No. 04-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant – admitted as "excited utterances" under a jurisdiction's hearsay law – constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington,* 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Adrian Martell Davis respectfully petitions for a writ of certiorari to the Washington Supreme Court in *State v. Davis,* No. 73893-9.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at ___ Wn.2d ___, 111 P.3d 844 (Wash. 2005), and is attached at App. 1-11. The opinion of the Washington Court of Appeals is published at 116 Wn. App. 81, 64 P.3d 661 (Wash. App. 2003), and is attached at App. 12-20. The relevant order of the trial court is unpublished.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on May 12, 2005. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This case presents this Court with an opportunity to clarify the bounds of the recent landmark decision in *Crawford v. Washington,* 541 U.S. 36 (2004), with respect to the question that is troubling the lower courts more deeply than any other: Whether an alleged victim's report to a governmental agent describing criminal activity that allegedly occurred moments ago – admissible as an excited utterance under a jurisdiction's hearsay law – constitutes a "testimonial" statement, and thus may not be introduced against the accused absent a showing of the victim's unavailability and a prior opportunity for cross-examination.

1. The City of Kent, Washington, like other political subdivisions in the United States, maintains a 911 telephone system. Dialing 911 connects a caller with an operator "associated with the police," App. 5, and allows the caller to request emergency assistance or to register less urgent complaints. The City's website advises its citizens: "If you need to see a police officer, want to report a crime, or observe suspicious activity, call 9-1-1. Even if it is not an 'emergency.'" <http://www.ci.kent.wa.us/emergency/911.asp>.

911 operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses. In order to maintain "a uniform method of interviewing callers requesting police assistance," Policy 602 of the Standard Operating Procedures for Kent's 911 system supplies detailed guidelines "to be used during the interview of a reporting party" during a "police incident interview." App. 21-23 (attaching Policy); *see also* App. 9 n.5 (Sanders, J., dissenting) (discussing this Policy). It instructs: "On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." App. 21. The Policy then outlines several suggested questions for obtaining this information. App. 21-23. Because "[a]n officer may arrest a subject on information given to him by a [911 operator]," the Standard Operating Procedures direct operators to "[q]uestion aggressively" and to "[b]e tenacious in obtaining information from reporting parties." Standard Operating Procedures, Section 4, at 29.

2. Just before noon on February, 1, 2001, Michelle McCottry, a resident of Kent, Washington, called 911. A 911 operator answered, but McCottry hung up before saying

anything. The operator called McCottry right back and asked her what was happening. McCottry, who sounded "hysterical and crying," said that a man who "had left the residence moments earlier" had beat her with his fists. App. 3. After the operator told McCottry she had "help started" (presumably meaning that police were on the way) the operator urged McCottry to "[l]isten to me carefully," App. 24, and then commenced a series of questions that "followed [Policy 602] almost exactly." App. 9 n.5 (Sanders, J., dissenting). This part of the call began with the following exchange:

911 Operator:	. . . Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, What's his first name?
Complainant:	Adr[i]an.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian.
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. . . .

App. 24-25. Later in the interview, which lasted about four minutes, McCottry also provided the operator Davis' birthdate and said that she had a protection order against him. App. 26-27. When the operator asked McCottry at one point whether she needed an "aid car," she answered, "No, I'm all right." App. 25.[1]

Two police officers arrived at McCottry's house minutes after the 911 call ended. "They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face." App. 3. The police later arrested Davis.

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[1] A transcript of the 911 call, as it ultimately was admitted into evidence at trial, is attached at App. 24-27. Three passages from the call, in which McCottry repeatedly tells the operator that the police were at her house two days ago and that there should be a warrant for Davis' arrest, were redacted for trial on the ground that their prejudicial effect outweighed their probative value. The trial court, of course, had the entire 911 call before it when it made its pretrial Confrontation Clause and hearsay rulings.

