IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. MORONI LOPEZ, Respondent.	CASE NO. SC05-88

DISCRETIONARY REVIEW OF CERTIFIED CONFLICT
PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Moroni Lopez, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol “R” will refer to the record on appeal and the symbol “T” will refer to the transcript of the trial court proceedings. “IB” will designate Appellant's Initial Brief. Each symbol is followed by the appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent Moroni Lopez was convicted of possession of a firearm by a convicted felon. In a proffered testimony elicited at trial, Tallahassee Police Officer Mel Gaston testified that the police were dispatched to an apartment complex based on a report to 911 that Hector Ruiz had been abducted from his

apartment at gunpoint (T 10,18). Within two and a half minutes, Officer Gaston arrived to the named apartment and found the door open with no one inside (T 10,18). Officer Gaston left the apartment and the people involved in the abduction arrived on scene and exited a vehicle (T 11).

Within twenty seconds of the their arrival in the apartment complex parking lot, Officer Gaston approached the owner of the vehicle, Hector Ruiz (T 11). Officer Gaston estimated that it was about six to eight minutes from the time of the 911 call until he talked to Mr. Ruiz (T 19). Upon contact with Mr. Ruiz, Officer Gaston observed that Mr. Ruiz appeared to be nervous, upset, shaken up and jittery (T 11,12,16,17). Officer Gaston testified that he had to calm Mr. Ruiz before he could get him to tell him his account of the incident (T 16,20,21).

While Respondent stood about 15 to 20 feet away from him, Mr. Ruiz told Officer that Respondent had a gun in his possession (T 21,22). Mr. Ruiz surreptitiously indicated that Respondent was person that pointed a gun at him and forced him out of his home (T 12,13,17).

A short time after the contact with Mr. Ruiz, another officer found a firearm in the Mr. Ruiz's vehicle. Respondent admitted to ownership of the firearm and that he hid the gun

under a seat in the Mr. Ruiz's vehicle. (T 68,70,72-75).

Although the Mr. Ruiz appeared for deposition, he could not be located for trial (T 31-32,39,40). Despite his failure to appear for trial, Mr. Ruiz's statement regarding Respondent possession of the firearm was admitted as an excited utterance (T 39,40). The jury subsequently convicted Respondent of possession of firearm by a convicted felon.

Respondent appealed his conviction and claimed that the Mr. Ruiz's excited utterance was testimonial hearsay under Crawford v. Washington, 541 U.S. 36 (2004), and thus was inadmissible. Respondent asserted that the trial court's admission of the Mr. Ruiz's testimonial statement violated his Sixth Amendment right to confront his accuser under the United States Constitution because Mr. Ruiz did not testify at trial.

The First District Court of Appeal reversed Respondent's conviction and stated: "We conclude that the trial court erred in allowing the jury to consider a hearsay statement made by person who said that he observed the defendant in possession of the firearm." Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004). The court found the statement qualified as an excited utterance, but was inadmissible under Crawford because it was testimonial and the declarant was not available or subject to cross-

examination. Id.

The court disagreed with the Fifth District Court of Appeal's view in Blanton v. State, 880 So. 2d 798 (Fla 5th DCA 2004), which found a witness's discovery deposition satisfied the right of confrontation. Id. Because the First District's ruling that Mr. Ruiz's deposition did not satisfy the right of confrontation directly conflicts with Blanton, the court certified a question on this point. Id.

The State timely filed its notice to invoke this Court's discretionary jurisdiction on January 14, 2005. This proceeding follows.

SUMMARY OF ARGUMENT

ISSUE I.

This Court should answer the certified question in the negative and find that the Confrontation Clause as set forth in Crawford v. Washington, 541 U.S. 36 (2004) was satisfied when Respondent's counsel conducted a pre-trial deposition of a witness who did not testify at trial. Crawford reiterates the view that the Sixth Amendment's Confrontation Clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

During the deposition, Respondent had the specific opportunity to cross-examine the victim, while at the same time uncovering facts that he thought undermined the State's case and supported his defense. Since he had a meaningful opportunity to cross-examine the victim during his deposition, the admission of the victim's out of court excited utterance did not infringe upon Respondent's right of confrontation. Accordingly, the lower tribunal's ruling that Respondent's constitutional rights under the Confrontation Clause were violated under Crawford constituted a misapplication of the law and should be quashed.

ISSUE II.

This court need not reach the question of whether the

Confrontation Clause was satisfied by the victim's deposition because the statement at issue was not testimonial and outside the scope of Crawford. Crawford prohibits the admission of a pretrial statement only if it was testimonial and the declarant who made the statement was not available or subject to cross-examination at trial. Crawford should not been interpreted to preclude the admission of the excited utterance since by its very nature an excited utterance cannot be testimonial in that there was an absence of time to reflect on or fabricate the statement.

Accordingly, the excited utterance was properly admitted as it was not testimonial as defined by Crawford. Since the lower tribunal's decision is based on erroneous finding that victim's excited utterance constituted a testimonial statement, this Court should quash the decision.

ARGUMENT

ISSUE I

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).

Following his conviction and sentence for possession of a firearm by a convicted felon, Respondent appealed to the First District Court of Appeal. The district court reversed Respondent's conviction reasoning that Crawford v. Washington, 541 U.S. 36 (2004), precluded the admission of an excited utterance statement from a declarant that did not testify at trial. The district court found under Crawford, the admission of the excited utterance violated Respondent's right to confrontation where the statement was testimonial and the declarant who made the excited utterance was not available or subject to cross-examination at trial. The lower tribunal misapplied the law relating to the Confrontation Clause as contemplated by Crawford v. Washington, 541 U.S. 36 (2004), and thus, this Court should quash the decision below.

Jurisdiction

Pursuant to Article V ' 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal

that passes upon a question certified by it to be one of great public importance. The District Court of Appeal of Florida, First District, certified that its decision expressly and directly conflicts with a decision of the Fifth District Court of Appeal in Blanton v. State, 880 So.2d 798 (Fla. 5th DCA 2004) on the same question of law. The question of law in conflict is:

> Whether the admission of a hearsay statement by a victim (who does not testify at trial) violates the defendant's right of confrontation under Crawford v. Washington, 541 U.S. 36 (2004) if the defendant had previously taken the victim's deposition and had an opportunity for cross-examination.

Therefore, this Court has jurisdiction.

Merits

The crux of the question before this Court is whether a non-testifying witness's deposition qualified as a "prior opportunity for cross-examination" as contemplated by Crawford v. Washington, 541 U.S. 36 (2004). Crawford prohibits the admission of testimonial statements from witnesses absent from trial where the defendant has not had the prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 54. Where testimonial evidence is at issue and the declarant is unavailable, the Sixth Amendment requires that there be a prior opportunity for cross-examination. Id.

Crawford reiterates the view that the Sixth Amendment's Confrontation Clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. Crawford, 541 U.S. at 54. The primary interest which Crawford secures is a defendant's right to confront and/or cross-examine the witnesses against him.

The Confrontation Clause does not require that he confrontation take place in front of a fact-finder or jury. Id.; Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). The requirements of the confrontation clause are satisfied when, at any time, including the deposition or trial, the defendant is accorded the right of cross-examination. United States v. Jones, 404 F. Supp. 529, 541 (E.D. Pa. 1975) (citing Government of the Virgin Islands v. Aquino, 378 F.2d 540, 548, 6 V.I. 395 (3d Cir. 1967)).

In the case at hand, Respondent was convicted of possession of a firearm by a convicted felon. In a proffered testimony elicited at trial, Tallahassee Police Officer Mel Gaston testified that the police were dispatched to an apartment complex based on a report to 911 that Hector Ruiz had been abducted from his apartment at gunpoint (T 10,18). Within two and a half minutes, Officer Gaston arrived to the named

apartment and found the door open with no one inside (T 10,18). Officer Gaston left the apartment and the people involved in the abduction arrived on scene and exited a vehicle (T 11).

Within twenty seconds of the their arrival in the apartment complex parking lot, Officer Gaston approached the owner of the vehicle, Hector Ruiz (T 11). Officer Gaston estimated that it was about six to eight minutes from the time of the 911 call until he talked to Mr. Ruiz (T 19). Upon contact with Mr. Ruiz, Officer Gaston observed that Mr. Ruiz appeared to be nervous, upset, shaken up and jittery (T 11,12,16,17). Officer Gaston testified that he had to calm Mr. Ruiz before he could get him to tell him his account of the incident (T 16,20,21).

While Respondent stood about 15 to 20 feet away from him, Mr. Ruiz told Officer that Respondent had a gun in his possession (T 21,22). Mr. Ruiz surreptitiously indicated that Respondent was person that pointed a gun at him and forced him out of his home (T 12,13,17).

