No. 80850-3

SANDERS, J. (dissenting)—

> In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . .

Const. art. I, § 22.

What is there about "face to face" that the majority doesn't understand? "The beginning of wisdom is calling things by their right names."[1]

Timothy Pugh was convicted of domestic violence, felony violation of a court order, based upon the contents of a 911 tape, not a live witness who could be confronted and cross-examined "face to face." If the majority can disregard constitutional text so clear on its face, it amends the constitution by judicial fiat. This undermines the very purpose of a written constitution to define the responsibility of government and the rights of the people in a manner that may be changed only by the people themselves acting through the amendment process. Moreover, the majority does similar violence to the Sixth Amendment right of an accused "to be confronted with the witnesses against him." U.S. Const. amend. VI. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177

[1] Ancient Chinese proverb.

(2004).

Article I, Section 22

The majority concedes some modern hearsay exceptions may not be admissible under article I, section 22. But the majority's interpretation of our confrontation clause eliminates any possibility of broader protection, even while it purports to leave the issue open. Moreover, the majority's historical analysis is misplaced, fails to give a plain meaning to the plain text of our constitution, and misconstrues precedent.

This provision could not be clearer: "In criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face." Const. art. I, § 22. We have previously determined an independent analysis of our confrontation clause is warranted. *State v. Foster*, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring in part, dissenting in part; C. Johnson, J., dissenting); *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006). The majority thus correctly turns to the text of our constitution and the law in place at the time of its ratification. Yet here the majority soon goes astray.

The text of our constitution is clear. Article I, section 22 states whom the defendant in a criminal case is entitled to meet—the "witnesses against him" – and how he is entitled to meet them—"face to face." Our early cases construed this requirement in accordance with its plain language: "[t]his means that the

examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him . . . ." *State v. Stenz*, 30 Wash. 134, 142, 70 P. 241 (1902), *abrogated on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001). But the majority nevertheless argues the clause must not be read literally, for to do so would eliminate all hearsay exceptions. Majority at 10. However if a hearsay exception conflicts with our constitution, this court simply has no authority to choose the exception over the constitution.

Our constitution proclaims, "[w]e, the people of the State of Washington . . . do ordain this constitution." Const. pmbl. It is the people who ratified our constitution, and "the constitution is the expression of the *people's* will, adopted by them." *State ex rel. Albright v. City of Spokane*, 64 Wn.2d 767, 770, 394 P.2d 231 (1964) (emphasis added). Therefore in analyzing the constitutional text "the intent to be determined is that of the *people* who ratified the document rather than the intent of the handful of men who wrote it." Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 511 (1984). Thus, "[a]ppropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997).

But our majority takes exactly the opposite approach. It looks not to the intent of the *people* who ratified our constitution in 1889, best illuminated by its text, but the res gestae exception to the hearsay rule of evidence as it was at the time.[2] Presumably the majority believes if those who wrote the constitution were aware of res gestae as a rule of evidence, they must have intended to subordinate the clear text to it. But the people did not ratify the res gestae doctrine. The people ratified just the opposite, a text so plain its meaning is unmistakable. Admittedly, the meanings of words may change. Thus we might rightfully "inquire about the accepted meaning of the words at the time the provision was adopted," Utter, *supra*, at 509 (citing *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945)), because "[c]onstitutions being the result of the popular will, the words used therein are to be understood ordinarily in the sense that such words convey to the popular mind," *State ex rel. State Capitol Comm'n v. Lister*, 91 Wash. 9, 14, 156 P. 858 (1916).

[2] I take this opportunity to stand with a host of commentators pointing out the absurdity of the res gestae exception as frequently applied. Professor Wigmore criticizes the exception as "most frequently used merely as a cover for loose ideas and ignorance of principles." IA Wigmore on Evidence § 218, 1888 (Tillers rev. 1983). Bryan Garner, editor in chief of *Black's Law Dictionary*, lambastes the concept: "'The phrase is antiquated. By modern judges it is being gradually discarded. It is superfluous, and serves only to obscure the logic of the rules. It should be left to oblivion.'" Black's Law Dictionary 1423 (9th ed. 2009) (quoting John H. Wigmore, A Students' Textbook of the Law of Evidence 279 (1935)). "Res gestae is perhaps the most famous—and certainly the hardiest—judicial nonreason of all time. It has endured—no, thrived upon—more than a century of abuse by both its detractors and its devotees." Jerome A. Hoffman, *Res Gestae's Children*, 47 Ala. L. Rev. 73, 75 (1995) (emphasis omitted)).

But it hardly seems necessary to examine whether the popular meaning of "face to face" has changed over the past hundred-odd years. A textual analysis "includes the words themselves, their grammatical relationship to one another, as well as their context." *Malyon*, 131 Wn.2d at 799. Thus we repair to the words, grammar, and context of our confrontation clause, rather than the subtleties of an obscure evidence rule relating to res gestae.

