the CJA report. The primary, indeed the sole, purpose of the interview was to provide information about the petitioner's community ties to the arraigning judge, not to collect evidence about a past crime.

This Court first adopted the primary purpose test shortly after *Crawford* in *Davis v. Washington*, 547 U.S.

at 822, 829-30, holding that statements made for the primary purpose of collecting evidence against the accused or to "investigate a possible crime" are testimonial, while those made for the primary purpose of resolving an emergency are not. *Davis* involved two companion cases and two sets of statements, one made by a domestic violence victim in the course of a 911-call and one made by a different victim in response to police interrogation about a completed assault expressly for the purpose of filling out a "battery affidavit" against the accused, *id.* at 822. The Court ruled that only statements with the "primary purpose" of "establish[ing] or prov[ing] past events," such as the statements made to police as part of the investigation of the completed assault and entry of information on the battery affidavit, were testimonial, *id.*, while statements made for a different primary purpose, such as the 911 caller's statements "describing events as they were actually happening" to obtain aid, were not, *id.* at 827.

The Court applied the primary purpose test again in *Michigan v. Bryant*, 562 U.S at 344. There, the Court found the victim's statements non-testimonial even though they were directly about the past crime ("'what had happened, who had shot him, and where the shooting had occurred'"). *Id.* at 349. The Court expressly recognized that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony" and announced that "[w]here no such [evidentiary] primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not

the Confrontation Clause." *Id.* at 358-59. The Court advised that "[i]n making the primary purpose determination, standard rules of hearsay . . . will be relevant." *Id.* at 358-59.

In *Ohio v. Clark*, 576 U.S. at 237, this Court again applied the primary purpose test, this time to civilian witnesses interviewing child victims. *Id.* at 246. The Court there confirmed that "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Id.*

The Court then recited the lineage of the primary purpose analysis from *Davis* to *Bryant* and, reviewing these decisions, defined the test as "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.'" *Id.* at 245 (quoting *Bryant*, 562 U.S. at 358). The Court reiterated that the formality of the encounter and standard hearsay rules may be relevant and observed that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 249. The Court held that the statements of the victim witnesses were non-testimonial, noting also that because the primary purpose was to provide evidence against the accused, it was irrelevant that the interrogator's "questions and their duty to report the matter had the natural tendency to result in *Clark*'s prosecution." *Id.* at 250.

While all three of these decisions, like this case, deal with statements made outside the forensic context, the primary purpose test has also played a critical role in determining when statements contained in forensic reports are testimonial. In *Melendez-Diaz v. Massachusetts*, 557 U.S. at 305, decided before *Bryant*, this Court held that the government's certified affidavit constituting the chemist's forensic report had "the *sole purpose* of . . . provid[ing] 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." *Id.* at 311 (emphasis in original). The report also concluded that the chemist preparing the report must have known that the report would be "available for later use at trial" as the "affidavits' evidentiary purpose . . . as stated in the relevant state-law provision—was reprinted on the affidavits themselves." *Id.* The Court also noted that "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status," except "if the regularly conducted business activity is the production of evidence for use at trial." Id. at 321.

Similarly, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), this Court, examining the certified results of a blood alcohol content test, referenced the certificate in *Melendez-Diaz* in holding that "the same purpose was served by the certificate in question here." *Id.* at 664. *See also id.* at 670 (Sotomayor, J. concurring) ("the BAC report and Caylor's certification on it clearly have a 'primary purpose of creating an out-of-court substitute for trial testimony'").

And in *Smith v. Arizona*, 602 U.S. at 779, the Court, remanding the matter to the Arizona Supreme Court for a determination of whether the lab notes and lab report at issue were testimonial, instructed the lower court to use the primary purpose test. The Court directed the lower court to isolate the relevant statement in question and determine "the principal reason it was made." *Id.* at 801. And in "addressing the statement's primary purpose—why [the analyst] created the report or notes," the lower court should look to whether the statements had an "evidentiary purpose." *Id.* at 802. *See also id.* at 800, n. 4 (noting further that materials upon which experts routinely rely in arriving at their conclusions often do not have an "evidentiary purpose," quoting *Melendez-Diaz*, 557 U.S. at 311).[2]