A short time after the contact with Mr. Ruiz, another officer found a firearm in the Mr. Ruiz's vehicle. Respondent admitted to ownership of the firearm and that he hid the gun under a seat in the Mr. Ruiz's vehicle. (T 68,70,72-75).

Although the Mr. Ruiz appeared for deposition, he could not

be located for trial (T 31-32,39,40). Despite his failure to appear for trial, Mr. Ruiz's statement regarding Respondent's possession of the firearm was admitted as an excited utterance (T 39,40). The jury subsequently convicted Respondent of possession of firearm by a convicted felon.

Respondent appealed his conviction and claimed that Mr. Ruiz's excited utterance was testimonial hearsay under Crawford v. Washington, 541 U.S. 36 (2004), and thus was inadmissible. Respondent asserted that the trial court's admission of the Mr. Ruiz's testimonial statement violated his Sixth Amendment right to confront his accuser under the United States Constitution because Mr. Ruiz did not testify at trial.

The First District Court of Appeal agreed with Respondent and reversed his conviction. Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004). Although the court found Mr. Ruiz's statement qualified as an excited utterance, the court found it to be inadmissible under Crawford because it was testimonial and Mr. Ruiz was not available or subject to cross-examination. Id.

In reaching is decision, the First District disagreed with the Fifth District Court of Appeal's view in Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004), which found a witness's

discovery deposition satisfied the right of confrontation under Crawford. Id. In Blanton v. State, 880 So. 2d 798 (Fla 5th DCA 2004), the court noted that the primary goal of the Confrontation Clause is to prevent the use of statements not previously tested through the adversarial process. This goal is ordinarily met when an accused is provided with notice of the charges, a copy of the witness's statement, and a reasonable opportunity to test the veracity of the statement by deposition. Id. The court in Blanton emphasized that Crawford mandated only the "opportunity" for the examination. Id. [1]

In the case at hand, the appellate court refused to follow the logical reasoning set forth in Blanton, and expanded the definition of what constituted a "prior opportunity for cross-examination". Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004). The appellate court found that the victim's deposition did not offer the opportunity for cross-examination as contemplated by Crawford because the deposition was not an adversarial testing of the evidence and Respondent was not present during the deposition. Id. While the court

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[1] This Court granted review in this case based upon conflict with Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004). The conflict case is pending before this Court under Blanton v. State, SC04-1823.

acknowledged that a lawyer could cross-examine a witness during a discovery deposition, the discovery deposition would not qualify as an adversarial testing of the evidence against the defendant. Id.

The appellate court relied upon State v. Basiliere, 353 So. 2d 820 (Fla. 1977) and reasoned that the "opportunity" for cross-examination meant more than the standard "discovery deposition". Id. In Basiliere, the victim died before the trial, and the state tried to introduce his deposition in evidence. Id. Although Basiliere's lawyer declined to cross-examine the witness during the deposition, the court held that this was not a waiver of the defendant's right to confront the witnesses against him. Id. The court considered the discovery deposition as only a means by which the defendant could ascertain facts upon which the charge was based. Id.

The court found that the defendant could not have been expected to conduct an adequate cross-examination because he was unaware that the deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements. Id. The court reasoned in Basiliere that, while a deposition to perpetuate the victim's testimony would have satisfied the defendant's right of cross-examination, a

discovery deposition did not. Id.

The State submits that the appellate court's decision was in error because the court overlooked key language from the Basiliere which found the right of confrontation was not satisfied with a deposition *at which a defense attorney is discovering facts and circumstances for the first time*.

> "Yet, when the defendant sought discovery through means of deposition, it was only to ascertain facts upon which the charge was based. Being unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements, defendant could 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."

Basiliere, 353 So.2d at 824,825.

In contrast to Basiliere, Respondent's counsel knew the subject of the deposition was the victim's excited utterance implicating Respondent in the possession of a firearm. The police reports indicated the victim's statement about Respondent's possession of a firearm was made, and the victim was examined precisely on that point (R 2, T 28). Thus, Respondent was prepared for and had the opportunity to confront and question the victim about his statement regarding Respondent's possession of the firearm at the deposition.