3. The State charged Davis with one count of violating a domestic no-contact order, Wash. Rev. Code § 26.50.110(1) & (4), a charge that the State made a felony by including a special allegation that Davis assaulted McCottry. App. 7. McCottry did not appear for trial, and the State did not attempt to prove that she was unavailable. Report of Proceedings (Sept. 4, 2001), at 35. Instead, in a pretrial hearing, the prosecution asked the trial court to rule that the statements McCottry made during the 911 call and later to the responding police officers were admissible as "excited utterances" under state hearsay law regardless of McCottry's availability.

The trial court excluded McCottry's later statements to the officers but ruled, over Davis' objection, that the entire 911 interview was admissible because McCottry's answers to the operator's questions were excited utterances. The trial court further rejected Davis' argument that McCottry's statements failed the multi-factor reliability framework that Washington used at the time to assess Confrontation Clause objections. *Cf. Crawford,* 541 U.S. at 63 (referencing this multi-factor test).

At trial, the State presented testimony from only two live witnesses, the two police officers who had responded to McCottry's call. The prosecutor also played the 911 tape. Davis' attorney argued in closing that there was insufficient evidence to convict. She emphasized that the only evidence suggesting Davis was ever in McCottry's house on the day at issue, McCottry's statements during the 911 call, had not been given in court, under oath, or even subject to cross-examination. Report of Proceedings (Sept. 5, 2001), at 48. The prosecutor offered the following rebuttal:

> [Davis' attorney] would like you to believe that . . . no one you heard from saw this crime. That is not true. You have the voice of Ms. McCottry on that 911 tape. She reported it right when it happened.

. . . .

> [J]ust consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better. *She left you her testimony on the day that this happened,* February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice.

Id. at 55 (emphasis added). The prosecutor then played the 911 tape again, quickly summarized how this "testimony" established the elements of the crime charged, and rested her case. *Id.* at 55-56. The jury returned a guilty verdict.

4. The Washington Court of Appeals affirmed Davis' conviction. As is relevant here, the Court of Appeals held that the trial court properly classified McCottry's answers to the 911 operator's questions as excited utterances. App. 15-16. It also held that the State's use of the 911 tape satisfied the requirements of the Sixth Amendment's Confrontation Clause under the then-controlling constitutional framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980). The *Roberts* framework provided that any out-of-court statements falling within a "firmly rooted" hearsay exception were sufficiently reliable to be offered against the accused, and that the excited utterance exception was a firmly rooted one. App. 16.

5. The Washington Supreme Court granted Davis' petition for discretionary review. While the case was pending, this Court abandoned the *Roberts* framework and held in *Crawford v. Washington,* 541 U.S. 36 (2004), that the Confrontation Clause bars the use of "testimonial" hearsay against criminal defendants unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. The Washington Supreme Court received supplemental briefing and held a second oral argument concerning whether the State's use of the 911 call contravened *Crawford.*

The Washington Supreme Court held, by an 8-1 vote, that "the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant" and that that identification was "nontestimonial and properly admitted." App. 7. The majority first discussed a California appellate decision saying it was doubtful whether there could exist "any circumstances under which a statement qualifying as an excited utterance would be testimonial." App. 5 (citing *People v. Corella,* 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004)). Without resolving this doubt, the majority then stated that a 911 call "must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness." App. 5. Apparently positing that every 911 call could neatly be characterized as one or the other, the majority concluded that McCottry's identification of Davis was nontestimonial because "there is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." App. 7.

Justice Sanders dissented. He found it irrelevant that McCottry's responses to the 911 operator's questions to identify her alleged assailant qualified as excited utterances. App. 10. In addition, the dissent rejected the majority's test requiring an inquiry into the subjective intent of 911 callers. It read *Crawford* to "dictate[] an objective standard," focusing on "whether the statement fulfills the function of prosecution testimony." App. 8 (quotation omitted). The dissent found it "clear that the 911 call in this case fulfilled th[at] function." App. 9. "[A] reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting a crime." App. 9.

REASONS FOR GRANTING THE WRIT

In *Crawford v. Washington,* 541 U.S. 36 (2004), this Court abandoned its prior framework for assessing Confrontation Clause claims and held that "testimonial" statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. This Court expressly declined to offer a "comprehensive" definition of testimonial. *Id.* at 68. But it did note that the victim's statements in *White v. Illinois,* 502 U.S. 346 (1992), "to an investigating police officer admitted as spontaneous declarations" were "testimonial" and "arguably" should have been excluded by the Confrontation Clause. *Crawford,* 541 U.S. at 58 n.8.

In the sixteen months since *Crawford*'s paradigm shift, federal and state courts have adopted divergent views of the term "testimonial." The single issue over which these courts have divided most deeply (in three different ways, in fact) is whether alleged victims' statements similar to those in *White* – that is, statements to governmental agents describing criminal conduct that allegedly occurred minutes ago – are testimonial. State courts regularly classify such statements to 911 operators or responding police officers as spontaneous declarations (also known as "excited utterances") under their hearsay law, so the constitutionality of using them against defendants when the declarants do not appear at trial presents a vitally important issue concerning the administration of criminal justice.

This Court should take this opportunity to resolve this issue. *Crawford*'s testimonial principle is applied on a daily basis in courts across the Nation, and courts and practitioners are urgently in need of further guidance concerning how far the rule extends. Indeed, the growing number of appellate decisions like the one here – which exempt from *Crawford*'s reach most any statement that modern hearsay law characterizes

as an excited utterance – are already affecting prosecutorial and law enforcement practices. Prosecutors are urging 911 and other crime-detecting agencies to "develop protocols for identifying and recording excited utterances," on the assumption that obtaining victims' statements while they are still under the influence of startling events is sufficient to "get around *Crawford.*" Wendy Murphy, *New Strategies for Effective Child Abuse Prosecutions After* Crawford, 23 ABA Child Law Practice 129, 129 (Oct. 2004) (discussing police department protocols); *see also* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim,* 39 Prosecutor 18, 20-21 (Feb. 2005) (911 protocols). Because this narrow conception of *Crawford* ignores the decision's discussion of *White* and is in serious tension with the core value of adversarial testing that the testimonial principle is designed to vindicate, this Court should act promptly to address its propriety and to elucidate the testimonial principle with greater specificity.

A. Courts Are Deeply Divided Over Whether Alleged Victims' Statements To Governmental Agents Describing Recent Criminal Activity – Admitted As Excited Utterances Under A Jurisdiction's Hearsay Law – Constitute "Testimonial" Statements.

In *Crawford v. Washington,* this Court abandoned its prior conception of the Confrontation Clause in favor of the "testimonial approach." Under the prior approach, encapsulated in *Ohio v. Roberts,* 448 U.S. 56 (1980), the prosecution could use any out-of-court statement against a defendant that the trial court found to be sufficiently reliable. This reliability inquiry turned on whether the statement fell within a "firmly rooted" hearsay exception, such as the exception for excited utterances, or bore "particularized guarantees of trustworthiness." *Id.* at 66. Now, however, "[w]here *testimonial* evidence is at issue, . . . the Sixth Amendment demands what the common law required:

unavailability [of the declarant] and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68 (emphasis added). When testimonial evidence is at issue, in other words, it is immaterial whether the proffered evidence falls within a "firmly rooted" hearsay exception or otherwise appears substantively reliable.

The *Crawford* Court noted three potential formulations of the term "testimonial," *id.* at 51-52, and it held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to [statements given during] police interrogations." *Id.* at 68. The latter category, this Court explained, includes, at the very least, recorded statements given "in response to structured police questioning." *Id.* at 53 n.4.

This Court also noted that the "statements of a child victim to an investigating police officer admitted as spontaneous declarations" in *White v. Illinois,* 502 U.S. 346 (1992), were "testimonial statements" whose use at trial "arguably" violated the Confrontation Clause. *Crawford,* 541 U.S. at 58 n.8. But this Court did not dwell on this issue at length, for the statement at issue in *Crawford* itself was a recorded statement given during a custodial interrogation and thus was unquestionably inadmissible. *See id.* at 53 n.4, 68. Indeed, the *Crawford* opinion concluded by expressly "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. This Court acknowledged that this "refusal to articulate a comprehensive definition" would cause "interim uncertainty," but suggested this uncertainty could, and would, be alleviated by expounding on the testimonial principle in future cases. *Id.* at 68 n.10.

The uncertainty the *Crawford* opinion created has come to fruition most acutely in the realm of statements like those at issue in *White* – alleged victims' "excited utterances"

to 911 operators, police officers, or other governmental agents describing criminal activity that allegedly occurred minutes ago. This Court has granted certiorari, vacated, and remanded one decision involving such a statement for further consideration in light of *Crawford*. *Siler v. Ohio,* 125 S. Ct. 671 (2004) (No. 04-6765), *GVR'ing State v. Siler,* 2003 WL 22429053 (Ohio App. 2003). But this Court has not yet addressed in a post-*Crawford* case on the merits whether these types of statements – or any other types of statements – are testimonial.

Meanwhile, courts – sometimes in the same jurisdiction – have divided three different ways over whether excited utterances describing recent criminal activity to a governmental agent are testimonial. The first group of courts from five jurisdictions holds that such a statement's status under modern hearsay law as an excited utterance automatically places it beyond *Crawford*'s reach. *See United States v. Luciano,* ___ F.3d ___, Slip Op. at 12-13 & n.3 (1st Cir. July 8, 2005) (statement is not testimonial when it is "an excited utterance"); *State v. Anderson,* 2005 WL 171441, at *4 (Tenn. App. Jan. 27, 2005) (publication designation pending) (excited utterances to responding officers "cannot be testimonial"); *People v. King,* ___ P.3d ___, 2005 WL 170727, at *4-6 (Colo. App. Jan. 27, 2005) (while classification may not be "dispositive" in other contexts, excited utterances to responding officers are, by definition, nontestimonial); *State v. Cannaday,* 2005 WL 736583, at *6 (Ohio App. March 31, 2005) (unpublished opinion) (*Crawford* does not apply to statements "that are . . . subject to common-law exceptions to the hearsay rule, such as excited utterances")[2]; *State v. Wright,* 686 N.W.2d 295, 302 (Minn. App.) (911 call nontestimonial; suggesting that statement to responding officer

[2] *See also City of Akron v. Hutton,* 2005 WL 1523880, at ¶¶ 15-17 (Ohio App. June 29, 2005) (unpublished opinion) (reaffirming this approach).

also was nontestimonial because a statement's status as an excited utterance "is inconsistent with a determination" that it is testimonial), *review granted* (Minn. 2004).[3] Two family court judges also have published an article taking this position in the national journal for such judges. *See* Judge Amy Karan & Judge David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington: *A View From the Bench,* 13 Juvenile & Family Just. Today 20, 22 (Summer 2004) <http://www.ncdsv.org/images/ DVHearsayExceptionsWakeCrawford.pdf>. Courts taking this position reason, as the Tennessee Court of Appeals put it, that "[b]ecause an excited utterance is a reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial." *Anderson,* 2005 WL 171441, at *4. Accordingly, these courts have established a categorical rule that when an alleged victim makes an excited utterance to a governmental agent, "in a noncustodial setting without indicia of formality, the statement is nontestimonial." *King,* ___ P.3d at ___, 2005 WL 170727, at *6.

A second group of courts, including the Washington Supreme Court here, from seventeen jurisdictions has rejected (sometimes explicitly and sometimes implicitly) the position that all "excited utterances" describing recently completed crimes to governmental agents are exempt from *Crawford*'s reach. Instead, these courts hold, in general terms, that whether such statements are testimonial depends on the speakers' supposed purposes in making them and the governmental agents' actions at the time. *See* App. 5-7 (911 call; nontestimonial); *Leavitt v. Arave,* 383 F.3d 809, 830 n.22 (9th Cir.

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[3] *See also State v. Wright,* 2005 WL 147487, at *3-4 (Minn. App. Jan. 25, 2005) (unpublished opinion) (responding officer; nontestimonial), *review denied* (Minn. 2005).

2004) (911 call and statement to responding officer; nontestimonial), *cert. denied,* 125 S. Ct. 2540 (2005)[4]; *Mungo v. Duncan,* 393 F.3d 327, 336 n.9 2d Cir. 2004) (responding officer; dicta suggesting initial statements nontestimonial and subsequent statements testimonial); *State v. Greene,* 874 A.2d 750, 771-76 (Conn. 2005) (responding officer; nontestimonial); *Hammon v. State,* ___ N.E.2d ___, 2005 WL 1406007, at *1 (Ind. June 16, 2005) (responding officer; nontestimonial); *State v. Hembertt,* 696 N.E.2d 473, 482-83 (Neb. 2005) (responding officer; initial statements nontestimonial, but suggesting statements a few minutes later were testimonial); *Stancil v. United States,* 866 A.2d 799, 809 (D.C. 2005) (responding officer; remanded for additional factfinding)[5]; *State v. Barnes,* 854 A.2d 208, 211 (Me. 2004) (statement at police station; nontestimonial); *People v. Diaz,* ___A.D. ___, 2005 WL 1514448, at *4-6 (N.Y. App. June 28, 2005); *State v. Ruth,* ___ S.W.3d ___, 2005 WL 1431324, at *6-7 (Tex. App. June 21, 2005) (911 call; nontestimonial)[6]; *Anderson v. State,* 111 P.3d 350 (Alaska App. 2005) (responding officer; nontestimonial); *People v. Walker,* 697 N.W.2d 159, 161-66 (Mich.

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[4] *See also Massey v. Lamarque,* 2005 WL 1140025 (9th Cir. May 9, 2005) (unpublished opinion) (applying *Leavitt* to hold that "spontaneous statement in the 911 tape was not testimonial").

[5] *See also Drayton v. United States,* ___ A.2d ___, 2005 WL 1413862 (D.C. June 16, 2005) (responding officer; testimonial).

[6] *See also Marc v. State,* ___ S.W.3d ___, 2005 WL 1294969, at *10 (Tex. App. June 2, 2005) (responding officer; nontestimonial); *Spencer v. State,* 162 S.W.3d 877, 881-83 (Tex. App. 2005) (responding officer; nontestimonial); *Davis v. State,* 2005 WL 183141, at *4 (Tex. App. Jan. 27, 2005) (unpublished opinion) (responding officer; nontestimonial); *Wilson v. State,* 151 S.W.3d 694, 697-98 (Tex. App. 2004) (responding officer; nontestimonial), *review denied* (Tex. 2005). One division of the Texas Court of Appeals has adopted an almost categorical approach, holding that "the underlying rationale of an excited utterance supports a determination that it is not testimonial in nature" because it is "likely to be truthful" and not made "in contemplation of its use in a future trial." *Key v. State,* ___ S.W.3d ___, 2005 WL 467167, at *5 (Tex. App. Feb. 28, 2005), *review denied* (Tex. June 29, 2005).

App.) (2-1 decision) (responding officer; nontestimonial), *appeal granted* (Mich. June 17, 2005)[7]; *State v. Alvarez,* 107 P.3d 350, 354-56 (Ariz. App. 2005) (responding officer; nontestimonial); *Commonwealth v. Gray,* 867 A.2d 560, 577 (Pa. App. 2005) (responding officer; initial statement testimonial; statement ten minutes later unresolved); *People v. Corella,* 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004) (911 call and statement to responding officer; nontestimonial)[8]; *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. App. 2004) (2-1 decision) (responding officer; nontestimonial), *aff'd*, 611 S.E.2d 833 (N.C. 2005) (per curiam); *Packer v. State,* ___ So.2d ___, 2005 WL 1252752 (Ala. Crim. App. May 27, 2005) (911 call and statements to responding officer; nontestimonial).

Two of these decisions – one in the 911 context and one in the responding officer context – are representative. In the decision below, the Washington Supreme Court reasoned that excited-utterance statements in 911 calls must be scrutinized on a case-by-case basis "to determine whether [the 911 call] is a call for help to be rescued from peril or is generated by a desire to bear witness." App. 5. When the caller is motivated by the former, her description of criminal activity is not testimonial, no matter how much it "assist[s] police in investigation or assist[s] the State in prosecution." *Id.*; *see also* App. 7 (statement not testimonial even though it was "essential to the prosecution of this case").

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[7] *See also People v. Bryant,* 2004 WL 1882661, at *1 (Mich. App. Aug. 24, 2004) (unpublished opinion) (responding officer; nontestimonial); *People v. Bechtol,* 2004 WL 2726076, at *3 (Mich. App. Nov. 30, 2004) (unpublished opinion) (responding officer; nontestimonial).

[8] *See also People v. Cage,* 15 Cal. Rptr. 3d 846, 856-57 (Cal. App.) (alleged victim's statements to officer at hospital shortly after event not testimonial), *review granted* (Cal. 2004); *People v. Caudillo,* 19 Cal. Rptr. 3d 574 (Cal. App. 2004) (911 call not testimonial); *People v. Kilday,* 20 Cal. Rptr. 3d 161 (Cal. 2004), *review granted* (Cal. 2005) (initial statements to responding officers nontestimonial, but statements after the scene is "secure" testimonial).

In the same vein, the Nebraska Supreme Court recently held that "some excited utterances [to responding officers] are testimonial and others are not, depending upon the circumstances." *Hembertt,* 696 N.W.2d at 480. When a scene has been assessed and secured, statements officers obtain acting in their "investigatorial capacit[ies] in anticipation of an eventual criminal prosecution" are testimonial. *Id.* at 482-83. But while the police are attempting to "assess the situation and secure the scene," any statements witnesses make describing the crime that just occurred – whether or not they are in response to officers' "preliminary questions" – are not testimonial. *Id.*

Even within this group of courts, however, significant disagreement exists regarding how to conduct the inquiries into declarants' motivations and governmental agents' actions. As one commentator recently summarized the situation:

> Courts that scrutinize victims' [excited utterances] to responding officers look to a long list of considerations, and apply those considerations inconsistently. For example, some courts hold that the informality of communication between the declarant and the police is a factor that militates in favor of admissibility; other courts flatly reject this notion. Some courts focus on whether an adversarial relationship exists between the declarant and the police; this consideration is immaterial in other courts. . . . Some courts hold that the declarant's initiation of communication with police makes her statement nontestimonial; other courts do not treat such statements any differently from police initiated conversation. Some courts imply that a statement is not testimonial when officers listen passively; other courts do not ascribe much significance to the ardor of the officers' questioning. . . .
>
> [Courts also] show varying interest in the intent of the parties to the conversation. Some courts place great emphasis on the motivation of the interviewers to gather evidence; other courts show little interest in the motivation of the interviewers. Some courts find a statement to be nontestimonial if the declarant's primary motive was not to provide a statement for use by the prosecution, but rather to

> avoid imminent danger; other courts reject the "primary motivation" test . . . .

Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 779-80 (2005) (footnotes and citations omitted). This group of courts, in short, accepts that not all excited utterances are testimonial but also refuses – for various, often internally inconsistent reasons – to hold that all statements knowingly describing recently completed criminal conduct to governmental agents are testimonial.

In direct contrast to the first two groups of courts, courts in eleven jurisdictions have held, as the dissent below argued, that statements alleged victims make to 911 operators or responding officers describing recently completed criminal activity are testimonial, regardless of whether they constitute excited utterances and regardless of the victims' or governmental agents' supposed motives at the time. *See* App. 8-11 (Sanders, J., dissenting); *United States v. Arnold,* ___ F.3d ___, 2005 WL 1431484 (6th Cir. June 21, 2005) (911 call and statements to responding officers identifying assailant); *Moody v. State,* 594 S.E.2d 350, 353-54 & nn.5-6 (Ga. 2004) (alleged victim's statements to responding officer)[9]; *Lopez v. State,* 888 So.2d 693, 700 (Fla. App. 2004) (responding officer)[10]; *Mason v. State,* ___ S.W.3d ___, 2005 WL 1531286 (Tex. App. June 30, 2005) (responding officer); *State v. Grace,* 111 P.3d 28, 30-31, 38 (Haw. App.) (responding officer), *cert. denied* (Haw. 2005); *State v. Hill,* 827 N.E.2d 351, 358-59 (Ohio App.

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[9] *See also Senior v. State,* ___ S.E.2d ___, 2005 WL 1208102, at *2 (Ga. App. May 23, 2005) (statement to responding fire investigator); *Miller v. State,* ___ S.E.2d ___, 2005 WL 1423393, at *2 (Ga. App. June 20, 2005) (responding officer; nontestimonial).

[10] *See also Howard v. State,* ___ So.2d ___, 2005 WL 1248965 (Fla. App. May 27, 2005) (victim's excited utterance to responding officer identifying assailant); *Manuel v. State,* ___ So.2d ___, 2005 WL 1130183 (Fla. App. May 16, 2005) (same).

2005) (statement to responding officer identifying assailant)[11]; *People v. Victors,* 819 N.E.2d 311, 320 (Ill. App. 2004) (majority opinion & O'Malley, P.J., concurring) (victim's statements to responding officers "at the scene of the alleged incident mere minutes after the incident supposedly occurred"), *appeal denied,* ___ N.E.2d ___ (Ill. Mar. 30, 2005)[12]; *State v. Clark,* 598 S.E.2d 213, 217 (N.C. App.) (responding officer), *review denied,* 601 S.E.2d 866 (N.C. 2004)[13]; *People v. Cortes,* 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004) (911 call)[14]; *Heard v. Commonwealth,* 2004 WL 1367163, at *3-5 (Ky. App. June 18, 2004) (unpublished opinion) (alleged victim's statements to responding police officer identifying assailant), *review granted* (Ky. 2004); *People v. Adams,* 16 Cal. Rptr. 3d 237, 244 (Cal. App) (responding officer), *review granted* (Cal. 2004); *see also United States v. Andrews,* 2005 WL 1395049, at *2 (11th Cir. June 14, 2005) (unpublished opinion) ("assuming" that statement to 911 operator identifying

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[11] *State v. Lee,* 2005 WL 1540575, at ¶¶ 13-14 (Ohio App. July 1, 2005) (publication designation pending) (statement to responding officer identifying assailant).

[12] In another case, the Illinois Court of Appeals stated it was adopting a case-by-case approach, but held, contrary to the Washington Supreme Court here and other courts in the second group above, that statements made in response to a 911 operator's questions to describe alleged assailants or criminal conduct are, by definition, testimonial. *People v. West,* 823 N.E.2d 72, 81-82 (Ill. App. 2005). Explaining that "a court should examine a caller's statement in the same manner it would a victim's statement to a treating medical professional," *id.* at 81, the Illinois Court of Appeals referred to a prior decision holding that a victim's statements describing her physical condition are not testimonial but – in direct opposition to the Washington Supreme Court here – that statements "identifying respondent as the perpetrator" are testimonial. *In re T.T.,* 815 N.E.2d 789, 803-04 (Ill. App. 2004).

[13] *See also State v. Lewis,* 603 S.E.2d 559, 562-63 (N.C. App.) (victim's statement to responding officer), *review allowed and appeal dismissed,* 605 S.E.2d 638 (N.C. 2004).

[14] *See also People v. Dobbin,* 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004). Prior to the state Supreme Court weighing in, a lower New York court had held that statements describing a crime to a 911 operator were not testimonial. *See People v. Moscat,* 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).