Given this Court's adoption and development of the primary purpose test over the better part of two decades, as well as the Court's admonition in *Clark* that the test is a necessary condition for a finding that a statement is testimonial, the Court of Appeals properly chose this test to apply to the statements here. The Court of Appeals also correctly applied the primary purpose analysis, considering, as has this Court, the "the principal reason" the CJA sheet was created, the language of the document itself and its formality, whether the statements were made to those "primarily charged" with investigating past crimes, and whether it

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[2] The only exception to this unbroken line of cases in this Court's fractured decision in *Williams v. Illinois*, 567 U.S. 50 (2012). Given the 4-1-4 ruling on the forensic report in that case, it provides little help in determining what test to apply here, in the non-forensic context. Far more helpful, the Court of Appeals justifiably found, was this Court's subsequent decision in *Clark,* a non-forensic case.

fell within a standard hearsay exception indicative of its use independent from providing evidence at trial.

As the Court of Appeals held, there is simply no doubt on this record that the primary purpose, indeed the sole purpose, of the CJA employee making the report was to provide information to the arraigning judge about petitioner's community ties. This is indeed the purpose of all CJA reports, as the CJA supervisor expressly testified, and the trial court found. Not only was the information in the CJA sheet not intended "as a substitute for trial testimony," as this Court framed the test in *Clark*, it was not intended for use at trial in any way, nor was it made for the purpose of investigating or collecting information about the crime. It did not, then, in the recent words of this Court, carry any "evidentiary purpose."

Thus, examining "why the [declarant]created the report," *Smith*, 602 U.S. at 802, the answer was and is clear: simply to advise the arraigning judge of the petitioner's local ties at the time of arrest. Indeed, even the report itself warned the arraigning judge that it was intended only to offer information about a defendant's community ties, not about the "weight of the evidence" against him. Pet. at 33a.

Other facts and circumstances leave no doubt about the admissibility of the redacted report under this Court's decisions. For one thing, the most incriminating part of the information admitted came from petitioner himself, who provided his own address, distinguishing this case from all the *ex parte* statements found objectionable in *Crawford*. For another, the information was provided to someone who

was "not principally charged with uncovering and prosecuting criminal behavior." *Clark*, 576 U.S. at 249, as the Court of Appeals observed. Pet. at 11a. As this Court noted in *Clark*, this fact made the statement less likely to have the primary purpose of producing evidence against the defendant at trial.

Still further, the report itself was unquestionably a business record, ordinarily admissible at trial under the Confrontation Clause. *Melendez-Diaz*, 557 U.S. at 321. And unlike the business records in *Melendez-Diaz*, which were inadmissible because the laboratory's business was "the production of evidence for use at trial," here the business of CJA was not to produce evidence against the petitioner at trial, or even before trial, but merely to provide information to the court about his community ties. The legend on the CJA sheet specifically so indicated (Pet. at 33a), in sharp contrast to the legend on the certificate of test results in *Melendez-Diaz*, which stated that the report was "prima facie evidence" of its contents. *Id.* at 311.

Moreover, while information in the report was used against petitioner, this fact alone does not dictate the purpose of the document when made. The statements in *Clark*, *Bryant*, and *Davis* were also used against those defendants and involved questioning directly revealing facts about the crimes that had been committed. Those statements were nevertheless admissible under the primary purpose test. *See, e.g., Clark*, 576 U.S. at 250. Similarly, in those cases, the defense, like petitioner here, could readily have posited fruitful cross-examination had the out-of-court declarants been called to testify. Thus, contrary to

petitioner's argument (Pet. at 24-25), the ability to articulate a viable line of cross-examination does not make a statement testimonial.[3]

Finally, even petitioner concedes that the purpose of CJA in interviewing arrestees and filing their reports is to "collect[] information to make a pretrial release recommendation to the arraignment judge." Pet. at 5. This acknowledgement, along with petitioner's inability to point out any other purpose of the document, is dispositive of the issue.

B. Petitioner's Claims of Mass Confusion and Widespread Irreconcilable Outcomes in the Courts Below are, Upon Examination, Highly Exaggerated.

As his primary ground for granting the writ, petitioner argues that federal circuit courts and state courts of last resort have split on what test to apply to determine whether statements are testimonial, that the resulting outcomes are mutually exclusive, and that this Court has failed to and should now make good on its promise of providing a definitive definition of "testimonial." But petitioner's string citations to different wording in different decisions and cramped descriptions of a few cases fail to establish his claims.