Furthermore, defense counsel had every opportunity to

limit, contradict, or otherwise cross-examine the victim about his allegation to the police. The First District's contention that the deposition was merely a "discovery deposition" is belied by the fact that defense counsel believed that the victim's deposition reflected a sufficient examination of the witness such that the trial judge could rely upon it show that Mr. Ruiz's statements were not credible (T 28).

Defense counsel told the trial court that Mr. Ruiz's deposition established that the Respondent's guilt was based upon Mr. Ruiz's statements (T 27).

> DEFENSE COUNSEL: What we would be presenting? If we have to we'll be forced to put on the defendant. What we won't be able to present, because Mr. Ruiz is not here, it that they both work for the same construction firm, they're both Hispanic workers working for a construction firm. That work for a gentleman name Mario Morqucho.
>
> Prior to this offense the defendant in this case had contacted the police about a sexual battery against him by Mr. Morqucho. That investigation was ongoing at the time. We did a deposition with Mr. Ruiz and with the lady that make the phone call and we got the 911 tape. All this could come out.
>
> Through Mr. Ruiz we were going to prove that supposedly he's taken by gunpoint to this store. He gets out of the –- that the defendant gets out of the car, in September, and goes into this convenience store, goes inside. Mr. Ruiz stays outside. He's got a cell phone in his possession that he 's had for I think six or seven months. He has the keys to the car. He gets out of the car and makes a phone call, not the police. He calls Mr. Morqucho. Mr. Morqucho is in a store where he is talking with Gail Yardis. Ms. Yardis is the woman that calls the police. Her

> conversation is on tape.
>
> Her conversation with the police relates to a set of facts that when we got to the deposition is nowhere near what's going on, nowhere near the police report as to what's going on, okay? They're at the store. This gentlemen walks back outside after getting some cigarettes. They go back to the apartment complex, the police are there when he gets there. Her gets out of the car. That's it. Mr. Ruiz was deposed. I would ask the Court to read the deposition.

(T 26-27). Defense counsel also said that the deposition revealed Mr. Ruiz's motive to make false allegations (T 26-27).

> DEFENSE COUNSEL:... I would ask the Court, before the Court makes a decision to read the deposition, listen to the audio tape, and find out why we think this was a complete setup in retaliation for Mr. Lopez reporting a criminal offense against Mr. – - where he was the victim by Mr. Morqucho.
>
> Without Mr. Lopez here to testify to any of this – - pardon me, without Mr. Ruiz here to testify to any of this, this jury is going to miss so much of this case, and they're going to get the last five minutes of it, and basically --

(T 28). Clearly, Mr. Ruiz's deposition was more than a general fact gathering or discovery exercise. The victim's deposition gave Respondent the specific opportunity to cross-examine the victim, while at the same time uncovering facts that he thought undermined the State's case and supported his contention that he was "set-up".

The appellate court reliance upon Basiliere is misplaced because unlike in Basiliere, the victim's deposition went beyond just the discovery of facts upon which the charge was based as

proposed by the appellate court. Thus, the admission of Mr. Ruiz's excited utterance about Respondent's possession of the firearm was not an infringement of Respondent's right of confrontation because he had an meaningful opportunity to cross-examine Mr. Ruiz during his deposition.

As with Basiliere, the First District misapplies State v. Green, 667 So. 2d 756 (Fla. 1995) to support the view that a discovery deposition would never satisfy the right of confrontation as contemplated by Crawford. The appellate court cited State v. Green, 667 So. 2d 756 (Fla. 1995) to emphasis the distinction between a discovery deposition and a deposition to perpetuate testimony. In Green, a child who had been the victim of sexual abuse recanted the testimony she gave in a discovery deposition. Id. She testified at trial that another man committed the offense. Id. Because the victim testified at trial, her deposition was presented as substantive evidence under section 90.801(2)(a) of the Florida Evidence Code. Id.

On review, this Court held that, although this section of the Evidence Code allows the admission of deposition testimony that was inconsistent with the testimony given by the witness at trial, the term "deposition" as used in the Code did not include discovery depositions. Id. Green reiterates the point that a

discovery deposition was not intended as an opportunity to perpetuate testimony for use at trial. Id.

In State v. Green, the issue was different. The issue in Green was the admissibility of the victim's discovery deposition as substantive evidence. Id. There was no discussion, nor legal analysis as to whether the admissibility of a previous statement by a witness would be admissible, as is the case in Lopez. Id. Green dealt exclusively with the admissibility of the discovery deposition transcript. Id.

