IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. MORONI LOPEZ, Respondent.	Case No. SC05-88

AMICUS BRIEF OF THE
FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENT

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C. PRELIMINARY STATEMENT.

This brief is being filed by the Florida Association of Criminal Defense Lawyers (AFACDL@) in support of the Respondent, Moroni Lopez. FACDL is a statewide organization representing over 1400 members, all of whom are criminal defense practitioners. FACDL has an interest in the issue before the Court as there is a conflict among the district courts as to whether the use of pretrial discovery depositions as substantive evidence violates a defendant=s confrontation rights when the declarant is unavailable at trial, the issue has constitutional implications as well as practical implications on pretrial discovery practices, and it potentially affects numerous criminal prosecutions.

D. SUMMARY OF ARGUMENT.

The Petitioner has raised two issues in this case: (1) whether a discovery deposition qualifies as previous opportunity to cross-examine a witness pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), and (2) whether an excited utterance is Atestimonial@ pursuant to *Crawford*. Regarding the first issue, *Crawford* holds that the Confrontation Clause requires a Aprevious opportunity to cross-examine@ before an out-of-court testimonial statement of a witness, who is not available for trial, is admitted at trial. Florida Rule of Criminal Procedure 3.220(h) allows defendants to depose witnesses, but pretrial discovery depositions do not constitute a Aprevious opportunity for cross-examination.@ Significantly, defendants are not allowed to be physically present at

depositions and confront deposed witnesses Aface to face.@ In addition, there are different motives in taking Ainformation seeking@ depositions and in cross-examining witnesses for impeachment or to challenge the accuracy of their statements. Finally, allowing depositions to be used as a substitute for in-court testimony would severely curtail the use of discovery depositions in the resolution of cases and the search for truth. Based on the *Crawford* court=s analysis of the right to Aface to face@ confrontation and this Court=s interpretation of the discovery rules, it is clear that pretrial discovery depositions are not the equivalent of in-court trial testimony and do not satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*.

Regarding the second issue, FACDL submits that the lower court correctly held that a statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made. FACDL suggests that the proper inquiry is whether a reasonable person in declarant=s position would anticipate the statement being used in furtherance of the investigation and prosecution of a crime. Based on the facts of the instant case, it was reasonable for the declarant to expect (and perhaps even planned by the declarant) that his statements to the police would be used in the prosecution of the Respondent=s case.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

Issue 1. Whether the admission of a hearsay statement by a declarant that was deposed but did not testify at trial violates the defendant=s right of confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004).[1]

As a preliminary matter, this Court must determine whether the hearsay statements introduced at Respondent=s trial constituted Atestimonial statements.@ *See* Issue 2, *infra*. Assuming the statements were testimonial, this Court must then determine whether the statements should have been excluded as violating Respondent=s right of confrontation under *Crawford*.

Crawford governs the use of testimonial hearsay at trial. In *Crawford*, the Supreme Court held that the Confrontation Clause of the Sixth Amendment places no constraints at all on the use of a declarant=s prior testimonial statements if the declarant testifies at trial and is subject to cross-examination. However, when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements constitute Atestimonial hearsay,@ the Confrontation Clause requires (1) that the declarant be unavailable and (2) a prior opportunity to cross-examine the declarant. The *Crawford* court did not specifically define the Aopportunity to cross examine.@ The question before this Court is whether a routine discovery deposition satisfies that requirement. FACDL submits the answer is found in *Crawford*=s exhaustive discussion of Aface to face@

[1] Whether a discovery deposition qualifies as previous opportunity to cross-examine a witness pursuant to *Crawford* is a question of law and subject to *de novo* review.

confrontation and in Florida=s application of the discovery rules.