In one string citation (Pet. at 16), petitioner, citing *Bryant* and *Clark*, references 16 cases from federal Courts of Appeals and state high courts which he concedes adopt the primary purpose test as

[3] Here, cross-examination of the CJA interviewer would most likely have been fruitless, as that individual would likely remember little if anything about this particular interview independent of the notations on the report. Far more fruitful would have been cross-examination of the domestic violence victim who called 911 in *Davis* or the children who accused the defendant of abuse in *Clark*.

articulated by the New York Court of Appeals. But petitioner neglects to mention, here or anywhere in the petition, at least 20 additional jurisdictions that have also adopted the primary purpose test.[4] This collection of courts alone provides powerful evidence of the national acceptance of the primary purpose test.

In a second set of citations, petitioner, citing *Davis*, posits a different test, one that purportedly defines testimonial statements as those made to "establish or prove past events." Pet. at 15. But petitioner omits that *Davis* itself and the cases he cites expressly rely on the "primary purpose" analysis, using those exact words, in the very same sentence as the language he quotes. Moreover, the citation of these cases as imposing a different rule from the one above reflects a fundamental misunderstanding of *Davis*. *Davis* did not impose a different test than *Bryant* and *Clark*. As this Court made clear in those later decisions, *Davis*, *Bryant,* and *Clark* are the development of a single primary purpose test. That is the test that the New York Court of Appeals applied. Indeed, that court quoted the very same language as petitioner does here, Pet. at 8a (referencing statements made with the

[4] *State v. Parsons*, 543 P.3d 465, 473 (Idaho 2024); *Commonwealth v. Weeden*, 304 A.3d 333, 351 (Pa. 2023); *State v. Martinez*, 545 P.3d 652, 658, (MT 2023); *State v. Louise*, 2023 WL 3161918, at *4 (Vt. Apr. 28, 2023); *State v. Beeler*, 281 A.3d 637, 648 (Maine 2022); *State v. Tsosie*, 516 P.3d 1116 (N.M. 2022); *State v. Sutter*, 959 N.W.2d 760, 768 (Minn. 2021); *Logan v. Commonwealth*, 858 S.E.2d 176, 179 (Va. 2021); *State v. Burke*, 478 P.3d 1096, 1107-08 (Wash. 2021); *State v. Roscoe*, 198 A.3d 1232, 1246 (R.I. 2019); *Chavis v. State*, 227 A.3d 1079, 1088 (Del. 2018); *State v. Miller*, 814 S.E.2d 93 (N.C. 2018); *State v. Rafeh*, 393 P.3d 1155, 1160-61 (Or. 2017); *Schmidt v. State*, 401 P.3d 868, 885 (Wyo. 2017); *In re J.C.*, 877 N.W.2d 447, 457 (Iowa 2016); *State v. Nofoa*, 349 P.3d 327, 342 (Haw. 2015); *State v. Maga*, 96 A.3d 934, 938-39 (N.H. 2014); *State v. Leibel*, 838 N.W.2d 286, 296 (Neb. 2013); S*tate v. Tisius*, 362 S.W.3d 398, 406 (Mo. 2012); *Delhall v. State*, 95 So.3d 134 (Fla. 2012). *See also State v. Williams*, 392 P.3d 1267, 1281 (Kan. 2017).

purpose to "establish or prove past events"), but it did not omit the words "primary purpose" like petitioner does.[5] This adds nine additional jurisdictions to the courts identified above applying the primary purpose test.

Other decisions petitioner cites as embodying a distinct rule examine the formality of the statement in determining whether it is testimonial. Pet. at 16-17. But each of the cases petitioner relies on in this regard uses the formality analysis in combination with the primary purpose test.[6] This is no different than the Court of Appeals, which expressly incorporated the formality test as part of its primary purpose analysis in this case. The Court of Appeals instructed lower courts to examine the formality or "informality of the situation and the interrogation," noting that "formal station house interrogation" is more likely to produce testimonial statements. Pet. at 8a. Thus, petitioner's citations to decisions using combinations of the two tests are not fundamentally at odds with New York's interpretation.

And the relatively few remaining decisions petitioner cites, applying the formulation that statements are testimonial if the maker "reasonably expects" that they will be "available for later use at trial," do not establish anything more than linguistic

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[5] Notably, certiorari was recently denied in one of these cases. *See United States v. King*, 93 F.4th 845 (5th Cir. 2024), *cert. denied sub nom. Diggs v. United States*, 2024 WL 4426928 (Oct. 7, 2024).