Webster's Third New International Dictionary 812 (2002) defines "face-to-face" as "within each other's sight or presence **:** involving close contacts **:** in person <a *face-to-face* meeting of the two leaders> <we met *face-to-face* for the first time>." Nearly 150 years earlier, *Webster's Unabridged Dictionary* defined "'face,' in part, as '*face to face*; when both parties are *present*; as to have accusers *face to face.*'" *State v. Foster*, 135 Wn.2d 441, 483, 957 P.2d 712 (1998) (C. Johnson, J., dissenting) (quoting Webster's Unabridged Dictionary 431 (1853)). As expected, the definition has not much changed in the past century and a half. The key to meeting "face to face" is presence. It cannot be otherwise if we are speaking English.

The context of the confrontation clause demands the same result. Article I, section 22 is titled "**Rights of the Accused**." Const. art. I, § 22. It begins, "the accused shall have the right . . . ." *Id.* The rights of the accused are then delineated, one after another. Nothing modifies the listed rights. There are no caveats. Among

these rights of the accused is the right "to meet the witnesses against him face to face." Only one possible conclusion can be drawn: criminal defendants have the right to stand in the physical presence of the witnesses against them and look them in the eye.

At least since 1902 our case law has been consistent with the popular understanding: a face to face meeting means physical presence. *See Stenz*, 30 Wash. at 142. Even earlier, this court in 1894 observed that dying declarations admitted at trial were "in practical conflict with the constitutional right of the defendant to meet the witnesses, that testify against him, face to face and . . . in conflict with his right to cross examine such witnesses." *State v. Eddon*, 8 Wash. 292, 297, 36 P. 139 (1894). Thus *Eddon* also recognized that physical presence was indeed the literal meaning of the clause notwithstanding "on the ground of necessity" the declaration was admitted given the defendant silenced the witness by homicide.[3] *Id.*

[3] Even if necessity is a legitimate consideration where murderers have put the witnesses "beyond the power of testifying by killing them," *Eddon*, 8 Wash. at 297, the rationale does not hold up where, as here, no act of the defendant made face-to-face testimony impossible. Moreover, the State's only effort to obtain Bridgette Pugh's testimony was a subpoena. Report of Proceedings (RP) (7/29/05) at 35-36. There is no evidence of any further attempts by the State to secure her as a witness. *Id.* The necessity of a dying declaration cannot be equated to a witness not showing up for trial. *See State v. Rivera*, 51 Wn. App. 556, 560, 754 P.2d 701 (1988) (prosecution's obligation to exercise good faith in attempting to procure witness's attendance not satisfied where prosecution's only effort was issuance of a subpoena).

All cases cited by the majority for the proposition that we have never read the clause literally are inapposite. In *Eddon* the court expressly stated that the confrontation clause is inconsistent on its face with dying declarations. It did not concern res gestae.[4]

The other cases cited by the majority are equally inapposite. *State v. Payne* held certain statements made by the defendant and others charged with him prior to the commission of the crime were admissible. 10 Wash. 545, 549-50, 39 P. 157 (1895), *overruled in part by State v. Goodwin*, 29 Wn.2d 276, 186 P.2d 935 (1947). But the opinion in *Payne* is entirely ambiguous regarding who exactly made the statements, who testified to them, and who was or was not present in the courtroom at the time. *Id.* Moreover, neither the federal confrontation clause nor the state confrontation clause is mentioned anywhere in the opinion. *Id.* at 548-55. *Payne* simply did not address the issue of confrontation.

State v. Bolen, 142 Wash. 653, 658, 254 P. 445 (1927) held military records containing the fingerprints of a murder victim whose head was missing were admissible to show identity of the victim. The court held this documentary evidence was not subject to the confrontation clause. *Id.* at 663-64. The majority's

[4] The words "res gestae" appear twice in *Eddon*, but the court does not make any analysis of the term, and certainly not in the context of the confrontation clause. *Eddon*, 8 Wash. at 294, 299. Its use of the term is not with regard to out-of-court statements, but a reference to the more general meaning of "a term describing acts and circumstances admitted into evidence because of their ability to shed light on a principal fact at issue . . . ." 29A Am. Jur. 2d *Evidence* § 876 (2009).

use of this case as an example is not well taken.