In *Crawford*, when examining the historical roots of the Confrontation Clause and English law, the Supreme Court focused on the right of a defendant to confront an accuser Aface to face.@ For example, the Supreme Court explained that England, at times, adopted elements of a civil-law practice where justices of the peace examined witnesses before trial and the examinations were sometimes read in court in lieu of live testimony B Aa practice that >occasioned frequent demands by the prisoner to have his accusers, i.e. the witnesses against him, brought before him *face to face*.=@ 541 U.S. at 43 (quoting 1 J. Stephen, History of the Criminal Law of England 326 (1883)) (emphasis added). The Supreme Court also focused on the 1603 treason trial of Sir Walter Raleigh, and quoted Raleigh as saying, A[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser *before my face* . . . .@ 541 U.S. at 44 (quoting Raleigh=s Case, 2 How. St. Tr. 1, 15-16 (1603)) (emphasis added). Partly due to the outcry of the unfairness of Raleigh=s trial, English law developed a right of confrontation. AFor example, treason statutes required witnesses to confront the accused >*face to face*= at his arraignment.@ *Id.* at 44 (citing 13 Car. 2, c. 1, ' 5 (1661)) (emphasis added).

Later in the opinion, the Supreme Court referred to its previous holding in *Mattox v. United States*, 156 U.S. 237 (1895), which involved a deceased witness= prior testimony. The Supreme Court explained that in allowing the statement to be admitted in *Mattox*, the Court Arelied on the fact that the defendant had had, at the first trial, an

adequate opportunity to confront the witness: ›The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness *face to face*, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . .= *Id.* at 244.@ *Crawford*, 541 U.S. at 57 (emphasis added).

The Supreme Court in *Crawford* also referred to the propriety of reading a previous deposition at trial in lieu of live testimony. The Supreme Court noted that the issue was discussed in the trial of Sir John Fenwick, wherein Fenwick=s counsel objected to such a procedure: A›[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . . . [O]ur constitution is, that the person shall see his accuser.=@ 541 U.S. at 45-46 (quoting *Fenwick=s Case*, 13 How. St. Tr. 537, 592 (H.C. 1696) (Shower)).

The Supreme Court also cited to state court decisions rendered shortly after the Sixth Amendment was adopted. For example, the Supreme Court cited *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794) (per curiam), which held that depositions could be read against an accused only if they were taken in his presence. *See Crawford*, 541 U.S. at 49. The Supreme Court also cited *State v. Campbell*, 30 S.C.L. 124, 125, 1844 WL 2558 (App. L. 1844), wherein South Carolina=s highest law court excluded a deposition taken by a coroner in the absence of the accused, holding: A[I]f we are to decide the

question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and, therefore, utterly incompetent.@ *See Crawford*, 541 U.S. at 49. The Supreme Court explained that the South Carolina court held that Aone of the >indispensable conditions= implicitly guaranteed by the State Constitution was that >prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his *personal examination*.=@ *Id*. at 49-50 (quoting *Campbell*, 30 S.C.L. at 125) (emphasis added).

The Florida Rules of Criminal Procedure allow a party to take a deposition of designated witnesses after the filing of the charging document. *See* Fla. R. Crim. P. 3.220(h). Defendants are not allowed to be present at discovery depositions, and depositions taken under this rule are not admissible at trial but may be used for impeachment under section 90.608(1), Florida Statutes. A deposition may be used as substantive evidence at trial only when it is taken to perpetuate testimony, in accordance with Florida Rule of Criminal Procedure 3.190(j). The express purpose of this rule is to protect a defendant=s Aface to face@ confrontation rights under the Sixth Amendment to the United States Constitution and article I, section 16, of the Florida Constitution. *See Basiliere v. State*, 353 So. 2d 820 (Fla. 1978).