[6] This includes three cases petitioner cites, *State v. Norton*,117 A.3d 1055, 1073 (Md. 2015) , *Leidig v. State*, 256 A.3d 870, 906-07 (Md. 2021), and *People v. Barner*, 30 N.E.3d 271 (Ill. 2015), as well as, *People v. GoodBear*, 2 N.W.3d 721, 727 (N.D. 2024), all of which use the primary purpose test in combination with the formality test.

differences. Indeed, there is ample reason to believe that most of this limited number of jurisdictions do not see this formulation and the primary purpose test as incompatible.[7] For example, all but one of the federal citations come from circuits that have expressly adopted the "primary purpose" formulation in other cases.[8] The same is true of the clear majority of states petitioner references as well.[9] Indeed, out of all of the lower court cases petitioner cites as evidence of the prevalence of tests that purportedly cannot be reconciled with the Court of Appeals decision below (see Pet. At 15-18), only one of those cases actually rejected the primary purpose test. *See People v. Washington*, 2024 WL 3551260 (Mich. 2024).[10]

Nor is there sound reason to believe that the "available for later use" linguistic formulation frequently leads to different results from the primary

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[7] Some courts use the two formulations together, even reciting them in consecutive sentences. *See, e.g., State v. Roscoe*, 198 A.3d 1232, 1246 (R.I. 2019); *State v. Mechling*, 633 S.E.2d 311, 321 (W. Va. 2006).

[8] Petitioner cites decisions from the Third, Ninth, Fourth, and Eleventh Circuits, all of which have expressly adopted the primary purpose test in other decisions. *See* Pet. at 7a, n. 3.

[9] Six of the seven jurisdictions petitioner references in this string cite have adopted the primary purpose test in other decisions. *See People v. Garcia*, 479 P.3d 905, 907 (Colo. 2021); *State v. Graham*, 282 A.3d 435, 451-52 (Conn. 2022); *James v. State*, 420 P.3d 552 (Nev. 2018); *State v. Maddox*, 890 N.W.2d 256, 259 (Wis. 2017); *State v. Bazar*, 2015 WL7628722 (W.Va. 2015); *Johnson v. State*, 155 So.3d 733, 740 (Miss. 2014).

[10] Petitioner's other cases in this category also fail to make his point. Most would, like the *Washington* case, not produce different results from those in New York. *See State v. Thomas*, 985 N.W.2d 87 (Wis. 2023) (DNA report inadmissible, consistent with *People v. John*, 52 N.E.3d 1114 [N.Y.2016]); *Zeger v. State*, 519 P.3d 44 (Nev. 2022) (victim's statements to police about events that occurred several days before were testimonial). And the remaining cases simply did not decide the Confrontation Clause issue. *See State v. Tomlinson*, 264 A.3d 950 (Conn. 2021); *State v. Sites*, 825 S.E.2d 758, 766 (W.Va. 2019); *Roby v. State*, 183 So.3d 857, 872 (Miss. 2016).

purpose test, as he asserts. In *United States v. Esparza*, 791 F.3d 1067 (9th Cir. 2015), one of the few cases petitioner discusses as an example of an irreconcilable result, the third-party owner of a vehicle filed a back-dated DMV form transferring ownership of her car only after she knew it had been seized with drugs in hidden compartments. While the court, which cited the primary purpose test in addition to the "available for use at a later trial" analysis, acknowledged that DMV filings generally are not for the purpose of being used at trial against someone else, it found that in this case the report was obviously filed to exonerate the owner and implicate the driver who had already been charged with the drugs in the car. *Id.* at 1073-74. *See also Washington*, 2024 WL 3551260 (implied statement from Canadian border officer to U.S. law enforcement officer that defendant was arrested with a bullet proof vest, leading to defendant's prosecution in U.S. for possession of that vest, was testimonial).[11] Petitioner's citations in this category then simply do not establish a different test driving different outcomes, but at most a different linguistic formulation producing predominantly the same results.

And while there are a few decisions, in very specific areas, with inconsistent results, these decisions do not show that a grant of certiorari would be appropriate here. While there are some conflicting results regarding autopsy reports, for example (*see* Pet.