Applying the logic of Basiliere and Green, the First District concluded that a discovery deposition could never be regarded as a prior opportunity for cross-examination. The First District court found that under Basiliere and Green, a deposition satisfied the right of confrontation only when the parties had expectation that the deposition would be used at trial.

The appellate court wrongly concluded that the victim's deposition did not satisfy the right of confrontation. The victim's deposition comported with Crawford's definition of "prior opportunity for cross-examination" because Respondent's counsel used the deposition for adversarial testing of Mr. Ruiz's statements.

The appellate court's decision should be reversed because it went beyond what was required in Crawford by expanding the interpretation of the "prior opportunity for cross-examination". To be sure, at least one other court noted Lopez's improper expansion of Crawford and rightly declined to follow the decision. Contreras v. State, 30 Fla. L. Weekly D 2175 (Fla. 4th DCA 2005)(we do not go as far as Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) and hold that a criminal discovery deposition could never satisfy Crawford's "prior cross examination" requirement). As found in Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004), the right of confrontation in Crawford mandates only the "opportunity" for the examination.

The fact that Respondent was not present during the deposition has no effect on this confrontation clause analysis under Crawford. The Supreme Court of Pennsylvania recognized that a discovery deposition offers confrontation and cross-examination opportunities sufficient to meet constitutional standards even when a defendant is not present during the deposition. Commonwealth v. McClendon, 2005 PA Super 164; 874 A.2d 1223 (2005)(a videotaped deposition of an eyewitness satisfied the right to confrontation since the defense attorney "had ample opportunity to cross-examine the witness in the

videotaped deposition, and did so).

Summary

Respondent's opportunity to confront and cross-examine the victim at his discovery deposition satisfied the Confrontation Clause as set forth in Crawford. The First District's ruling that the victim's deposition did not satisfy the requirements of the confrontation clause as contemplated by Crawford was misapplication of the law and should be reversed.

ISSUE II.

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).

The State asserts that this Court should review the decision of the appellate court which held that the victim's excited utterance constituted a testimonial statement under Crawford v. Washington, 541 U.S. 36 (2004). As a threshold matter, this Court needs to determine whether the statement at issue was testimonial. If the statement is not testimonial, this Court need not reach the question of whether the confrontation clause was satisfied by the victim's deposition. Since the lower tribunal's decision was based on erroneous finding that victim's excited utterance constituted a testimonial statement under Crawford, this Court should quash the decision.

Jurisdiction

Pursuant to Article V ' 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." Furthermore, this Court has held that when it acquires jurisdiction over a case, it has jurisdiction to decide any issues in the case. Feller v. State, 637 So.2d 911, (Fla. 1994). The District Court of Appeal, First District

certified a question in this case. Therefore, this Court has jurisdiction to decide any corollary issues.

The State acknowledges that this Court does not have to decide additional issues raised. However, this issue is not an unrelated issue which the State is attempting to obtain review of, but, an issue that was integral to the decision below. Therefore, this Court should exercise its jurisdiction and review this issue.

Merits

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court barred the admission of testimonial hearsay in a criminal case under circumstances in which the accused has not had an opportunity to cross-examine the declarant. While the United States Supreme Court in Crawford, did not provide a definition the term "testimonial", it did provide a broad formulation of the kinds of statements that may be regarded as testimonial statements. Crawford, 541 U.S. 36.

In the case at hand, the appellate court interpreted Crawford's broad formulation as setting out three categories of testimonial statements:

> (1) "'ex parte in-court testimony or its functional equivalent - - that is, material such as affidavits, custodial examinations, prior testimony . . . or other pretrial statements that declarants would reasonably

> expect to be used prosecutorially'"; (2) "'extrajudicial statements contained in formalized testimonial material such as affidavits, depositions, prior testimony, or confessions'"; and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"

Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004). Based upon the purpose for which the exited utterance statement at issue was made, the appellate court found it to be a testimonial statement. Id.

The appellate court held that "a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect". Id. The court added "a statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made". Id.

While acknowledging the victim's statement was an excited utterance, the district court determined the statement to be testimonial because the victim must have expected that the statement he made to a police officer might be used in court against the defendant. Id. This decision turns on the assertion that even in the excitement, the vicitm knew that he was making a formal report and that his report would be used against

Respondent. Id. In this ruling the district court overlooked several crucial points regarding the nature of an excited utterance statement and the holding in Crawford.