In *Basiliere*, this Court addressed two certified questions:

> Whether the use of the deposition testimony at trial violates defendant=s confrontation rights under the Sixth Amendment to the United States Constitution and under Article I, Section 16, Florida Constitution, inasmuch as the defendant was not present during the taking of the deposition by his attorney and defendant received no notice that said deposition could be used at his trial.
>
> Whether Fla. R. Crim. P. 3.220(d),[2] which provides for discovery depositions and says that they >may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness,= yet does not provide, as does the comparable Fla. R. Civ. P. 1.330(a)(3), for the use of said deposition as evidence at trial upon a finding of unavailability of the witness, precludes the use of deposition testimony as evidence at trial upon the finding of unavailability of the witness.

353 So. 2d at 822. *Basiliere* involved the use of a victim=s discovery deposition in a trial where the victim had died between the time the deposition was taken and the trial was held. Basiliere was in custody and was not present at the deposition, and the deposition was not taken to perpetuate the victim=s testimony pursuant to rule 3.190(j). The Court first noted that when a defendant has been confronted with the witnesses against him in a former trial of the same cause, and has had an opportunity to fully cross-examine the witnesses, and it is satisfactorily shown that the witnesses are not available for trial, admission of the witnesses= testimony at trial Adoes not violate the organic right of an accused to meet the witnesses against him face to face.@ 353 So. 2d at 823 (quoting *Blackwell v. State*, 79 Fla. 709, 86 So. 224 (1920)). The Court noted that, unlike former trial testimony, defendants are not present at discovery depositions, nor is there notice that the deposition will be used against him at trial. The Court further explained that there

[2] This is the equivalent of present rule 3.220(h).

are different motives in taking depositions and cross-examining witnesses at trial, and said that when a defendant deposes a witness in the discovery process, it is to ascertain facts upon which the charge was based and not necessarily to examine and challenge the accuracy of the witnesses= statements. The Court reasoned that because the defendant was Aunaware that [the] deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent=s statements,@ defense counsel Acould not have been expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the deposition.@ *Id.* at 824-25. The Court concluded that impeachment is the exclusive use of depositions in a criminal proceeding, unless the deposition is taken to perpetuate testimony under rule 3.190(j).

Even when a deposition is taken to perpetuate testimony under rule 3.190(j), its use at trial is prohibited unless the defendant is present, or voluntarily waives his or her presence at the deposition. AThe use of a deposition, taken in the involuntary absence of a defendant, as evidence against him violates the defendant=s right to be personally present during his trial and his Sixth Amendment right to confront witnesses.@ *Wilson v. State*, 479 So. 2d 273, 274 (Fla. 2d DCA 1985). *Accord Brown v. State*, 471 So. 2d 6 (Fla. 1985). The point is that a defendant has the right to be present when testimony is given against him, to confront his accusers Aface to face,@ and to conduct meaningful cross-examination.

Based on the foregoing, it is apparent that a pretrial discovery deposition in Florida

is not the equivalent of in-court trial testimony, nor is it sufficient to satisfy the constitutional right of confrontation set forth in the Sixth Amendment. In his recent article, Professor John Yetter points out that the discovery rule prohibits the presence of the defendant at discovery depositions without a court order or a stipulation between the state attorney and the defense counsel. *See* John F. Yetter, AWrestling With *Crawford v. Washington* and the New Constitutional Law of Confrontation,@ 78 Fla. Bar J. 26, 30 (Oct. 2004). *See also* Fla. R. Crim. P. 3.220(h)(7) (AA defendant shall not be physically present at a deposition except on stipulation of the parties or as provided by this rule.@).

In *Contreras v. State*, 910 So. 2d 901, 908 (Fla. 4th DCA 2005), the Fourth District explained that previous decisions from this Court Ahold that the admission of discovery depositions against a defendant who was not personally present during the deposition violates the Confrontation Clause.@ *See State v. Clark*, 614 So. 2d 453 (Fla. 1992); *Basiliere*. The Fourth District also pointed out that Aprior decisions curtail the use of discovery depositions to impeachment only.@ *Contreras*, 910 So. 2d at 908-09 (citing *State v. Green*, 667 So. 2d 756 (Fla. 1995); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992)). As Professor Yetter concludes in his article:

> [I]t seems clear that if the defendant=s confrontation of the witness at a discovery deposition is to substitute for cross-examination at trial, then the deposition testimony will have to be admissible as substantive proof to the same extent as it would be if solicited on cross-examination at trial. Because the Florida decisions categorically prohibit this result, the only option for the state would seem to be to anticipate and try to avoid the impediment by waiving on the record, and in advance of the deposition, any objection to the defendant=s substantive use of the discovery deposition.