[11] Similarly, the decision in *Williams v. Greene*, 112 F.4th 155 (3d Cir. 2024), would not come out differently in New York. There, the Third Circuit held that the introduction of information that the co-defendant pled guilty to charges that also named defendant "operated, for all intents and purposes, as a plea allocution." 112 F.4th at 165. New York excludes plea allocutions under *Crawford* as well. *See* n. 11, *infra*.

at 19),[12] this fact simply suggests that a grant of certiorari might be appropriate in one of those cases. Petitioner does not explain why this Court should grant certiorari here to resolve the autopsy report issue indirectly and by inference only, without even a proper record to consider the circumstances of the making of such a report.[13]

Most importantly, petitioner cites no inconsistent results with regard to the issue presented here, statements made by defendants not for use at trial but for edifying the arraigning court on defendants' community ties. The record here is limited to this issue, one that is uncommon at best, and this Court should decline to grant certiorari to resolve different, more common evidentiary questions presented by other cases.

In short, petitioner's depiction of the lower courts as in virtual chaos is simply incorrect. In the final tally, 11 Federal Circuit Courts of Appeals have expressly adopted the primary purpose test, as the Court of Appeals noted in its decision in this case. Pet. at 7a n. 3. And the vast majority of state high courts petitioner cites plus the 20 additional jurisdictions he has omitted total 42 states (including New York) that have used the primary purpose test. Of the remaining state high courts, many of which have not opined on the issue, only

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[12] This includes *State v. Hutchinson*, 482 S.W.3d 893 (Tenn. 2016).

[13] New York's view of the Confrontation Clause also precludes the introduction of hearsay from autopsy reports, consistent both with *Smith* and with petitioner's viewpoint on the issue, and the decision in this case does not change that conclusion. *See People v. Ortega*, 227 N.E.3d 302 (N.Y. 2024); Pet. at 6a. If anything, this simply shows that New York's interpretation of the test is not nearly as dogmatic as petitioner represents.

a single case identified by either party has expressly rejected the primary purpose test. For these reasons, and because the limited differences in outcomes affect types of evidence not relevant here, this Court should deny certiorari.

C. Even Assuming the Existence of Disparate and Irreconcilable Tests, Petitioner Has Failed to Espouse a Viable Definition of "Testimonial" That Would Resolve the Purported Confusion, Much Less Resolve it in His Favor.

As a primary reason for granting certiorari, petitioner urges this Court to make good on its promise in *Crawford* to provide a definitive definition of "testimonial" and resolve, once and for all, what he portrays as the abject confusion of the lower courts. At the same time, petitioner decries the Court of Appeals' application of the primary purpose test and fails to espouse any specific alternative, simply pointing to what he describes as the many disparate, and unavoidably inconsistent, options. But without the most obvious and firmly grounded primary purpose test, and in the absence of a viable alternative, he has failed to show how granting certiorari in this case would "complete the job" of providing a definition of "testimonial" or end the confusion he so vigorously advances as the reason for granting certiorari. Moreover, with regard to the potpourri of options he offers, petitioner has failed to show that he would succeed under those tests or even, in at least one instance, that the record here would be sufficient to consider and resolve the issues presented by the possible alternatives.

One of the tests petitioner references is the "core class" test, requiring a comparison between the case the case before the court in question and the core Confrontation Clause scenarios that this Court identified in *Crawford*. Pet. at 28-31. But this loose comparative analysis has been available for two decades and, as petitioner himself would have to admit, has done little to stem the tide of confusion he posits. Moreover, it is precisely this "test" that the Court promised in *Crawford* to supersede with a definition of testimonial – the reason petitioner gives for granting certiorari in the first place. Petitioner thus fails to show how the use of this test would solve the problem he identifies.

Nor would petitioner succeed under this test. Not one of the cases *Crawford* cites as part of the "core class" includes defendant's own statements. In describing the core class, this Court specifically referenced *ex parte* statements of third parties rather than defendants' own statements. As this Court wrote, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. Modern equivalents include grand jury testimony, *ex parte* preliminary hearing testimony, and custodial interrogations of third parties. *Id.* But petitioner's own statements fall into none of these categories, nor does he explain how his own statements are in any sense *ex parte*.

Founding era authority confirms that petitioner's own statements to a magistrate under the

Marian bail statutes would not be considered testimonial at common law. *See Crawford*, 541 U.S. at 52 ("Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone *but the confessor*.") (emphasis added) (citing 2 W. Hawkins, *Pleas of the Crown*, Ch. 46, sec. 3 (T. Leach 6th ed. 1787). And the Hawkins treatise this Court referenced in *Crawford* opined: "It seems that the Confession of the Defendant himself, whenever taken upon an Examination before Justice of Peace, . . . or other magistrate hath always been allowed to be given in Evidence against the Party Confessing, but not against others." 2 W. Hawkins, *Pleas of the Crown*, Ch. 46, §3 (1726), p. 429 (Arno Press reprint, 1972). Thus, the protections arising to address the abuses of the Marian Bail statutes simply did not include protecting defendants from their own statements, whether made to a magistrate or otherwise.

And while petitioner also provided his mother's contact information to the CJA employee to confirm his residence, which she did, petitioner explicitly approved of the redactions that left her information in the report (A1109). Moreover, the express purpose of the Marian bail examinations was to determine whether there was to collect and evaluate evidence of the arrestee's guilt, Davies, *What Did the Framers Know, and When Did They Know It?* 71 Brook. L. Rev. 105, 128 (2005), whereas here the purpose was simply to confirm information petitioner himself provided about his current residence to show his community ties. Petitioner provides no authority for the proposition that confrontation protections precluded the introduction of evidence collected solely for such an administrative

purpose. And even under petitioner's understanding of the "core class," the inclusion of her statement would have been at most harmless error, as petitioner's own admission that he lived in the basement would have been more than sufficient to convict him. Nor would this routine harmless error issue present a question worthy of this Court's review.

Additionally, contrary to petitioner's assertion (Pet. at 8), the Court of Appeals never conceded that the result here would be different under a "core class" test. The Court simply declined to apply that test, choosing the primary purpose formulation without ever stating that the result would have been different had it chosen to apply the "core class" rubric. Pet. 8a-9a.

Petitioner cites as another option the test that finds a statement testimonial when the declarant "reasonably expects" that it would be "available for later use at trial." Pet. at 15, 19. But petitioner never argued at trial that the court should adopt this test, and thus neither the trial court nor the Court of Appeals considered it. To the extent petitioner relies on it now, this Court should decline to consider it for this reason alone. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Even more significantly, because petitioner did not mention this alternative at trial, neither the People nor the trial court elicited critical information relevant to its application. Had petitioner raised it, the People could have, for example, elicited the ordinary expectations of CJA workers in this regard from the supervisor who testified. This testimony would likely have reflected the fact that the reports are very rarely used at trial; as the Court of Appeals noted,

the hundreds of thousands of CJA reports generated over five decades have resulted in only four reported decisions. In the absence of information in the record on the central questions underlying this analysis, petitioner could not avail himself of this test were this Court to grant review.

Moreover, interpreting this test broadly, as does petitioner, would contradict this Court's jurisprudence. The questioners in *Clark* could "reasonably expect" that the statements they were eliciting from the child victims would be "available for later use at trial," especially since they were mandated reporters, yet these statements were not testimonial. And a broad view of the test would also arguably preclude medical records in an assault or rape case, accounting records in a fraud case, and all types of public records, such as birth certificates, in a variety of cases. While these records are not made with the purpose of being used at trial, the maker could "reasonably expect" that they would be "available for later use" at trial, in the broad sense petitioner advances. A far more reasonable interpretation of this test would reflect the way it was used in *Melendez-Diaz*: state chemists "reasonably expect" the certificates they produce would be "available for later use at trial" because those certificates were routinely, if not exclusively, used in that fashion. That is the polar opposite of this case, where the information in the CJA reports were routinely, indeed virtually exclusively, prepared for and used by the arraigning judge rather than as evidence at trial.

Petitioner also references the formality of the out-of-court statement as an alternative test to the one

espoused by the Court of Appeals. Pet. at 17. But, as explained above, this analysis is incorporated into the Court of Appeals test. Moreover, it has never been adopted by a majority of this Court as a definition of testimonial in and of itself. It has also never been applied to a defendant's own statements. And it is markedly different from the reports in *Melendez-Diaz* and *Bullcoming*. Those were signed by the chemists who performed the tests, bore attestations certifying the results of the testing, and were made at the behest of the prosecution in order to be used as evidence against the defendant at trial. Here, the report was not signed, it included no certification, it primarily provided information from petitioner, and its legend indicated that it was not to be used as evidence of petitioner's guilt or innocence, even at arraignment. Pet. at 33a. Indeed, if the uncertified DNA reports in *Williams v. Illinois*, which were requested for use as evidence at trial, were insufficiently formal to be testimonial, 567 U.S. at 111 (Thomas, J. concurring), so was the report here.