The excited utterance statement was not the formal report or the testimonial statement envisioned by Crawford. Excited utterances are admissible under Crawford because they are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." § 90.803(2), Fla. Stat.;. One of the requirements for an excited utterance is the absence of time to reflect on or fabricate the statement. Stoll v. State, 762 So.2d 870, 873-874 (Fla. 2000). Regardless to whom an exited utterance is made, the declarant has not had time to reflect on his or her situation and as such, had no time to consider whether his or her statement may be used in court against the defendant. Id.

An excited utterance by its very nature cannot be testimonial. Logic dictates that a person in the excitement of an event cannot grasp any likelihood that his statements will be used for prosecution. It is not reasonable to conclude that a declarant made a statement with the knowledge that it might be used at trial if he made his statement under the stress of a

startling event without the opportunity for reflective thought. If a excited utterance declarant is able to engage in this reflective, then his statement cannot be an excited utterance. Thus, the appellate court's ruling that the victim's statement was both an exited utterance and a testimonial statement cannot be correct.

Moreover, the appellate court's finding that an excited utterance qualified as a testimonial statement, cannot be squared with post-Crawford opinions. In State v. Barnes, 2004 Me. LEXIS 124 (Me. Aug. 10, 2004), the defendant (Barnes) was charged with murdering his mother. Before trial, Barnes moved in limine to exclude certain testimony, e.g., prior statements by Barnes that he wanted to kill his mother. The trial court denied Barnes's motion in limine, and a police officer testified that Barnes's mother drove herself to the police station on a prior occasion and entered the station crying. Barnes's mother continued crying despite efforts to calm her down, and she stated Barnes assaulted her and threatened to kill her. The trial court ruled the police officer's testimony regarding the statements made by Barnes's mother was admissible under the excited utterance exception to the hearsay rule.

On appeal, Barnes cited Crawford and argued his mother's

statements "were testimonial in nature, and, because she was not subject to cross-examination, their admission violated the Confrontation Clause of the United States Constitution." The State argued the comments were admissible under Crawford because they were nontestimonial in nature.

The Maine Supreme Judicial Court did a thorough analysis of Crawford and determined that "the only question presented is whether the statements at issue were 'testimonial' in nature." The court held that Barnes's mother's statements were not testimonial in nature and listed a number of factors to support its holding: (1) Barnes's mother's went to the police station on her own, not at the demand or request of the police, (2) the statements were made when Barnes's mother was still under the stress of the alleged assault, and (3) Barnes's mother was seeking safety and was not responding to tactically structured police questioning (as the declarant was in Crawford). Because the statements of Barnes's mother were not testimonial in nature, they were admissible and did not implicate the Confrontation Clause concerns discussed in Crawford.

Courts in a multitude of other jurisdictions have addressed whether the decision in Crawford precludes the admission of excited utterances as evidence at trial. In Fowler v. State,

809 N.E.2d 960 (Ind. Ct. App. 2004), a police officer responded to a 911 domestic disturbance call at the defendant's (Fowler's) residence five minutes after receiving the dispatch. The officer came into contact with Fowler and his wife (the victim). Blood was coming from the victim's nose and she had blood on her clothes. Ten minutes after arriving at Fowler's residence, the officer asked the victim what happened. The victim, who was moaning and crying, told the officer that Fowler punched her in the face several times. Fowler was charged with, and convicted of, domestic battery after a bench trial.

At trial, the victim refused to testify that Fowler battered her. The prosecution then called the responding officer to testify and introduced (over Fowler's objection) the victim's statement that Fowler battered her as an excited utterance. The Indiana Court of Appeals conducted a detailed analysis of Crawford and held the victim's statement to the responding officer was not testimonial. The court also held the victim's statement was admissible under Crawford and noted that "the very nature of [the victim's] ‘excited utterance' to Officer Decker places it outside the realm of ‘testimonial' statements."

The decision in Fowler followed a decision released by the

Second District on the same day, Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004). In Hammon, the defendant claimed admission of the victim's excited utterance to a police officer ran afoul of Crawford and violated his Confrontation Clause rights. The court rejected the defendant's argument and noted "the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.'" The court also pointed out that "[a]n unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial." See also Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004).