78 FLA. BAR J. at 30-31.

For all of these reasons, the Fourth District in *Contreras* held that a discovery deposition is not sufficient to satisfy the requirements of the Sixth Amendment: AIf a statement is >testimonial= under *Crawford,* a >prior opportunity for cross examination= under the Sixth Amendment requires *face-to-face confrontation* of a defendant and a witness against him.@ *Contreras,* 910 So. 2d at 909 (emphasis added). Discovery depositions in Florida do not permit Aface to face@ confrontation and therefore violate the Confrontation Clause and the holding set forth in *Crawford.*

Consistent with *Contreras,* FACDL urges the Court to hold that discovery depositions are no substitute for the right of confrontation afforded to a criminal defendant pursuant to Aface to face@ cross-examination at trial. The only exception would be where the defendant is aware of the State=s intention to use a prior testimonial statement, is present at a deposition, and so conducts the cross-examination of the witness consistent with the principles set forth in *Crawford* (which, in essence, would be the equivalent of a deposition to perpetuate testimony pursuant to Florida Rule of Criminal Procedure 3.190(j)).

FACDL further submits that there will be far-reaching ramifications if the Court determines that a discovery deposition is sufficient to satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*. The most obvious implication of such a holding would be that the Court would need to amend rule 3.220(h)(7) to allow the presence of a

criminal defendant at all depositions.[3] But more importantly, such a holding would drastically change the purpose of discovery depositions in this state. Currently, the purpose of a discovery deposition is to gain information about the case. It is routine for attorneys to ask broad questions during discovery depositions, and the answers to such questions often involve testimony that would be inadmissible at trial. However, if the Court holds that such depositions could be used at trial, the ruling would have a chilling effect on an attorney=s ability to conduct a thorough deposition. Arguably, an attorney would be hesitant to ask Ainformation seeking@ questions, because the answers to such questions may contain harmful or damaging information, and by asking the questions, the attorney will potentially invite the error or open the door to the information being admitted at trial. An attorney conducting an Ainformation seeking@ deposition will simply ask different types of questions than an attorney conducting a deposition with the purpose of cross-examining, confronting, and perhaps impeaching a witness.[4]

In *Binger v. King Pest Control*, 401 So. 2d 1310, 1313 (Fla. 1981), this Court stated the following regarding the goals of discovery in this state:

Although *Rose* [*v. Yuille*, 88 So. 2d 318 (Fla. 1956),] is somewhat dated,

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[3] It therefore follows that any new rule/holding announced by this Court would be prospective only. For depositions that took place prior to such a new rule/holding, the previous opportunity to confront and cross-examine would not have been satisfied because rule 3.220(h)(7) would have prevented the defendant from being present at the deposition.

[4] This is in contrast to a deposition to perpetuate testimony, where all parties are on notice that the deposition will be used at trial.

> the general policy of full and open disclosure underlying the decision has been carried forward in Florida=s rules of discovery. The goals of these procedural rules are Ato eliminate surprise, to encourage settlement, and to assist in arriving at the truth.@ *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. 4th DCA 1975) (Downey, J., concurring).

For the reasons set forth above, it would be contrary to the Ageneral policy of full and open disclosure@ to hold that a discovery deposition is sufficient to satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*.

The Petitioner suggests that defense counsel in the instant case had every opportunity in the deposition to limit, contradict, or otherwise cross-examine the victim about his allegations to the police but, as noted above, that is not the primary purpose of a discovery deposition. Furthermore, using a deposition to limit, contradict, or otherwise impeach a witness in deposition may in fact impede the fact-finding purpose of the deposition. As the district court below recognized, ARule 3.220(h) was designed to provide an opportunity for discovery, not an opportunity to engage in an adversarial testing of the evidence against the defendant. Nor is the rule customarily used for the purpose of cross-examination.@ *Lopez v. State*, 888 So. 2d 693, 700 (Fla. 1st DCA 2004). Thus, the opportunity for cross-examination must mean more than an opportunity to conduct pre-trial discovery. The deposition discovery tool contemplates learning what the testimony will be, not attempting to limit it. *See id*.

Finally, if the Court determines that a discovery deposition is sufficient to satisfy the Aprevious opportunity to cross-examine@ component of *Crawford*, the holding will

create the possibility for witness and/or prosecutorial misconduct. Depending on the circumstances of the case and the witnesses involved, prosecution witnesses will be less likely to show up at trial, and prosecutors will be more likely to argue that witnesses are unavailable at trial. On the other hand, if discovery depositions are deemed insufficient to satisfy the requirement of Aprevious opportunity to cross-examine,@ prosecutors will still have the opportunity to take depositions to perpetuate testimony if they anticipate that a witness will become incapacitated or unavailable.

Issue 2. Whether the appellate court erred by finding that the victim=s excited utterance constituted a testimonial statement as defined by *Crawford v. Washington*, 541 U.S. 36 (2004).[5]

The second issue in this case is whether an alleged Aexcited utterance@ is Atestimonial@ pursuant to *Crawford*, and therefore subject to the requirements of the Confrontation Clause of the Sixth Amendment. To help the Court answer this question, FACDL will examine the definition of Atestimonial@ articulated by the Supreme Court in *Crawford* and examine the holdings of other jurisdictions concerning this issue.

a. *Crawford*. In *Crawford*, the Supreme Court expressly declined to spell out

[5] Whether a statement is an excited utterance is a question of fact subject to the abuse of discretion standard of review, *see Cotton v. State*, 763 So. 2d 437, 440-41 (Fla. 4th DCA 2000), but whether a statement is Atestimonial@ is a question of law and subject

a comprehensive definition of Atestimonial.@ 541 U.S. at 68. Unquestionably Atestimonial statements@ include formal statements taken by police officers in the course of interrogations, as well as extrajudicial statements contained in affidavits, depositions, or prior testimony. However, it is clear that the meaning of Atestimonial@ extends beyond merely custodial statements to law enforcement or statements given in the context of formal proceedings. Rather, Atestimonial@ applies to those statements which are solicited by law enforcement for the purpose of investigating and prosecuting crimes. FACDL submits that statements in response to non-custodial police interviews of witnesses fall in the category of testimonial statements. FACDL further submits that such statements do not lose their quality as testimonial merely because they are excited utterances.

b. Other jurisdictions. Courts in other jurisdictions have reached vastly different conclusions regarding whether an excited utterance is Atestimonial@ pursuant to *Crawford*. Recently the First Circuit Court of Appeals summarized the three different approaches taken by courts:

> Some courts take the view that excited utterances never can constitute testimonial hearsay. Their rationale is that, by definition, an excited utterance is made under the influence of a startling event and, thus, the declarant acts in response to that event rather than in response to interrogation or in anticipation of bearing witness.
>
> A second cluster of cases holds that the excited nature of the utterance has no bearing on whether a particular statement is testimonial. These courts effectively discount the excited nature of the utterance and focus instead on the declarant=s objectively reasonable expectations.
>
> A third cadre of courts recognizes that the excited utterance inquiry

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to *de novo* review.

> and the testimonial hearsay inquiry are distinct but symbiotic; the startling event that gives rise to an excited utterance informs the Confrontation Clause analysis and often dissipates the very qualities of a statement that otherwise might render the statement testimonial. This approach suggests that courts must undertake a case-by-case examination of the totality of the circumstances in order to determine whether or not a particular excited utterance should be deemed testimonial in nature.

United States v. Brito, 427 F.3d 53, 60-61 (1st Cir. 2005) (citations omitted). The First Circuit in *Brito* adopted the third approach:

> . . . It does not necessarily follow, however, that just because a statement falls within the literal definition of an excited utterance, the declarant must have lacked the ability to recognize that the statement could be used for prosecutorial purposes. . . . If, say, the utterance is removed in time from the startling event, it might qualify as excited, but still might be considered testimonial.
>
> We therefore reject the categorical approaches that lie at either end of the spectrum. Instead, we conclude that the excited utterance and testimonial hearsay inquiries are separate, but related. . . . The excited utterance inquiry focuses on whether the declarant was under the stress of a startling event. The testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement.
>
> These parallel inquiries require an ad hoc, case-by-case approach. An inquiring court first should determine whether a particular hearsay statement qualifies as an excited utterance. If not, the inquiry ends. If, however, the statement so qualifies, the court then must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance.
>
> We offer some general guidance for the proper application of this rule. Ordinarily, statements made to police while the declarant or others are still in personal danger cannot be said to have been made with consideration of their legal ramifications. Such a declarant usually speaks out of urgency and a desire to obtain a prompt response. It follows, therefore, that such statements will not normally be deemed testimonial. Once the immediate danger has subsided, however, a person who speaks while still under the

> stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature.

Brito, 427 F.3d at 61-62 (citations omitted).[6]

FACDL submits that the Court should adopt the Aad hoc, case-by-case approach@ articulated in *Brito*. Pursuant to this approach, the Court must first determine whether the statements were made by the witness Aso the police could secure their own or the witness[]= safety, render emergency aid, or protect the security of a crime scene.@ *Parks*, 116 P.3d at 641. *See also Commonwealth v. Gonsalves*, 833 N.E.2d 549, 556 (Mass. 2005) (AQuestioning by law enforcement agents to secure a volatile scene or establish the need for or provide medical care is not colloquially understood as interrogation . . . .@) (footnote omitted). The Court must then determine Awhether a reasonable declarant,

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[6] Similarly, in *State v. Parks*, 116 P.3d 631, 641-42 (Ariz. Ct. App. 2005), the Arizona appellate court concluded:

> . . . [A]n interrogation may occur even in the absence of Aformal@ or Astructured@ police questioning, concepts the State seems to suggest incorporate some type of prior planning or systematic organization. Questioning during a field investigation when there are no Aexigent safety, security, and medical concerns@ that has as its objective the production of evidence or information for a possible prosecution, is within the core concerns of the Sixth Amendment just as is a formal witness interview at a station house. It is the A[i]nvolvement of government officers in the production of testimony with an eye toward trial@ that presents the Aunique potential for prosecutorial abuse,@ *Crawford*, 541 U.S. at 56 n.7, not whether the exchange can be labeled Aformal@ or Astructured.@

(Citation omitted.)

similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement.@ *Brito*, 427 F.3d at 61. *See also Gonsalves*, 833 N.E.2d at 558 (AThe proper inquiry is whether a reasonable person in the declarant=s position would anticipate the statements being used against the accused in investigating and prosecuting a crime.@).

c. The instant case. Applying the *Brito* approach to the instant case, FACDL submits that Ruiz= statements to Officer Mel Gaston were Atestimonial@ pursuant to *Crawford*. Officer Gaston=s questioning of Ruiz was not for the purpose of securing a volatile scene or to establish the need for or provide medical care; at the time Officer Gaston arrived at the scene, Ruiz was in the parking lot (not the vehicle) and Lopez was Astanding about twenty-five yards behind him in the parking lot.@ *Lopez*, 888 So. 2d at 695.[7]

FACDL further submits that a reasonable person in Ruiz= position would anticipate the statements being used in furtherance of a criminal investigation. Notably, Lopez explained at trial that Ruiz= accusations were part of a set-up:

> The defendant told the jury that he believed he had been set up by Ruiz and his employer, Mario Morqucho. The day before he was accused of this offense, the defendant reported to law enforcement officers that he had been the victim of a sexual battery perpetrated by Morqucho. He said that he was also at odds with Ruiz. As he explained, he could not get Ruiz to leave his apartment. The defendant told the jury that he thought Ruiz and

[7] The Petitioner=s brief indicates that Ruiz was standing A15 to 20 feet away@ from Lopez, *see* Initial Brief at 2, but the district court=s opinion indicates that the two were twenty-five yards apart. *See Lopez*, 888 So. 2d at 695.

> Morqucho set him up in retaliation for the complaints he had made against them.

Lopez, 888 So. 2d at 696. At least one other court has recognized that this fact made it much more likely that Ruiz would have expected that his statements would be used against Lopez in a criminal prosecution:

> The only case holding to the contrary, *Lopez*, is distinguishable. There, the court concluded the victim=s statements to the police regarding the defendant=s involvement were testimonial. However, the defendant in that case alleged that he had been set up by the victim and the victim=s employer because the day before, the defendant had reported that he had been sexually assaulted by the victim's employer. *Therefore, the victim=s statements to the police were much more likely to have been made in anticipation of their use at trial*.

People v. King, 121 P.3d 234, 240 (Col. App. 2005) (emphasis added).[8]

Moreover, FACDL submits that Ruiz= statements were made in response to police questioning conducted for the purpose of investigation. *Ruiz* did not approach the officers and make spontaneous or unsolicited statements; rather, *the officers* approached Ruiz and questioned him about the alleged crime: AOfficer Gaston asked Ruiz what had happened.@ *Lopez*, 888 So. 2d at 695. This was police questioning conducted for the sole purpose of investigating a crime and presumably for use at a later trial. FACDL asserts that Ruiz= demeanor or state of mind (i.e., the fact that ARuiz was nervous and appeared to be upset,@ *see id*.) at the time the statements were made did not somehow

[8] In light of the unique facts of this case, FACDL suggests that this may not be the proper case for the Court to decide whether excited utterances are Atestimonial@ pursuant to *Crawford*.

alter or diminish the testimonial character of the statements.

The First District correctly held that Aa statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.@ *Lopez*, 888 So. 2d at 699-700.[9] An excited utterance may not be testimonial when it is a spontaneous statement, when it is an unsolicited comment, or when it is unresponsive to police questioning. However, an excited utterance is testimonial when it is solicited or directly in response to police questioning. FACDL submits that the focus should be on the context in which the statement is made, not the witness= mental status. Statements made during police interviews should not be deemed non-testimonial based on the witness= demeanor (Ahe looked excited, anxious, nervous@).

The *Crawford* court recognized that A[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.@ *Crawford*, 541 U.S. at 51. The statements at issue here were not casual remarks but formal statements to the police, and are thus testimonial regardless of the witness= excited state.

F. CONCLUSION.

[9] The district court in *Lopez* followed the well-reasoned approach advocated in *Brito*. The district court first determined that Ruiz= statements qualified as an excited utterance and then looked at the attendant circumstances in concluding that the hearsay statements were testimonial. Ruiz was no longer in personal danger, there was no urgency to the situation as both Lopez and Ruiz were in a public place and outside the vehicle where the weapon was found, and Ruiz was able to comprehend the significance of his statements to the police officers despite his excited state.

For all the foregoing reasons, FACDL respectfully requests that this Court approve the district court=s decision in this cause.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Amicus Brief complies with the type-font limitation.

Respectfully submitted,

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