And the purportedly separate test that testimonial statements are those made "to prove past events" potentially relevant to a criminal prosecution (Pet. at 15) would not produce a result favorable to petitioner. As noted above, this quotation comes from *Davis*, which adopted the primary purpose test, and all the cases petitioner cites in support of this test specifically use the primary purpose language as well. Because the outcome of the primary purpose test is clear, petitioner cannot succeed under these cases.

And even if this language in fact represented a separate test, petitioner still could not prevail. This is because the subject of the CJA report is decidedly not "past events," it is a defendant's current community ties at the time he or she stands before the court at arraignment. Because defendants are frequently not arrested immediately upon the commission of their crimes, the distinction is significant. Thus, even defendants who have spent years unidentified or unapprehended are the subject of CJA reports, which relate only their status at the time they are arraigned, not what they did or were doing in relation to the crimes committed long before. Because CJA reports do not address past crimes but relate current information, they would not qualify even under petitioner's novel interpretation of the language in *Davis* as a separate analysis. *See Davis*, 547 U.S. at 827 (a 911 call "is ordinarily not designed primarily to "'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance.").

In the end, the most likely reason petitioner does not espouse a particular alternative test and simply points to the supposed options as evidence of confusion is that he cannot prevail under any of these alternative formulations. The purpose of the report, the fact that the contents came primarily from petitioner himself, and the routine use of these statements at arraignments rather than as evidence all point to the information provided as fundamentally non-testimonial in nature.

D. The Court of Appeals Decision in This Case Does not "Threaten to Unleash a Torrent of Prejudicial Evidence Nationwide" As Petitioner Asserts. To the Contrary, It Affects Only A Few Rare Cases.

Petitioner's "floodgates" argument, predicting "the torrent of prejudicial evidence" that will be released under the Court of Appeals decision here (Pet. at 25), sounds an unnecessary and unsupported alarm. There is no torrent in the offing, or indeed anything more than a trickle.

This is so for many reasons. Initially, as the Court of Appeals observed in its decision below, in the five decades since CJA has been in operation, presumably producing hundreds of thousands of reports, there have been only four reported decisions addressing the admissibility of any part of this document at trial. *See* Pet at. 14a, n. 8. While CJA reports have affirmatively been held to be admissible at trial for at least 14 years, *see People v. Mitchell*, 74 A.D.3d 417 (1st Dept. 2010), it is simply not a frequent occurrence, much less a torrent. Nor is it a frequent issue nationwide, as petitioner fails to cite even a single case from across the country in which the issue has arisen.

Indeed, rather than being supported by caselaw, petitioner's arguments rest entirely on hypotheticals that, upon review, have simply never come to pass, even though by his own count there are 16 jurisdictions and two decisions of this Court that have adopted the precise same rule as the Court of Appeals here (Pet. at 16).

Nevertheless, petitioner argues that statements made in sentencing reports would be admissible at a subsequent trial under the Court of Appeals rule. But he does not cite a single case from any of the 16 jurisdictions following that rule in which this has come to pass. This may be in part because pre-sentence reports usually are, by statute, confidential and only for use in the case in which they are created. *See, e.g.,* N.Y.C.P.L. §350.90. Petitioner thus fails to establish why this hypothetical scenario compels this Court's intervention.

Petitioner also raises the specter that statements made to professionals during court-mandated treatment would be admissible at trial. Again, this has not occurred in any of the jurisdictions that follow New York's interpretation, most likely because all of a client's statements to such professionals would be privileged under the psychiatrist, psychologist, or social worker privileges. *See* N.Y.C.P.L.R. §§4507-08. In the absence of a single case in which this issue has arisen, this hypothetical simply does not provide a compelling reason for granting certiorari.

Even more strained is petitioner's argument that the decision below will eviscerate the rule that co-defendants' plea allocutions are precluded at trial under the Confrontation Clause. Pet. at 27.[14] The Court of Appeals has long held that plea allocutions fall within

[14] Indeed, applying the primary purpose test, when prosecutors take pleas from defendants and insist that they implicate their co-defendants, this is almost always with an "eye toward [the] trial" of the remaining defendant. *See Crawford*, 541 U.S. at 56. There is no other reason for eliciting another's role in the crime if the pleading defendant's admissions about his own conduct are sufficient.

the Clause's prohibition.[15] *See, e.g., People v. Douglas*, 4 N.Y.3d 777 (2005). And, of course, plea allocutions involve statements of third-party co-defendants, not the defendant's own statements.

The common thread in these hypotheticals seems to be the notion that statements made for any use in court are necessarily testimonial. But this proposition cannot be correct. In *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911), for example, a decision that this Court cited with approval in *Davis*, this Court held that a clerk's statements regarding defendant's presence at a prior proceeding was not the equivalent of testimony against him and therefore not within the Confrontation Clause. Even more to the point here, there is no reason why a defendant's own statements at a prior proceeding would be precluded under the Confrontation Clause from admission at a later trial. Such a rule would, for example, bar his or her own prior testimony, his or her pedigree information as he or she provided it to the court, and even his or her own signature on an order of protection acknowledging receipt of that order in open court. Petitioner cites no case supporting preclusion this broad under the Confrontation Clause.

Petitioner's warning of the imminent dire consequences of the opinion below is also based on an incorrect characterization of that decision. Petitioner argues that the Court of Appeals has applied a singular test, to be applied in all cases, to determine what is "testimonial," and that this test operates to the exclusion of all others. Even his unabashedly

[15] The one exception was *Hemphill v. New York*, 595 U.S. 140 (2022), where the Court of Appeals relied on an implicit waiver of the right.

argumentative "Question Presented" criticizes the Court of Appeals for holding that a statement is testimonial under this test "solely" and "if, *and only if*," its primary purpose was to "serv[e] as trial testimony." *See* Pet. at i (emphasis in original).

But New York's test is not so dogmatic. The Court of Appeals expressly incorporated the formality test into its analysis, specifically instructing lower courts that formal statements are more likely to be testimonial than informal ones. Pet. at 8a. And in forensic cases, the court has adopted a formulation that petitioner himself has dubbed broader and more favorable than the one in this non-forensic case. *People v. Ortega*, 40 N.Y.3d 463 (2023) (discussing autopsy reports' availability for later use at trial). The decision below did not repudiate or otherwise alter that court's conclusions just months earlier as to use of this formulation as to forensic reports. Pet. at 6a, n. 2.

And while the Court of Appeals, in articulating the test, used the language of the then-most-recent case from this Court enunciating the primary purpose test -- that an out-of-court statement is testimonial if acting "as a substitute for trial testimony," Pet. at 6a, citing *Clark* citing *Bryant* -- it did not suggest that this particular linguistic formulation that petitioner finds so limiting was a straightjacket or that the Court would not consider any linguistic variation of the test. Indeed, the Court itself also used what petitioner has characterized as a broader formulation in its reasoning, observing that the purpose of the statement was not "to establish or prove past events" relevant to a crime but to "give the arraigning judge information pertaining to

a defendant's suitability for pretrial release. . . ." Pet. at 10a.

Petitioner's concerns, then, about the strictness of the Court of Appeals test and his predictions of its ruinous consequences are wholly unsupported by a reading of the decision below. Neither hypothetical scenarios or warnings of outcomes that have never occurred provide a sound basis for a grant of certiorari.

* * *

In the end, all of petitioner's arguments for certiorari are unavailing. While petitioner asks this Court to resolve the supposed confusion below, he seeks to avoid the one test this Court has espoused time and again, the primary purpose test, without advocating a viable definition of "testimonial" in its place. And to the extent he asks this Court to resort to the common law and restore the loose, comparative "core class" analysis, his position would do little to resolve the supposed confusion, instead turning back the clock twenty years.

Nor would the core class analysis favor him, as defendants' own statements during the Marian procedure were admissible against them at common law even after confrontation protections arose. Significantly, while petitioner invokes Sir Walter Raleigh's trial in his peroration (Pet. at 32), it was, after all, Lord Cobham's affidavit that was introduced against Raleigh at trial, not Raleigh's own affidavit.

Finally, the supposed flood of prejudicial evidence that would become admissible at trial under the decision below is not supported by a single citation. Instead, petitioner's argument depends on

hypotheticals that have not occurred and are highly unlikely to materialize.

CONCLUSION

For these reasons, this Court should deny certiorari.

Respectfully submitted,

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