The majority also contends that *State v. Ortego*, 22 Wn.2d 552, 157 P.2d 320 (1945), shows this court's willingness to expand exceptions to the confrontation right. Majority at 11. We did state in *Ortego* that exceptions to the privilege of confrontation "may be enlarged from time to time if there is no material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right to confront the witnesses against him." *Ortego*, 22 Wn.2d at 563 (citing *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 107, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). But here the reason for the confrontation clause *would* be defeated by allowing hearsay. Moreover the actual holding of the case belies the apparent radicalism of the quotation. *Ortego* ruled that parol evidence of testimony of an unavailable witness was admissible, but only where the witness had *already testified* to the matter at a former trial, and "the accused was *present* and had an *opportunity for cross-examination*." *Id*. at 564 (emphasis added). This is indeed the underlying reason for our confrontation clause, and it is precisely this right to a face to face meeting, so the accused may cross examine the witness, that the majority's holding ignores.

Finally, none of the cited cases applying the res gestae doctrine in Washington arises under our confrontation clause. Hearsay exceptions developed

through the laws of evidence are not necessarily exceptions to the confrontation clause. The United States Supreme Court in *Crawford* recognized this distinction, rejecting the view that the confrontation clause's application to out-of-court statements "depends upon 'the law of Evidence for the time being.'" *Crawford*, 541 U.S. at 50-51 (quoting 3 James Wigmore, Evidence § 1397, at 101 (2d ed. 1923)). Constitutional prescriptions are not subject to the "vagaries of the rules of evidence." *Id.* at 61. Thus it is because hearsay exceptions are *not* confrontation clause exceptions that states are afforded "flexibility" in determining what effect their various confrontation clauses have on hearsay law. *Id.* at 68. The common law of hearsay exceptions cannot abrogate a constitutional right, regardless of how often it has been applied in the past.

Moreover, "it does not appear that the judges who fashioned the modern exceptions gave much thought to the conflict between the new exceptions and the earlier understanding of the confrontation right." Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 452 (2007).[5] This observation is borne

[5] While Davies, *supra*, disagrees with the historical distinction between testimonial and nontestimonial statements made by the Court in *Crawford*, both are in agreement that the development of modern hearsay law bears little relationship to constitutional concerns. *See Crawford*, 541 U.S. at 51; Davies, *supra*, at 452. As *Crawford* points out, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the

out by every case cited by the majority because not one of those cases so much as mentions confrontation in the context of res gestae.[6] *See State v. Labbee*, 134 Wash. 55, 234 P. 1049 (1925); *State v. Hazzard*, 75 Wash. 5, 134 P. 514 (1913); *State v. Ripley*, 32 Wash. 182, 72 P. 1036 (1903); *State v. Smith*, 26 Wash. 354, 67 P. 70 (1901). The confrontation issue was never raised and thus never considered in any of these opinions. The judges deciding them indeed gave no thought to the conflict between the res gestae exception and the defendant's fundamental right to meet witnesses face to face. *See* Davies, *supra*, at 452. Rather they were concerned only with the law of evidence at the time. This narrow focus is confirmed by the authorities cited in the cases applying the res gestae doctrine. In *Labbee*, the court supported its ruling that statements were admissible as res gestae in part by citing *Lucchesi v. Reynolds*, 125 Wash. 352, 216 P. 12 (1923). *Labbee*, 134 Wash. at 59. But *Lucchesi* was a civil case involving a car accident. 125 Wash. at 352. Another Washington criminal case that admitted statements as res gestae relied on *Heg v. Mullen*, 115 Wash. 252, 197 P. 51 (1921). *State v. Goodwin*, 119 Wash. 135, 139, 204 P. 769 (1922). As noted above, *Heg* was also a civil case. If we consider hearsay rules as exceptions to the right of confrontation, we allow the

---

most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51.

[6] Several of the cases cited are not criminal cases at all and are thus all the more irrelevant to confrontation rights. *See Beck v. Dye*, 200 Wash. 1, 92 P.2d 1113 (1939); *Heg v. Mullen*, 115 Wash. 252, 197 P. 51 (1921); *Walters v. Spokane Int'l Ry. Co.*, 58 Wash. 293, 108 P. 593 (1910).

"vagaries of the rules of evidence" to trump the constitution.

Crawford, 541 U.S. at 61.

The people ratified our constitution. Const. pmbl. The understanding of the ratifying public is thus the key to constitutional interpretation. Utter, *supra*, at 510. "Constitutions are not designed for metaphysical or logical subtleties . . . . The people make them ; the people adopt them, the people must be supposed to read them, with the help of common sense ; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." 1 Joseph Story, Commentaries on the Constitution of the United States § 451, at 322 (3d ed. 1858). Moreover, "if a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or *permissible*." *State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975) (emphasis added).

What could be plainer or more unambiguous than our confrontation clause? But the majority simply reads "face to face" out of our constitution. It is sadly not surprising that the majority refuses to follow the text, since elsewhere this court has opined, "'In the past, the plain meaning rule rested on theories of language and meaning, now discredited, which held that words have inherent or fixed meanings.'" *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 48A:16, at 809-10 (6th ed. 2000)). The majority seems to adhere to its made up rule that a text can

be "interpreted" in whatever way is most expedient to reach the desired result. This is nothing more than constitutional amendment by judicial fiat.