In addition to Maine and Indiana, numerous state courts have addressed the impact of Crawford on the admissibility of excited utterances. In Demons v. State, 595 S.E.2d 76, 80-81 (Ga. 2004), the Supreme Court of Georgia determined that an excited utterance admitted against a defendant in a murder case did not violate the Confrontation Clause or the holding in Crawford. In addition, a Washington Court of Appeals recently held the admission of an excited utterance was not precluded by Crawford because the statements were not testimonial in nature.

State v. Orndorff, 2004 Wash. App. LEXIS 1789, *7-8 (Wash. Ct. App. Aug. 3, 2004). Analogous holdings were also made by the North Carolina Court of Appeals and by the Third District Court of Appeals of Texas. See State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004)(admission of the victim's excited utterance to police officer did not violate Crawford); Cassidy v. State, 2004 Tex. App. LEXIS 4519 (Tex. Ct. App. May 20, 2004)(the victim's excited utterances were admissible under Crawford and did not violate the Sixth Amendment); People v. Mackey, 2004 N.Y. Misc. LEXIS 1768 (N.Y. Crim. Ct. Oct. 5, 2004)(Excited utterance statements to the police at the scene of the incident were not testimonial under Crawford); Wilson v. State, 2004 Tex. App. Lexis 9874 (Tex App Ft Worth 2004); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004); People v. Corella, 122 Cal. App. 4th 461, (Cal. Ct. App. 2004). These cases stand for the reasoned position that Crawford does not preclude the admission of excited utterances into evidence, because excited utterances by their very definition, are not testimonial. The same reasoning applies here.

Indeed, recent decisions from the federal courts reveal that Crawford does not prevent excited utterances from being admitted into evidence at trial. In fact, the Ninth Circuit

Court of Appeals recently dealt with the matter in Leavitt v. Arave, 371 F.3d 663 (9th Cir. 2004). In Leavitt, the defendant was convicted of murder and sentenced to death for his crime. At trial, the victim's statements made to police the night before her death (i.e., that a prowler tried to break into her home and she thought it was the defendant because he tried to talk himself into the victim's home earlier that day) were admitted into evidence under the excited utterance exception to the hearsay rule. The defendant argued the admission of the victim's statements violated his Confrontation Clause rights.

The Ninth Circuit acknowledged the victim's statements were excited utterances and rejected the defendant's argument because the court did "not believe that [the victim's] statements are of the kind with which Crawford was concerned, namely, testimonial statements." Leavitt, 371 F.3d at 683 n.22. Thus, the Ninth Circuit held that Crawford did not preclude the admission of excited utterances into evidence.

In the instant case, several factors demonstrate that the victim’s statement was not testimonial. The record on appeal reveals that: (1) As the officer approached, the victim was talking about the event to his friend by his own volition, not at the demand or request of the police, (2) the victim’s

statement was made shortly after the kidnaping, when he was nervous, upset and frightened, and (3) the victim was seeking safety and protection from Respondent. The victim was not responding to tactically structured police questioning (as the declarant was in Crawford).

Nothing in the facts lead to the conclusion that law enforcement did anything to provoke or persuade any particular statement. Law enforcement arrived at the scene in response to a dispatch. Upon arrival the officer asked basic questions to collect initial facts from witnesses. No legal precedent was cited by the district court to indicate that the mere presence of a law enforcement officer, or a statement to a government official automatically invokes the Crawford requirements. Crawford does not apply to the preliminary questions by a police officer because such questions do not rise to level of interrogation. Mackey; Wilson; Forrest; Corella; Fowler; Hammon; Cassidy.

Here, the victim's excited utterance statement was not the product of interrogation or formal structured questioning. The harm presented by the admission of out-of-court statements identified in the Crawford was not implicated with the admission of the victim's non-testimonial excited utterance made under the

stress of the moment to a police officer at the scene of a crime.

Summary

This Court should follow the precedent set by the federal courts, along with the vast majority of state courts passing on the issue, and hold that the excited utterance in this case was not testimonial and as such, was outside the scope of Crawford. The district court went too far when it barred admission of the excited utterance on the grounds merely because it was made to a uniformed law enforcement officer. An excited utterance, by its very definition, cannot be a testimonial statement that triggers the confrontation clause protections set forth in Crawford. Since the lower tribunal's decision is based on erroneous finding that victim's excited utterance constituted a testimonial statement under Crawford, this Court should quash the decision.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) should be disapproved, and the judgment entered in the trial court should be reinstated.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jamie Spivey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on November 2nd, 2005.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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