The only relevant questions here are whether Bridgette Pugh was a witness against her husband and whether, at his criminal trial, he met her face to face. The prosecutor at the trial told the jury that although Ms. Pugh "didn't come before you and testify . . . . that doesn't mean that you didn't hear her voice. That doesn't mean that she didn't tell you what happened to her." RP (7/29/05) at 7. The prosecutor was certainly correct. Bridgette Pugh was obviously a witness, indeed the principal witness, against the defendant. But she was not present. Read in the light of our face-to-face confrontation clause, these statements by a government prosecutor are telling. How could a constitutional violation be any clearer than this?

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. Hearsay evidence of a testimonial statement is thus inadmissible against a criminal defendant without showing both unavailability of the witness and a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. Statements are testimonial "when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S.

813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Statements are not testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.*

The Court in *Davis* examined several factors to determine whether a statement is objectively testimonial in the context of a 911 call. First, is the caller speaking about events as they were actually happening or describing past events? Second, would a reasonable listener recognize that the caller was facing an ongoing emergency? Third, was the nature of the interrogation, viewed objectively, such that the statements given were necessary to resolve the present emergency or to learn what had happened in the past? Finally, how formal was the interrogation? *Id.* at 827.

The standard established in *Davis* is clearly based on objective criteria. *Id.* at 822, 827. Yet the majority's analysis improperly focuses on the subjective intent of the caller, albeit obliquely. The *caller's* "overriding purpose in calling 911" is irrelevant. *See* majority at 7. The test is whether the circumstances objectively show (1) that there is or is not an ongoing emergency and (2) that the primary purpose of the *interrogation* is or is not to establish past events relevant to later criminal prosecution. *Davis*, 547 U.S. at 822. Generalized statements about what the caller thought are mere speculation. *See* majority at 7. Rather, we must look

objectively at what exactly was said in the call and determine on that basis whether or not it was testimonial.

First, this caller was speaking of past events, not events as they were actually happening. *Davis*, 547 U.S. at 827. The majority claims that Bridgette Pugh's statements appear to describe past events if read out of context. Majority at 6. But the context to which the majority refers is elusive, since every statement Bridgette made regarding the incident not only appears to, but does, describe past events. The first statement made in the 911 call, and indeed the only statement the majority quotes directly throughout its entire analysis, is: "[m]y husband was beating me up really bad." Clerk's Papers (CP) at 215. In her next reference to the assault, Bridgette states, "[h]e fuckin' hit me as I was . . . he fuckin' hit me." CP at 216. She goes on to state, "[h]e fuckin' pushed me," "he was fuckin' pushin' me," "he pushed me off . . . ," and "I was outside."[7] CP at 218, 220, 221. The entire conversation with the 911 operator, viewed objectively, shows that the event described was in the past at the time of the 911 call.

Second, a reasonable listener would not recognize this situation as an ongoing emergency. The 911 operator's first question after verifying the address of the caller was, "[i]s he still there?" To this, Bridgette responded, "[n]o he's walking away." CP at 216. Moreover, it is apparent from the call that the husband was not

[7] While one statement was made in the present tense, that "[h]e's beatin' me up," CP at 219, it is this statement, not the others, that is out of context.

even inside the house at the time of the incident:

OPERATOR:	Is he living there with you?
PUGH:	Nope.
OPERATOR:	Did he force his way in or how did he get . . .
PUGH:	I . . . I was outside.

CP at 220-21. A reasonable listener would discern from this exchange that whatever had happened had occurred outside the house altogether. Bridgette's husband was not a continuing threat but was walking away. The emergency was over.

Third, the objective nature of the interrogation in this case must be considered. The information gathered in the 911 call here, as in most such calls, includes information relevant to prosecution, not simply resolution of the instant situation. The operator here established that there was "a restraining order in place," CP at 220, and asked whether the suspect had "force[d] his way in." CP at 221. While some of the information may have been relevant to aid police in resolving the situation, such as whether the suspect was present (he wasn't) and whether he had a weapon (he didn't), an objective line can be drawn between evidence-gathering and resolving the situation. This interrogation crossed that line. Finally, the formality of the interrogation also weighs against finding it was not testimonial, because 911 calls are commonly conducted according to a "script" composed by agents of investigating authorities. *See State v. Davis*, 154 Wn.2d

291, 310, 111 P.3d 844 (2005) (Sanders, J., dissenting), *aff'd on other grounds by Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

When all factors are considered together, the 911 call was testimonial. It described past events and could not reasonably be interpreted as an ongoing emergency. It was constitutional error to admit the call without a showing of unavailability and a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 68.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: