No. 04-_____

IN THE
SUPREME COURT OF THE UNITED STATES

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ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

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On Petition for Writ of Certiorari to the
Washington Supreme Court

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# 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 The relevant order of the trial court is unpublished.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).

assailant was testimonial); *State v. Rapp,* 2005 WL 1397205, at *1-2 (Iowa App. June 15, 2005) (unpublished opinion) ("[a]ssuming" 911 call to report domestic violence incident was testimonial). Consequently, these courts exclude statements made "under the same or similar circumstances" as even the courts employing a case-by-case approach to excited utterances. *Davis v. State,* ___ S.W.3d ___, 2005 WL 1173964, at *6 (Tex. App. May 19, 2005) (collecting and discussing several "conflicting decisions").[15]

Once again, two cases are fairly representative. In holding that an alleged victim's 911 call and statements minutes later to responding officers were testimonial, the Sixth Circuit reasoned:

> Although one purpose of the 911 call may have been to secure assistance, it remains that [the caller] could also reasonably expect the statements to be used in a future trial. In addition, [the caller's] statements were declarations made for the purpose of "establishing or proving some fact." [*Crawford,* 541 U.S. at 51] (quotation and citation omitted). It would be antithetical to this entire examination were the government to suggest that [the caller] made the statements for any other reason than to establish that the alleged incident occurred.

*Arnold,* ___ F.3d at ___; 2005 WL 1431484, at *6. Turning back the dissent's argument that excited utterances to 911 operators and responding officers should be assessed, as the Washington Supreme Court held, on a "case-by-case basis" according to declarants' subjective motivations, *id.* at *16-18 (Sutton J., dissenting), the Sixth Circuit ruled categorically that statements "made knowingly to authorities, describ[ing] criminal activity" are testimonial. *Id.* at *6; *see also Cortes,* 781 N.Y.S.2d at 415 (a 911 call that

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[15] It also bears mention that the New Jersey Supreme Court recently held, contrary to some prior suggestions in state law, that an alleged victim's statements to a responding officer ten minutes after the incident could not be admitted as excited utterances. *State v. Branch,* 865 A.2d 673 (N.J. 2005). The court stated its holding was "informed by" the Sixth Amendment principles enunciated in *Crawford. Branch,* 865 A.2d at 690.

reports criminal activity is testimonial; "it makes no difference what the caller believes"). In another case involving a victim's statements to a responding officer, the Florida Court of Appeals has reasoned quite simply that telling a police officer that someone just committed a crime "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.

There can be no doubt that the law in this area is in total disarray. Post-*Crawford* cases involving excited utterances made to 911 operators and responding officers are generating a sprawling patchwork of confusion and contradictions. This Court is the only institution that can bring order to the escalating turmoil in the lower courts.

### B. The Decision Below Interprets *Crawford*'s Testimonial Principle Too Narrowly.

The Washington Supreme Court's decision – like other courts' decisions holding that alleged victims' excited-utterance statements to governmental agents describing crimes that just have occurred are not testimonial – refuses to come to grips with the paradigm shift that *Crawford* effectuated. *Crawford*'s testimonial principle reinvigorates the Confrontation Clause's fundamental commitment, as Justice Thomas put it years earlier, to the "adversary process." *White,* 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment); *see also Crawford,* 541 U.S. at 42-52. It requires that the Clause be interpreted at all times with its original "focus" in mind – namely, prohibiting the use of "*ex parte* examinations as evidence against the accused." *Crawford,* 541 U.S. at 50.

The practice of trying defendants based on statements alleged victims give to 911 operators or responding officers is antithetical to the adversarial process the testimonial principle is designed to protect. The 911 service contractor in this case describes its

interactions with alleged victims as "police incident interviews," App. 21, and rightfully so: Operators, as agents of the State, carry out such interviews not only for the purpose of facilitating responses to any needs for assistance but also to begin gathering information that may be useful in the police's investigating and the State's prosecuting criminal cases. The identity of an alleged offender is foremost among such useful information. The police, of course, may use these interviews to further their investigations, but if the prosecution attempts to use them as substantive evidence of guilt in a criminal trial, the Confrontation Clause's concerns respecting the inadequacies of *ex parte* examinations, and the need to subject witness testimony to cross-examination, come squarely into play.

The Washington Supreme Court nevertheless held the statements the alleged victim, Michele McCottry, made identifying her alleged assailant were not testimonial for three primary reasons: (1) it is "difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial," App. 5 (citing *Corella,* 18 Cal. Rptr. 3d at 776); (2) McCottry supposedly called 911 "because of an immediate danger" rather than to "assist the police in investigation or assist the State in prosecution," App. 5, 7; and (3) more generally, a 911 interview is "not of the same nature" as *ex parte* examinations in the civil law mode. App. 5.

A proper understanding of *Crawford* demonstrates that none of these reasons for holding that McCottry's statements were not nontestimonial has merit.

1. That an alleged victim's statements describing criminal activity to a governmental agent qualify as excited utterances under a jurisdiction's hearsay law neither suggests (as the Washington Supreme Court indicated) nor automatically means

(as other courts have held) that they are exempt it from *Crawford*'s reach. *Crawford* made clear that the right to confrontation is a procedural right; it no longer turns on "the vagaries of the rules of evidence." 541 U.S. at 61; *see also United States v. Cromer,* 389 F.3d 662, 677 (6th Cir. 2004) ("If there is one theme that emerges from *Crawford,* it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements."). Accordingly, as the dissent below recognized (App. 10), the dangers that require statements with testimonial characteristics to be subjected to cross-examination "do[] not evaporate" when the statements "happen to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." *Crawford,* 541 U.S. at 56 n.7; *see also* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses,* 39 U. Rich. L. Rev. 511, 547 (2005) ("[T]here is no theoretical basis to assume that, simply because a statement falls within a modern-day exception, it was intended to be excluded from protection of the Confrontation Clause if it has testimonial characteristics.").

That is precisely the case with respect to "excited utterances," such as those here, made in response to a governmental agent asking who committed a potential crime. As *Crawford* noted, the scope of the hearsay rule when the Sixth Amendment was adopted sheds light on the reach of the testimonial principle, *id.* at 55-56, and "to the extent the hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Id.* at 58 n.8 (alterations in original; quotation and citation omitted). If a startling or stressful incident was complete

– even if it ended only minutes before – statements answering questions or describing the incident were not admissible. *See* Richard D. Friedman and Bridget McCormack, *Dial-In Testimony,* 150 U. Pa. L. Rev. 1171, 1212-16 (2002) (collecting historical sources). This rule against admitting narrations of completed events remained firm into the twentieth century. *See id.* at 1216-20.

The modern version of the excited utterance exception, however, "is much more expansive" than the exception was for most of our history, "and only a few of the statements currently received under it would likely meet that more limited historical antecedent." Mosteller, 39 U. Rich. L. Rev. at 577 (footnote omitted); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1217-23. Washington courts, for example, have acknowledged that Washington's modern excited utterance rule "is not as restrictive as the requirements of the common law exception," *State v. Dixon,* 684 P.2d 725, 728 (Wash. App. 1984), and have held that alleged victims' statements made several minutes or hours after upsetting incidents can constitute excited utterances, even if made in response to governmental agents' questions. *See State v. Thomas,* 83 P.3d 970, 987 (Wash. 2004) (collecting examples); *State v. Williamson,* 996 P.2d 1097, 1102-03 (Wash. App. 2000) (victim's statements at police station after being promised suspect would be arrested constituted excited utterances); *State v. Morrison,* 1999 WL 429806 (Wash. App. 1999) (unpublished opinion) (statements in interview with police officer four to five hours after incident were excited utterances). Most other states in modern times have developed similarly broad excited utterance rules. *See, e.g., Spencer,* 162 S.W.3d 881 ("Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously or in response to

questioning."); *Stancil,* 866 A.2d at 808 (recounting modern expansion of exception in District of Columbia); *People v. Brown,* 517 N.E.2d 515, 517-522 (N.Y. 1987) (same in New York and other jurisdictions).

Wigmore, whose modern treatise on evidence advocated a broad formulation of the excited utterance exception, openly acknowledged that narrative statements describing past events were "testimonial," as he used that term. 6 John Henry Wigmore, Evidence § 1746, at 194 (J. Chadbourn ed. 1976); *see also id.* § 1756.[16] But even when the interviewers were governmental agents, Wigmore did not perceive this as posing a Confrontation Clause problem because he thought the Clause did "not prescribe what kinds of testimonial statements . . . shall be given infrajudicially – this depends [exclusively] on the law of evidence for the time being." 3 *id.* at § 1397; *see also Crawford,* 541 U.S. at 50-51 (reciting Wigmore's view).

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[16] Wigmore said:

> Whenever, therefore, an [excited] utterance *is* used as testimony that the *fact asserted in it did occur* as asserted, i.e., on the credit of the speaker as a credible person, it is being used testimonially, and is within the [general] prohibition of the hearsay rule.
>
> Now this testimonial use is precisely the use that is made of the present class of statements. . . . [T]hey clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted – for example, *when the injured person declares who assaulted him* or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; i.e., we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts – which is essentially the feature of all human testimony.

Wigmore, *supra,* at §1746, at 194 (emphasis added).

Although Wigmore's understanding of the Confrontation Clause – and, relatedly, the *Roberts* framework – gave states like Washington open field running to use expansive excited utterance exceptions to prosecute criminal cases, *Crawford* does not. *Crawford* expressly rejects Wigmore's limited view of the confrontation right and demands of *all* testimonial statements "what the common law required." 541 U.S. at 50-51, 68. The common law precluded the admission of a victim's description of a completed crime to a governmental agent in the absence of a showing of unavailability and an opportunity to cross-examine. Consequently, so does the Confrontation Clause.

2. The Washington Supreme Court's majority also erred in reasoning that McCottry's identification of Davis was nontestimonial because "[t]here is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." App. 7. As the dissent and other courts have noted, *Crawford*'s "focus on reasonableness dictates an objective standard, evaluated by whether a reasonable person would 'expect [the statement] to be used prosecutorially,' not a subjective determination of whether the 911 caller actually knew his or her statement would be used prosecutorially." App. 8 (Sanders, J., dissenting) (quoting *Crawford,* 541 U.S. at 51-52); *see also, e.g., Cromer,* 389 F.3d at 675 (inquiry must be based on a "reasonable person in declarant's position").

Indeed, in countless areas of constitutional criminal procedure, this Court has shunned subjective inquiries in favor of objective standards. *See, e.g., Berkemer v. McCarty,* 468 U.S. 420, 430-31, 442 & n.35 (1984) ("in custody" requirement for Fifth Amendment's *Miranda* rule); *Rhode Island v. Innis,* 446 U.S. 291 (1980) ("interrogation" standard for Fifth Amendment's *Miranda* rule); *Florida v. Bostick,* 501 U.S. 429, 437 (1991) ("seizure" standard under Fourth Amendment). The reasons for favoring

objective standards – efficiency, certainty, and consistency – apply, if anything, with more force here. The very reason confrontation issues arise in the first place is because certain witnesses are not present to testify. The idea, therefore, that courts should estimate those witnesses' "perception[s] of [their] situation[s]" at the time they gave their out-of-court statements ignores a fundamental teaching of Crawford – that "[o]nly cross-examination could reveal [those perceptions]." 541 U.S. at 66.

What is more, the Washington Supreme Court's rule dividing 911 statements seeking help from danger from those seeking to "assist the police in investigation" sets up a demonstrably false dichotomy. The truth is that almost all 911 calls contain an element of each. The typical caller wants some kind of help and probably realizes she is making statements that might reasonably be used for investigative or prosecutorial purposes. Pretending, as the Washington Supreme Court does, that the spectrum of 911 calls – and the spectrum of statements within such calls – can be neatly divided between those that seek to get help and those that seek to trigger prosecutorial action invites judicial manipulation and idiosyncratic decision making – the very problems that plagued the *Roberts* framework. *Crawford,* 541 U.S. at 62-63; *see also Walker,* 697 N.W.2d at 170 (Cooper, J., dissenting) ("Determining whether a statement is testimonial in nature based on the declarant's state of mind is as amorphous as the reliability test of *Ohio v. Roberts*"; indeed, "it is merely a reliability analysis in disguise."); *United States v. Bordeaux,* 400 F.3d 548, 556 (8th Cir. 2005) (interview during forensic examination of victim that served both medical and law enforcement purposes was testimonial because "*Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial"). In this very case, in fact, the Washington Supreme Court majority did

nothing more than label McCottry's identification of Davis as "seeking assistance and protection from peril." App. 7. It never explained how identifying her alleged assailant could have furthered such purposes, and it ignored that McCottry specifically said she did *not* need an aid car. App. 25. Constitutional rights should not be so easily swept aside.

Employing an objective test – as Professor Richard Friedman, whose work this Court drew upon in *Crawford,* 541 U.S. at 61, advocates in his article applying the testimonial approach to 911 calls – would have forced the majority to grapple with several facts demonstrating that McCottry's statements were testimonial. "A reasonable person [who calls 911] knows she is speaking to officialdom – either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities." Friedman & McCormack, 150 U. Pa. L. Rev. at 1242. It also is common knowledge that 911 calls are recorded and preserved for evidentiary purposes. App. 9 (Sanders, J., dissenting). This is especially so with respect to allegations that someone has engaged in criminal activity. Because "the contents of [such a] call are significant only as the caller's report of what has happened," they should be considered testimonial. Friedman & McCormack, 150 U. Pa. L. Rev. at 1243.

3. The final reason the Washington Supreme Court invoked to hold that McCottry's identification of Davis as her assailant was not testimonial – *i.e.,* that a 911 interview "is not of the same nature" as an *ex parte* examination, App. 5 – also misses the mark. When dealing, as here, with a type of out-of-court statement that did not exist at common law, it is useless to inquire whether the statement's descriptive characteristics mirror those of one of the particular abuses the Confrontation Clause meant to quell. *See*

*Crawford,* 541 U.S. at 52 n.3. The proper inquiry, grounded in the Framers' concern with guaranteeing an adversarial process, is a functional one: whether the statement that the accused is unable to challenge is being used at trial in a manner that "fulfills the function of prosecution testimony." App. 9 (Sanders, J., dissenting) (quoting Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* <http:// www.personal.umich.edu/rdfrdman/Grappling1.pdf>, at 2 (2005)); *see also Arnold,* ___ F.3d at ___, 2005 WL 1431484, at *6.

There can be little doubt that McCottry's statements identifying Davis as her assailant satisfy this standard. The core function of prosecution testimony is to "establish[] or prove[] some fact," *Crawford,* 541 U.S. at 51 (quotation omitted) – ultimately, that a person committed a crime. McCottry's statements served exactly that function – so much so that the prosecutor told the jury in closing that "although Ms. McCottry is not here today to talk to you she left you something better. She left you *her testimony* on the day that this happened . . . th[at] shows that the defendant, Adrian Davis was at her home and assaulted her." Report of Proceedings (Sept. 5, 2001), at 55 (emphasis added). The Washington Supreme Court dismissed the prosecutor's characterization of McCottry's statements as irrelevant, App. 6, but at least one other court has held that a prosecutor's "colloquial" use of the word "testimony" to describe an absent witness's statements is a "a relevant factor in the calculus." *Stancil,* 866 A.2d at 814. At the risk of stating the obvious, such colloquial characterizations strongly suggest the proffered statements are serving the function of prosecution testimony.

This conclusion pertains, contrary to the Washington Supreme Court's suggestion (App. 5-6) and other courts' explicit statements (*e.g., Corella,* 18 Cal. Rptr. 3d at 776),

regardless of whether a 911 operator's questioning "rise[s] to the level of an 'interrogation.'" *Id.* Nothing in *Crawford* limits the realm of testimonial statements to those produced during interrogations. To the contrary, *Crawford* says repeatedly that statements made during police interrogations are part of a class of "paradigmatic" or "core" testimonial statements, 541 U.S. at 52, 63, indicating that other types of statements also are testimonial. *See also id.* at 68 ("*Whatever else the term ['testimonial'] covers*, it applies *at a minimum* to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.") (emphasis added); *Lilly v. Virginia,* 527 U.S. 116, 137 (1999) (plurality opinion) (whenever "the government is involved in the statements' production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice"). Indeed, *Crawford* also stated, without referring to any "interrogation" requirement, that the statements the alleged victim in *White* made "to an investigating police officer admitted as spontaneous declarations" were "testimonial statements." *Id.* at 58 n.8.

Neither the Washington Supreme Court nor any of the dozens of other appellate decisions from other jurisdictions – *not a single one* – holding that excited utterances to 911 operators or responding officers are not testimonial has even mentioned *Crawford*'s footnote concerning *White*, much less attempted to distinguish or reconcile it. It is impossible to know whether this collective silence is attributable to mere oversight or feigned ignorance. Regardless, it represents a rather extraordinary way to treat this Court's precedent. For once that footnote is absorbed, it is difficult to escape the conclusion that excited utterances like those at issue here are testimonial. *See, e.g.,* Lininger, 91 Va. L. Rev. at 773-82.

Lest there be any doubt, the police incident interview here, like "[m]ost 911 calls today" (App. 9 & n.5 (Sanders, J., dissenting)), was conducted according to a detailed script, designed to "obtain pertinent information" to facilitate a criminal inquiry, "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; *accord Cortes,* 781 N.Y.S.2d at 405-07. The script generated, as the Washington Supreme Court put it, "*the information essential to the prosecution of this case*[,] McCottry's initial identification of Davis as her assailant." App. 5 (emphasis added). This degree of governmental involvement in producing the statements at issue is more than sufficient to trigger confrontation concerns. If prosecutors could try and convict defendants based solely on such 911 police incident interviews, the right to confrontation would be unable to serve its fundamental objective: requiring accusations of criminal conduct to be leveled in court proceedings, subject to adversarial testing.

Nor does it matter that 911 calls are "typically initiated by the victim." App. 5; *see also Spencer,* 162 S.W.3d at 882 (collecting other cases holding that "[i]nteraction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police"). It has always been common ground that "the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses.*" *California v. Green,* 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (emphasis added); *see also Bruton v. United States,* 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (emphasis added) (*"[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused."). Whether or not a person's accusation that someone committed a crime is

prompted by the government has nothing to do with whether the defendant has the right to confront his accuser.

Indeed, a rule exempting "victim initiated" accusations from *Crawford*'s reach would produce outrageous results. It would mean that anytime a person called 911 – or the police or district attorney's office – and reported a crime, the caller's statements would not be testimonial. It also would mean that a person could go to a police station to report a crime and, so long as the police were previously unaware of its commission, the complainant's accusation (if blessed by local hearsay law) would be admissible against the accused regardless of whether the complainant appeared at trial. These are not fanciful possibilities. The Maine Supreme Judicial Court, for example, already has ruled that statements an alleged assault victim made upon driving to the police station to report the crime were not testimonial because "she went to the police station on her own, not at the demand or request of the police." *Barnes,* 854 A.2d at 211; *see also Marc v. State,* ___ S.W.3d ___, 2005 WL 1294969, at *10 (Tex. App. June 2, 2005) (Victims' statements describing crime were not testimonial because "the officers did not seek out the victims for the purpose of investigating the offenses the victims eventually described."). And appellate courts in New York and California have held that "excited utterances" at field "showups" were not testimonial because the victim identified the assailants "spontaneously" (after the police orchestrated the encounters). *Diaz,* ___ A.D. at ___, 2005 WL 1514448, at *4; *People v. Jimenez,* 2004 WL 1832719, at *11 (Cal. App. Aug. 17, 2004) (unpublished opinion). This Court should not tolerate such obfuscation of a "bedrock" constitutional right. *Crawford,* 541 U.S. at 42.

### C. There Is A Pressing Need For This Court To Delineate The Scope Of *Crawford*'s Testimonial Principle, Especially In This Context.

This Court should not wait any longer before beginning to delineate the scope of *Crawford*'s testimonial principle. On the day *Crawford* was announced, the Chief Justice (joined by Justice O'Connor) stated:

> [T]he thousands of federal prosecutors and tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

541 U.S. at 75-76 (Rehnquist, C.J., concurring in the judgment) (internal citation omitted).

Whether or not it would have been advisable in *Crawford* itself to expound further on the testimonial principle, the time unquestionably has come, over one year later, to commence that effort. "Courts across the country are churning out *Crawford*-related opinions at breakneck speed." Rene L. Valladares & Franny A. Forsman, Crawford v. Washington: *The Confrontation Clause Gets Teeth,* 12 Nev. Law. 12, 14 (Sept. 2004); *see also* Major Robert Wm. Best, *To Be Or Not To Be Testimonial?,* 2005 Army Lawyer 65, 87 (2005) ("Every week, at least twenty opinions are released that make a citation to *Crawford.*"). The divergent views concerning how to analyze excited utterances describing criminal activity have been fully vetted and the conflicting rules are becoming increasingly entrenched. And the conflict has reached state high courts and federal appellate courts. *See supra* at 10-18. Further appellate percolation would consist of nothing more than choosing sides. *See, e.g., Greene,* 874 A.2d at 776 (recent Connecticut Supreme Court decision simply noting conflicting decision from Georgia

Supreme Court in a "*but see*" citation); *Ruth,* ___ S.W.3d at ___, 2005 WL 1431324, at *6 (treating conflicting authority same way).

The necessity of resolving the question presented here is particularly pressing because "a large number of jurisdictions" use the excited utterance exception, as the State of Washington did in this case, to conduct "victimless" (or "evidence based") prosecutions – that is, prosecutions that, instead of putting the alleged victim on the stand at trial, are "based largely on the admission of hearsay statements that a victim makes to 911 operators, police officers," and similar officials. Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?,* 28 Seattle U. L. Rev. 301, 301, 309 (2005) (describing this practice in Washington and other states). Although prosecutions "rarely if ever" were conducted using absent victims' accusations before the advent of the *Roberts* framework, Friedman & McCormack, 150 U. Pa. L. Rev. at 1222-24, Washington and other states are maintaining they may do so even now that *Crawford* has abrogated *Roberts*. *See, e.g., Stancil,* 866 A.2d at 807 (describing prevalence of victimless prosecutions in District of Columbia in the course of addressing argument that they are still permissible); *People v. Moscat,* 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (same in New York City); Donna B. Bloom, Comment, *"Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecutions Will Survive* Crawford v. Washington, 36 St. Mary's L.J. 717, 731 & n. 65, 751 (2005) (arguing that "*Crawford* has or should have no effect in Texas" with respect to basing evidence-based prosecutions on excited utterances). New cases are being filed and prosecuted in this mode every day – in domestic violence as well as in other types of cases. *See, e.g., State*

*v. Williams,* 2005 WL 120054, at ¶¶ 3-9 (Ohio App. 2005) (ordinary assault case); *Jimenez,* 2004 WL 1832719 (ordinary robbery case in California).

Consequently, several courts and commentators in this particular context have since echoed, and amplified, the Chief Justice's call for prompt guidance concerning the testimonial principle. *See, e.g., Hammon,* ___ N.E.2d at ___, 2005 WL 1406007, at *6 (judges "need answers" regarding *Crawford*'s reach); *Moscat,* 777 N.Y.S.2d at 877-78 (Chief Justice's concerns are, "[i]f anything, understated"); *Grace,* 111 P.3d at 37 (*Crawford*'s lack of a comprehensive definition of testimonial has left courts in a "quandary"); Won Sin, Comment, Crawford v. Washington: *Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine,* 40 Harv. C.R.-C.L. L. Rev. 223, 232 (2005) (Chief Justice's warning that the Court's decision would cast a mantle of uncertainty over future trials "is coming true before our very eyes" with respect to 911 calls); Mosteller, 39 Rich. L. Rev. at 608 (*Crawford* has created "great uncertainty" concerning victimless prosecutions); *The Supreme Court – Leading Cases,* 118 Harv. L. Rev. 248, 321 (2004) ("Equally as significant as the Court's holding, then, is what it failed to resolve," including the status of "911 phone calls"); Karan & Gersten, 13 Juvenile & Family Justice Today at 22 ("As Chief Justice Rehnquist noted in his concurring opinion in *Crawford,* the legal community needs answers to the hearsay problem now."); Best, 2005 Army Lawyer at 80 (testimonial principle "need[s] some simplification and clarification").

Delaying guidance regarding how *Crawford* applies to excited utterances describing criminal activity to governmental agents not only would prolong frustration in trial and appellate courts; it would impose serious costs on both prosecutors and

defendants. Prosecutors are maintaining in professional publications that they "must continue to argue that *Crawford* does not bar traditional evidence in evidence-based prosecutions." Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *In Domestic Violence Cases,* 38 Prosecutor 14, 16 (Nov./Dec. 2004) <http://www.ndaa-apri.org/publications/ndaa/toc_prosecutor.html>; *see also* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim,* 39 Prosecutor 18, 21, 26 (Feb. 2005) (prosecutors must be "ready, willing, and able" to press ahead in evidence-based prosecutions and to argue against *Crawford* objections); Victor I. Veith, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, 16 Update No. 12 (American Prosecutors Research Institute 2004) <http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_12_2004.html> ("*Crawford* specifically called into question the excited utterances made to a police officer in *White v. Illinois* that were in response to questioning. Keep in mind, though, that this language in *Crawford* is merely dicta. Prosecutors must be prepared to argue in future cases" that statements made in informal settings are not testimonial – "whether or not the statement [at issue] was made to an investigator."); King-Ries, 28 Seattle U. L. Rev. at 320-28 (former prosecutor arguing *Crawford* should allow the use of all accusations that satisfy modern excited utterance exception); Celeste E. Byrom, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409, 428 (2005) ("[T]he prosecutor should argue that *Crawford*'s rule does not apply to excited utterances because (1) *Crawford* does not expressly overrule *White v. Illinois*, and (2) by definition, an excited utterance cannot be 'testimonial.'").

Accordingly, as soon as *Crawford* was announced, prosecutors began advising law enforcement agencies to "develop protocols for identifying and recording excited utterances" in "government-directed interview[s]." Murphy, 23 ABA Child Law Practice, *supra,* at 131; *see also* Wendy N. Davis, *Hearsay, Gone Tomorrow?,* 90 ABA Journal 22, 24 (Sept. 2004) (After *Crawford* was announced, prosecutors' offices "immediate[ly]" began "instructing officers to take notes of the victim's demeanor at the scene – such as 'she was screaming, she was crying' – to prove that the statement was an excited utterance and not the product of an interrogation."). One article in *Prosecutor* magazine emphasizes that "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution is the 911 call of a scared, crying victim" and urges protocols including "training . . . the dispatchers who take 911 calls from domestic violence victims." Claypoole, 39 Prosecutor at 20.

Prosecutors also are developing their own protocols premised on a constricted reading of *Crawford.* A publication from the American Prosecutors Research Institute provides a detailed list of several "predicate questions" prosecutors should use to lay a foundation to "overcome a [*Crawford*] challenge to the introduction of excited utterances made by a victim to a police officer." Cindy Dyer, *Sample* Crawford *Predicate Questions,* 1 The Voice 8 (Nov. 2004) <http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf>. Typical questions are: "Describe the victim's emotional condition at the time you were talking to her."; "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were those questions asked in order to determine whether a crime had even occurred?"; and "At this time, did the victim make any statements to you that were not in response to any questions?" *Id.* at 8-

9; *see also* Byrom, 24 Rev. Litig. at 424-26 & n.86 ("[I]t is extremely important for a prosecutor to distinguish informal police questioning from the more formal questioning of police interrogation"). Some courts already have rested decisions upon such spoon-fed testimony. *See, e.g., Hembertt,* 696 N.E.2d at 479 (noting that officer "agreed" with prosecutor's suggestion that the victim's statement to him "was not in response to a question that [he] or another officer asked"); *Marc,* ___ S.W.3d at ___, 2005 WL 1294969, at *10 ("The officers' testimony indicates that each one asked questions of a lone, visibly upset female . . . in an attempt to determine the reason for her emotional state."); *cf. Hammon,* ___ N.E.2d at ___, 2005 WL1406007, at *11 (affidavit victim filled out at the scene testimonial but oral statements made to officer minutes before nontestimonial because the officer at that time "was essentially attempting to determine whether anything requiring police action had occurred").

It comes as no surprise that criminal defense lawyers are urging precisely the opposite approach. Public defenders are asserting that *Crawford* "shut down" prosecutors' ability to bring evidence-based prosecutions based on 911 calls or statements to responding officers. David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution,* Slate, Mar. 12, 2004 <http://slate.msn.com/id/2097041>; *see also* Valladares & Forsman, 12 Nev. Law. at 14 ("witness statements to investigating officers are typically testimonial as they are generally given for evidentiary purposes"). Several law professors have echoed this assessment: "If [under *Crawford*] we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would have been more abhorrent to their values than [victimless prosecutions]." Mosteller, 39 U. Rich. L. Rev. at 607-08 & n.548; *see also*

Lininger, 91 Va. L. Rev. at 776, 781 (under *Crawford,* "911 calls appear to be a precarious basis for 'evidence-based' prosecutions," and "prosecutors will take a tremendous risk if they continue to stake 'evidence-based' prosecutions on hearsay statements to responding officers"); Andrew Siegal, *Court Is Adjourned – What Have We Learned?,* 16 S. Carolina Lawyer 14, 20 (2004) (evidence-based prosecutions "almost certainly" unconstitutional under *Crawford*); Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under* Crawford v. Washington: *Some Good News But . . . ,* 28 The Champion 16, 18 (Sept./Oct. 2004) ("prosecutors will be unable to generalize all . . . 'excited utterances' . . . as automatically nontestimonial"); Best, 2005 Army Lawyer at 86 ("Whether there is a constitutional difference between a preliminary investigation and a later investigation is a dubious distinction at best.").

Until this Court resolves this issue, the only thing prosecutors and defenders will agree upon in the hundreds or thousands of cases across the country raising it is that the issue is critically important. *See* Leonard Post, *Prosecutors Feel Broad Wake of 'Crawford,'* 27 Nat'l L.J. No. 15, Dec. 13, 2004, at 1 (discussing uncertainty regarding inadmissibility of 911 calls); Allie Phillips, *Weathering the Storm After* Crawford v. Washington, 17 Update No. 6 (American Prosecutors Research Institute Nov. 6, 2004) ("Since *Crawford,* the firmly rooted hearsay exception of excited utterance has been the most discussed and controversial of all hearsay exceptions."); Dennis J. Opatmy, Crawford *Ruling Affirms Confrontation Clause,* L.A. Daily J., Apr. 14, 2004, at 1 (prosecutors and defense lawyers "agreed that one of the key issues is whether spontaneous statements, or 'excited utterances,'" made to governmental officials are testimonial); Neil P. Cohen & Donald F. Paine, Crawford v. Washington: *Confrontation*

*Revolution,* 40 Tenn. Bar J. 22 (May 2004) (lamenting the "disturbing uncertainties" over whether excited utterances reporting recent criminal activity are testimonial); John Council, *The* Crawford *Questions,* Law.com, July 2, 2004 <http://www.law.com/jsp/article.jsp?id=1088138437273> (describing disputes between prosecutors and defense lawyers in pending cases involving "excited utterances victims make to police officers" and to 911 operators); Byrom, 16 Rev. Litig. at 419 ("Until a more precise definition is pronounced, prosecutors will be left scratching their heads over whether a victim's statement is testimonial and, therefore, subject to *Crawford*'s requirements.").

All the while, the uncertainty concerning *Crawford*'s reach is increasingly threatening core constitutional values. Perhaps most pointedly, the question whether excited utterances alleging criminal conduct are testimonial controls not merely whether prosecutors may use such statements when declarants become unavailable for trial; it determines whether prosecutors even have an obligation to try to produce such accusers at trial in the first place. This Court held in *White v. Illinois* that states may introduce out-of-court "excited utterances" against criminal defendants regardless of whether the declarant has been shown to be unavailable for trial. 502 U.S. at 355-58; *see also, e.g.,* Fed. R. Evid. 803(2) (unavailability not required under excited utterance exception); Wash. R. Evid. 803(a)(2) (same). Taking the subsequent holding in *Crawford* into account, this means that if excited utterances to governmental agents are not testimonial, states may use them to convict a defendant regardless of whether they even try to secure the accusers' live testimony. Police and prosecutors will lack any incentive to do what the Confrontation Clause, not to mention due process in general, urges: finding witnesses and calling them at trial, so juries can observe them in an adversarial setting.

Furthermore, the finality of innumerable criminal convictions depends on resolving the question presented. A cloud of potential constitutional error hangs over every new guilty verdict obtained under the assumption that *Crawford* allows victims' excited utterances alleging criminal conduct to be used in the place of live testimony subject to cross-examination. The sooner this Court decides this issue, the fewer cases may need to be retried. And the sooner this Court clarifies *Crawford*'s scope in the context of governmental interviews conducted shortly after crimes have occurred, the sooner prosecutors and trial judges can adjust their practices to ensure in future trials that defendants are not deprived of a fundamental constitutional guarantee.

### D. This Case Is An Excellent Vehicle For Clarifying The Scope Of The Testimonial Principle.

For three reasons, this case is an excellent vehicle for this Court to resolve the conflict over *Crawford*'s application to statements reporting recent criminal activity to governmental agents, as well as to begin the more general enterprise of clarifying the boundaries of the testimonial principle.

1. There are no procedural impediments to reaching the question presented. The case is on direct review, and Petitioner has contested the admissibility of McCottry's responses to the 911 operator's questions at every stage of the proceedings. The Washington Supreme Court applied *Crawford* to the facts of the case without noting any procedural problems, giving this Court a clean appellate opinion to review.

2. As is ordinarily the case in "victimless prosecutions," Davis' conviction stands or falls on the applicability of *Crawford*. The prosecutor told the trial judge that this is "a typical case involving domestic violence" because "the evidence . . . is very minimal, and it comes down to credibility issues between one of three people or potentially two

people[,] meaning the complaining victim and the defendant." Report of Proceedings (Sept. 4, 2001) at 44. Yet the State was never required to make any effort to produce the victim to take the stand. Davis was never able to ask a single question of his accuser. This case thus places the consequences of condoning victimless prosecutions for confrontation law – and for the adversarial process in general – in stark relief.

The dissent, in fact, expressly found that "[g]iven that there was no evidence introduced at trial other than the 911 tape which showed that Davis assaulted McCottry or violated the no-contact order, the admission of the 911 tape was not harmless." App. 11 (Sanders, J., dissenting). The majority never suggested otherwise.

3. More generally, the excited utterance issue here is an excellent one to begin elaborating the meaning of "testimonial" because the issue arguably cuts across the *Crawford* opinion's three potential formulations of the term. *See, e.g.,* Best, 2005 Army Lawyer at 79 ("The[] 911 phone call cases point to the difficulty courts are having in the absence of a comprehensive definition of testimonial."). One of those formulations requires statements to be made in a "formalized" setting to be testimonial, while the other two do not. *See Crawford,* 541 U.S. at 51-52; *Greene,* ___ A.2d at ___, 2005 WL 1384052, at *16 & n.16 (elaborating on this difference). Not surprisingly, therefore, some courts have held that a statement must be "formal" to be testimonial, while some have held it need not be. *Compare Cage,* 15 Cal. Rptr. 3d at 856 ("a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial"); *Mungo,* 393 F.3d at 336 n.9 (requiring "formality, command, and thoroughness") (quotation omitted); *with Cromer,* 389 F.3d at 674 (rejecting argument that testimonial principle applies "only in the instance of formalized statements"); *and*

*Kilday,* 20 Cal. Rptr. at 173 ("an interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with [the decision]").

What is more, even courts and commentators within the group requiring formality disagree over exactly what constitutes formality. Some limit the concept to stationhouse interrogations while others extend it to 911 calls and field interviews with responding officers. *Compare King,* ___ P.3d at ___, 2005 WL 170727, at *6; (statement to responding officer in field interview lacks "indicia of formality"); *People v. Lugo,* 2004 WL 2092018, at *8 (Cal. App. 2004) (unpublished opinion) (a police invitation at the scene for alleged victim to tell story involves "no formality at all"); *Corella*, 18 Cal. Rptr. 3d at 776 (statements in 911 call "bear no indicia common to the official and formal quality of the various statements deemed testimonial in *Crawford*"); *with Stancil,* 866 A.2d at 810, 813 (*Crawford* requires "some level of structure or formality" but field interviews immediately after incident satisfy that test); *Lopez,* 888 So.2d at 700 (statement to a responding officer constitutes "a formal report of the incident"); *Cortes,* 781 N.Y.S.2d at 406 ("The procedures in connection with 911 calls meet the definition of formal."). Resolving the conflict here would sort out whether some degree of "formality" is necessary to trigger *Crawford*, and, if so, what that concept means. The lower courts cannot settle this issue themselves.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 8th day of July, 2005.

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Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Adrian Martell **DAVIS**, Appellant.
No. 73893-9.

Argued Sept. 14, 2004.
Decided May 12, 2005.

Background: Defendant was convicted in the Superior Court, King County, Jay V. White, J., of felony violation of a domestic no-contact order. Defendant appealed. The Court of Appeals, 116 Wash.App. 81, 64 P.3d 661, affirmed.

Holdings: The Supreme Court, Ireland, Justice pro tempore, held that:
(1) for purpose of analyzing whether admission of an emergency 911 call is barred by the confrontation clause, each 911 call should be analyzed on a case-by-case basis;
(2) 911 calls may contain both testimonial and nontestimonial statements
under *Crawford v. Washington* interpretation of Sixth Amendment;
(3) any error in admitting testimonial statements in victim's 911 call in this case was harmless beyond a reasonable doubt; and
(4) bifurcation of "to convict" instruction from special interrogatory on assault element, which elevated defendant's base misdemeanor offense to felony, was consistent with due process and jury trial guarantees.
Affirmed.

Sanders, J., filed dissenting opinion.

West Headnotes

[1] Criminal Law ⚿662.8
110k662.8

[1] Criminal Law ⚿662.9
110k662.9
An out-of-court "testimonial statement" of a witness is inadmissible under the confrontation clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine him or her. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[2] Criminal Law ⚿662.8
110k662.8
For purposes of analyzing whether admission of hearsay statements contained in a 911 call is barred by the confrontation clause under *Crawford v. Washington,* which held that out-of-court statements that are testimonial in nature in must be excluded under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant, each 911 call should be analyzed on a case-by-case basis; in most cases, one who calls 911 for emergency help is not "bearing witness," and thus the call will not be the equivalent of a "testimonial statement," but a 911 call to the police to report a crime may be the functional equivalent of testimony to a government agent, and thus testimonial in nature. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[3] Criminal Law ⚿662.8
110k662.8

[3] Criminal Law ⚿662.9
110k662.9
Emergency 911 calls may contain both testimonial and nontestimonial statements under *Crawford v. Washington* which held that out-of-court "testimonial statements" must be excluded under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[4] Criminal Law ⚿1168(2)
110k1168(2)
A violation of the confrontation clause is subject to harmless error analysis on appeal. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22
.

[5] Criminal Law ⚿1168(2)
110k1168(2)
Any error in admitting testimonial statements in victim's 911 call, which statements were barred by confrontation clause as victim did not testify in prosecution for felony violation of domestic no-contact order, was harmless beyond a reasonable doubt; police officers arrived four minutes after 911

call and observed and documented victim's fresh injuries with photographs that were introduced into evidence, portion of call that identified defendant as assailant was nontestimonial and most essential to prosecution of case, certified copy of prior no-contact order was admitted into evidence, and thus untainted evidence of guilt was overwhelming. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22; West's RCWA 26.50.110(1, 4).

[6] Criminal Law ⚿1165(1)
110k1165(1)
To determine whether an error is harmless, the Supreme Court utilizes the "overwhelming untainted evidence test"; under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless.

[7] Criminal Law ⚿1038.1(4)
110k1038.1(4)
Because the "to convict" instruction carries with it a special weight in that the jury treats the instruction as a "yardstick" by which to measure a defendant's guilt or innocence, the issue of omission of an element from that instruction is of sufficient constitutional magnitude to warrant review when raised for the first time on appeal. RAP 2.5(a)(3).

[8] Constitutional Law ⚿268(11)
92k268(11)

[8] Criminal Law ⚿772(1)
110k772(1)

[8] Jury ⚿34(1)
230k34(1)
Bifurcation of "to convict" instruction from special jury interrogatory on assault element, which elevated defendant's base misdemeanor violation of domestic no-contact order offense to felony, was consistent with state and federal constitutional due process and jury trial guarantees, where the jury unanimously found all elements necessary to conviction, and was instructed that its unanimous agreement beyond a reasonable doubt was required for affirmative answer to special interrogatory. U.S.C.A. Const.Amends. 6, 14; U.S.C.A. Const. Art. 3, § 2, cl. 3; West's RCWA Const. Art. 1, §§ 3, 21, 22; West's RCWA 26.50.110(1, 4).

[9] Constitutional Law ⚿268(2.1)
92k268(2.1)

[9] Criminal Law ⚿870
110k870

[9] Jury ⚿34(1)
230k34(1)
Where the legislature has established a statutory framework which defines a
base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form; so long as the jury is instructed it must unanimously agree beyond a reasonable doubt before it may affirmatively answer the special verdict, the constitution is not offended. U.S.C.A. Const.Amends. 6, 14; U.S.C.A. Const. Art. 3, § 2, cl. 3; West's RCWA Const. Art. 1, §§ 3, 21, 22.

***846** Washington Appellate Project, Nancy Collins, Jason Saunders, Seattle, for Appellant.

Norm Maleng, King County Prosecutor, Julie Cook, Deputy, James Whisman, Deputy, Seattle, for Respondent.

Suzanne Lee Elliott, Jeffrey L. Fisher, Scott Carter-Eldred, Seattle, for Amicus Curiae Wash. Ass'n of Criminal Defense Attorneys.

IRELAND, J. [FN*]

FN* Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

¶ 1 This case requires us to determine whether the admission of a 911 call violated the defendant's Sixth Amendment right to confrontation under the United States Supreme Court's recent decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We hold that emergency 911 calls should be assessed on a case by-case basis and that the statements made should be individually evaluated for admissibility in light of the confrontation clause. We hold that overwhelming untainted evidence supports Adrian Davis's conviction and that any error in admitting "testimonial" statements without cross-examination was harmless beyond a reasonable doubt.

¶ 2 The defendant also claims that the jury instructions were fatally flawed because the element that raises the crime of domestic violence violation

of a court order from a misdemeanor to a felony was not included in the "to convict" instruction, but rather was placed in a special interrogatory. We hold that such bifurcation is constitutionally permissible where the legislature has created a statutory framework that establishes a base crime and provides for elevated penalties upon proof of an additional fact as determined by a unanimous jury. We therefore affirm the Court of Appeals.

FACTS

¶ 3 On February 1, 2001, Michelle McCottry called 911. McCottry hung up before speaking to anyone. The 911 operator called McCottry back and asked her what was happening. McCottry was hysterical and crying as she responded, "He's here jumpin' on me again." Ex. 2 (911 audiotape). The 911 operator asked who McCottry was referring to, what his relationship to her was, and whether he had been drinking. McCottry identified her assailant as Adrian Davis. She told the operator that Davis had used his fists to beat her and that he had left the residence moments earlier. McCottry indicated ***847** that she had a protective order against Davis.

¶ 4 Police officers Mark Jones and Steve Tamanaha responded within four minutes of McCottry's call to 911. They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face. The officers observed McCottry's frantic efforts to gather her belongings and her children so that they could leave the residence.

¶ 5 Davis was charged with one count of felony violation of the provisions of a domestic no-contact order under RCW 26.50.110(1), (4). The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries. A certified copy of the no-contact order was admitted into evidence.

¶ 6 McCottry did not testify. Although she initially cooperated with the prosecutor's office, the State was unable to locate McCottry at the time of trial. The only evidence linking Davis to her injuries was the tape recording of the 911 call. [FN1] The defense argued that admission of the 911 tape would violate Davis's right of confrontation, but the court admitted the tape under the excited utterance exception to the hearsay rule. At trial, the court denied the request of Davis's counsel for a missing witness instruction concerning McCottry.

> FN1. The tape had been redacted to remove references to a police visit to the residence two days earlier for a domestic disturbance between Davis and McCottry.

¶ 7 The "to convict" instruction told the jury to convict Davis of domestic violence violation of a court order if the State proved each of the following elements beyond a reasonable doubt:

(1) That on or about February 1, 2001 the defendant willfully had contact with Michelle McCottry;
(2) That such contact was prohibited by a no-contact order;
(3) That the defendant knew of the existence of the no-contact order;
(4) That the acts occurred in the County of King.

Clerk's Papers at 21 (Instruction 9).

¶ 8 Instruction 12 directed the jurors to use the special verdict form only if they found the defendant guilty of the crime of violation of a no-contact order. The special verdict form asked if Davis's conduct that constituted a violation of the no-contact order was an assault. In order to answer the special verdict form in the affirmative, the jury was instructed to be unanimously satisfied beyond a reasonable doubt that "yes" was the correct answer. These instructions followed the *Washington Pattern Jury Instructions. See* 11 *Washington Pattern Jury Instructions: Criminal* 36.51, 36.54-36.55 at 182-83, 187-89 (2d ed. Supp.1998) (WPIC).

¶ 9 Davis did not object to the jury instructions, but he did take exception to the court's refusal to give his proposed missing witness instruction. The jury rendered a general verdict of guilty and answered "yes" to the special verdict form.

¶ 10 On appeal, the Court of Appeals rejected Davis's confrontation clause argument. Relying on *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court of Appeals held that the trial court properly classified the 911 call as an excited utterance, which is a firmly rooted exception to the hearsay rule and thus satisfies the requirements of reliability. The court also rejected Davis's arguments that the trial court erred in refusing the missing witness instruction and in

placing the assault element in a special interrogatory rather than placing it in the "to convict" instruction. *State v. Davis,* 116 Wash.App. 81, 64 P.3d 661 (2003).

¶ 11 This court granted review and initially consolidated the case with *State v. Mills,* No. 73894-7 (Wash. Apr. 28, 2003), because the primary issue in each case was the propriety of the "to convict" jury instruction. The cases were argued on November 19, 2003.

[1] ¶ 12 Before this court issued an opinion in this case and the *Mills* case, the United States Supreme Court issued its opinion in *Crawford,* which altered confrontation ***848** clause analysis. The *Crawford* court held that an out-of-court "testimonial statement" of a witness is inadmissible unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine him or her. On April 30, 2004, Davis filed a motion for oral argument in light of *Crawford.* The State also requested oral argument.

¶ 13 We granted the parties' requests for additional briefing and argument on the issues raised by *Crawford.* After rehearing, we deconsolidated the *Davis* and *Mills* cases and treated them as companion cases, issuing a separate opinion in each case.

ISSUES

¶ 14 1. Did the trial court err in admitting Michelle McCottry's conversation with the 911 operator?

¶ 15 2. Did the trial court err in placing the element that raises the crime from a misdemeanor to a felony in a special verdict form rather than in the "to convict" instruction?

ANALYSIS

Confrontation Clause

¶ 16 The Sixth Amendment confrontation clause provides: In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. U.S. Const. amend. VI. The *Roberts* court determined that the confrontation clause does not bar the statement of an unavailable witness against a criminal defendant is the statement bears "adequate 'indicia of reliability."' 448 U.S. at 66.

¶ 17 In *Crawford,* the Supreme Court overturned the *Roberts'* rule that an out-of-court statement was admissible as evidence without confrontation as long as it fell within a firmly rooted hearsay exception or carried other indicia of trustworthiness and reliability, stating that the "[*Roberts'* ] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." 541 U.S. at 63, 124 S.Ct. 1354.

¶ 18 The *Crawford* court began by examining the historical background of the confrontation clause:

> The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.
>
> Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony....
>
> *Id.* at 43, 124 S.Ct. 1354 (citation omitted).

¶ 19 From its examination of the history of the confrontation clause, the Court gleaned two overriding principles: (1) the primary purpose of the confrontation clause was preventing the civil law mode of criminal procedure, particularly the use of ex parte examinations as evidence against the accused; and (2) the Framers would not have allowed the admission of the testimonial statements of a witness who did not appear at trial unless he or she was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 47-48, 53-54, 124 S.Ct. 1354.

¶ 20 The Court declined to spell out a comprehensive definition of "testimonial." But it did give several examples of the types of statements at the core of the definition, including prior testimony at a preliminary hearing, before a grand jury or at a former trial, and police interrogations. "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68, 124 S.Ct. 1354.

¶ 21 The Court also explained that "testimony," is typically defined as " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.* at 51, 124 S.Ct. 1354 (quoting 1 Noah Webster, *An American Dictionary of the English Language* (1828)). "An accuser who makes a formal statement to government ***849** officers bears testimony in a sense that a person

who makes a casual remark to an acquaintance does not." *Id.* The text of the Sixth Amendment and the history underlying the common-law right of confrontation reflect "an especially acute concern with a specific type of out-of-court statement." *Id.*

¶ 22 In the *Crawford* case, Michael Crawford was charged with assault and attempted murder. *Id.* at 40, 124 S.Ct. 1354. After his wife, Sylvia, was given *Miranda* [FN2] warnings, she was questioned. *Id.* "Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case.... In response to often leading questions from police detectives, she implicated her husband in [the] stabbing and at least arguably undermined his self-defense claim." *Id.* at 65, 124 S.Ct. 1354. She did not testify at trial because of the marital privilege. *Id.* at 38, 124 S.Ct. 1354. Instead, a tape recording of her statement was played to the jury at the defendant's trial. *Id.* at 40, 124 S.Ct. 1354. The Supreme Court held that Sylvia's recorded statement was testimonial and thus inadmissible because it had not been subject to cross-examination.

> FN2. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶ 23 A statement may be testimonial by virtue of the manner or mode of its making. For example, Sylvia Crawford's in-custody, tape-recorded statement taken by police officers was deemed "testimonial under even a narrow standard." *Id.* at 52, 124 S.Ct. 1354. Police interrogations are very similar to examinations by justices of the peace, who had essentially investigative and prosecutorial functions. Interrogations by law enforcement officers fall squarely within the classification of testimonial statements. *Id.* at 53, 124 S.Ct. 1354.

¶ 24 On the other hand, *Crawford* allows that "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* at 51, 124 S.Ct. 1354. An offhand, overheard remark, although perhaps objectionable under hearsay rules, "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* Further, even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted. *Id.* at 60 n. 9, 124 S.Ct. 1354.

[2] ¶ 25 The primary issue in the present case is whether McCottry's 911 call constitutes a "testimonial" statement under the *Crawford* analysis. The context of a 911 call presents a more complex scenario than the in-custody, *Miranda*-warned interrogation by police officers at issue in *Crawford.* Sylvia Crawford's statement was given during a custodial examination, which the *Crawford* court indicated fell within even a narrow definition of testimonial.

¶ 26 Generally, an emergency 911 call is not of the same nature as an in-custody interrogation by police. Such an emergency call is not the functional equivalent of uncross-examined, in-court testimony. Even though a call to 911 involves personnel associated with the police, the 911 operator is not a police officer. Moreover, the purpose of the call is generally not to "bear witness." The 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.

¶ 27 A 911 call is typically initiated by the victim, not the police. Even though an emergency 911 call may assist police in investigation or assist the State in prosecution, where the call is not undertaken for those purposes, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned.

¶ 28 In *People v. Corella,* 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770 (2004), the court held that admission of a 911 call did not violate the defendant's right to confrontation, and his conviction for corporal injury to his spouse was affirmed. The *Corella* court determined that the statements made to the 911 operator were not " 'knowingly given in response to structured police questioning' " and did not have the formal and official quality of the statements deemed testimonial by *Crawford.* 18 Cal.Rptr.3d at 776 (quoting *Crawford,* 541 U.S. at 53 n. 4, 124 S.Ct. 1354).

¶ 29 The *Corella* court further stated that it is difficult to perceive any circumstances ***850** under which a statement qualifying as an excited utterance would be testimonial. *Id.* The rationale behind the excited utterance exception to the hearsay rule is that the statement is "made without reflection or deliberation due to the stress of excitement." *Id.* "[S]tatements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." *Id. See also State v. Wright,* 686 N.W.2d 295, 302

(Minn.Ct.App.2004) (victims' statements to 911 operator seeking help immediately after assault not testimonial); *Beach v. State,* 816 N.E.2d 57, 59 (Ind.Ct.App.2004) (victim's statement to responding police at scene after assault not testimonial); *State v. Forrest,* 164 N.C.App. 272, 596 S.E.2d 22, 27 (2004) (victim's statements to police upon rescue from defendant nontestimonial).

¶ 30 In most cases, one who calls 911 for emergency help is not "bearing witness," whereas calls made to the police simply to report a crime may conceivably be considered testimonial. It is necessary to look at the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent. *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection,* 19 Crim. Just., Summer 2004, at 4, 10 (whether statements made in calls to 911 operators are testimonial requires case-by-case assessment).

¶ 31 Amicus Curiae Washington Association of Criminal Defense Lawyers (WACDL) argues it is common knowledge that 911 calls may be used at subsequent trials and that McCottry reasonably knew her 911 call would later be used to prosecute Davis. Thus, McCottry's call would fit within one of the core classifications of testimonial hearsay listed in *Crawford.* WACDL Br. at 14 (citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. Pa. L.Rev. 1171, 1196 (2002) ). However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911.

¶ 32 The WACDL further argues that if a 911 call involves a completed event, no matter how recent, the caller's remarks will be testimonial. But this argument fails because it focuses on the reliability traditionally accorded excited utterances under hearsay rules by virtue of their spontaneity. *Crawford* rejected the use of evidentiary rules and "amorphous notions of 'reliability' " in assessing whether the protections of the confrontation clause have been satisfied. 541 U.S. at 61, 124 S.Ct. 1354. *Crawford* instructs that for purposes of Sixth Amendment confrontation, the inquiry is whether the "witness" was testifying. As the *Crawford* court explained, the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50, 124 S.Ct. 1354. McCottry's 911 call cannot accurately be described as an ex parte examination or its functional equivalent.

¶ 33 Nor is it accurate to describe the events that occurred during McCottry's call as "completed." The fact that the operator determined McCottry did not need an aid car does not necessarily mean McCottry was out of danger or that her subsequent responses were then testimonial. Her 911 call was part of an ongoing emergency situation. When the operator called McCottry back, McCottry was crying and hysterical. Only in hindsight was it known that Davis would not reappear and that the assault had ended when he left the residence.

¶ 34 Davis also contends that this call was not a typical 911 call because McCottry hung up and the 911 operator called McCottry back. But the fact that McCottry hung up does not render the phone call testimonial. On the contrary, a hang-up call often signals that the caller is in grave danger, and the 911 operator must return the call to ensure the caller's safety. It would be unwise to label 911 hang-up calls as testimonial simply because the operator must call the victim back to determine the seriousness of the situation. Rather, the circumstances and content of the call should be examined in each case.

¶ 35 Davis points to the prosecutor's closing argument where McCottry's call was described as her "testimony." Report of Proceedings (Sept. 5, 2001) at 55. According to Davis, in using the word "testimony," the ***851** State essentially admitted that the 911 call was testimonial. However, the statement was made before the *Crawford* decision focused confrontation clause analysis on the word "testimonial." Since *Crawford,* "testimony" has acquired a specific meaning that should not be attributed to the State pre-*Crawford.*

[3] ¶ 36 An emergency 911 call may contain both statements which are nontestimonial and statements which are testimonial. In *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), the Court rejected the "whole statement" approach and held that federal courts should examine proffered hearsay narrative by separating inculpatory portions from portions which are self-serving and require redaction. 512 U.S. at

603, 114 S.Ct. 2431. We adopted the *Williamson* holding in *State v. Roberts,* 142 Wash.2d 471, 494, 14 P.3d 713 (2000). The *Roberts* court held that erroneous admission or exclusion based upon a "whole statement" approach is subject to harmless error analysis.

[4] ¶ 37 A violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Smith,* 148 Wash.2d 122, 138-39, 59 P.3d 74 (2002).

[5] ¶ 38 Under the facts of the present case, McCottry called 911 because of an immediate danger. There is no evidence McCottry sought to "bear witness" in contemplation of legal proceedings. Nonetheless, certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant.

[6] ¶ 39 To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." *Smith,* 148 Wash.2d at 139, 59 P.3d 74. Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* (citing *State v. Guloy,* 104 Wash.2d 412, 426, 705 P.2d 1182 (1985)).

¶ 40 In this case, the officers arrived four minutes after McCottry's 911 call and observed and documented her fresh injuries with photographs that were introduced into evidence. The portion of McCottry's 911 call that identified Davis as her assailant was nontestimonial and properly admitted. The certified copy of the prior no-contact order was also admitted into evidence. Thus, the untainted evidence was overwhelming, and any error in admitting testimonial statements from the 911 call was harmless beyond a reasonable doubt.

Preservation of Error

[7] ¶ 41 Before addressing the adequacy of the "to convict" instruction, it is necessary to address the State's argument that Davis waived his right to challenge the "to convict" jury instruction because he did not take exception to the instruction at trial.

¶ 42 Although recognizing this court's power to review constitutional errors, the State argues the alleged error lacked the "manifest" requirement of RAP 2.5(a)(3), which permits a party to raise for the first time on appeal a "manifest error affecting a constitutional right." The Court of Appeals properly rejected this argument.

¶ 43 The State argues that Davis cannot show practical and identifiable consequences as a result of the bifurcated element. But, as we recently held in *State v. Mills,* 154 Wash.2d 1, 109 P.3d 415 (2005) , the "to convict" instruction carries special weight because the jury relies on it as a "yardstick" by which to determine a defendant's guilt or innocence. *Id.* at 417. The issue of omission of an element from a "to convict" instruction is of sufficient constitutional magnitude to warrant review of a challenge to the instruction raised for the first time on appeal. Accordingly, we address the merits of Davis's challenge.

"To Convict" Jury Instruction

[8] ¶ 44 Davis argues the bifurcation from the "to convict" instruction of the assault element, which elevates his base misdemeanor***852** crime to a felony, unconstitutionally relieved the State of proving the element of assault, thereby violating his constitutional rights to due process [FN3] and to a jury trial. [FN4]

> FN3. *See* U.S. Const. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); Wash. Const. art. I § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

> FN4. *See* U.S. Const. art. III § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); Wash. Const. art. I § 21 ("The right of trial by jury shall remain inviolate."); Wash. Const. art. I § 22 ("In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury.").

¶ 45 The State responds by asserting that the jury did find every element of the crime beyond a reasonable doubt, and that appearance of the elevating fact in a special verdict form does not

deny a defendant due process, as the practice has been traditionally utilized and approved in other crimes where an elevating fact increases the statutory penalty.

[9] ¶ 46 We recently discussed this issue at length in *Mills*. There we held that where the legislature has established a statutory framework which defines a base crime that may be elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form. As long as the jury is instructed it must unanimously agree beyond a reasonable doubt before it may affirmatively answer the special verdict, the constitution is not offended. [FN5] Because the jury unanimously found all elements necessary to convict Davis, the instructions were sufficient here.

> FN5. In *Mills*, however, we emphasized that while such bifurcation is constitutionally *permissible*, it is not constitutionally *required*. There would have been no constitutional violation had the trial court in the case before us provided a single "to convict" instruction that included the assault element without using the special verdict approach from WPIC 36.54-36.55.

CONCLUSION

¶ 47 Finding that any error in admitting testimonial statements from McCottry's emergency 911 call was harmless beyond a reasonable doubt, and that there was no error in the "to convict" instruction, we affirm the Court of Appeals.

ALEXANDER, C.J., C. JOHNSON, MADSEN, BRIDGE, CHAMBERS, OWENS and FAIRHURST, JJ., concur.

SANDERS, J. (dissenting).

¶ 48 The majority is correct that every 911 call must be evaluated on a case-by-case basis to determine whether the contents are testimonial under *Crawford*. [FN1] Majority at 846, 850. The majority is also correct that logically discrete segments of the 911 call must be analyzed separately. [FN2] Majority at 851. However, the majority errs when it suggests-- though it does not *hold*--that a relevant factor is the *subjective intent* of the absent witness to provide information to be used in an accused's prosecution, rather than an *objective* evaluation of whether a reasonable person would know that their statements could be used to prosecute. The majority also errs in its evaluation of the facts of this case. Because I would hold that under the specific circumstances of this case all of Michelle McCottry's statements are testimonial, I dissent.

> FN1. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

> FN2. Given the majority's holding that 911 calls must be evaluated as testimonial on a case-by-case basis and that discrete portions of 911 calls must be analyzed separately to determine if they are testimonial, the majority's generalizations regarding 911 calls (majority at 849-850) are pure dicta.

¶ 49 *Crawford* defined as the "core class of 'testimonial' statements ... pretrial statements that declarants would *reasonably* expect to be used prosecutorially ... [and] '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.' " *Crawford*, 541 U.S. at 51-52, 124 S.Ct. 1354 (emphasis added). The focus on reasonableness dictates an objective standard, evaluated ***853** by whether a reasonable person would "expect [the statement] to be used prosecutorially," not a subjective determination of whether the 911 caller actually knew that his or her statement would be used prosecutorially. Yet the majority focuses on the *lack* of evidence that McCottry "knew" her 911 call would be used to prosecute Adrian Davis. [FN3]

> FN3. "However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911." Majority at 850. "There is no evidence McCottry sought to 'bear witness' in contemplation of legal proceedings." Majority at 851.

¶ 50 The proper inquiry, as required by the United States Supreme Court's use of the terms "objective" and "reasonably," and as recognized by lower courts and leading commentators who have examined the issue, is whether a reasonable person in the 911 caller's position would know that their statement "is likely to be used in investigation or prosecution of a crime." *People v. Cortes*, 4 Misc.3d 575, 781 N.Y.S.2d 401, 2004 WL 1258018, *12 (citing Richard D. Friedman &

Bridget McCormack, *Dial-In Testimony,* 150 U. PA. L.REV. 1171, 1241 (2002)).

¶ 51 The United States Court of Appeals for the Sixth Circuit stated:

> The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

*United States v. Cromer,* 389 F.3d 662, 675 (6th Cir.2004).

¶ 52 Objectively, given the extensive media coverage of the use of 911 calls in the prosecution of crimes, the endless police and legal procedural dramas in which such usage plays a key role, and the nature of the questioning that occurs during the call, 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 the crime.

¶ 53 Professor Richard Friedman, a leading expert on the confrontation clause whose framework for analyzing the clause was adopted by the United States Supreme Court in *Crawford,* stated in his seminal article on 911 calls and the Confrontation Clause: "Now consider statements made in 911 calls.... A reasonable person knows she is speaking to officialdom--either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities." Friedman & McCormack, *supra,* at 1242.

¶ 54 Even under the circumstances of this case it is clear that a reasonable person in McCottry's position would have known that her 911 call would have resulted in Davis' prosecution and that the information relayed in the call would be used in that prosecution. As the majority notes, Davis was charged with felony violation of a no-contact order under chapter 26.50 RCW. Majority at ---. Under that chapter McCottry would have had to obtain the no-contact order, would have received a copy of that order, and would have been notified at that time of the criminal penalties for violating the order. RCW 26.50.035(1)(c); *see also, e.g., State v. Powers,* 124 Wash.App. 92, 97, 99 P.3d 1262 (2004).

¶ 55 Professor Friedman's most recent post-*Crawford* work sets forth the best reasoned structure for analyzing whether an absent witness's statement is testimonial: "Whether a statement is deemed to be testimonial ... depends on whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution." Richard D. Friedman, *Grappling with the Meaning of "Testimonial," http://wwwpersonal. umich.edu/ rdfrdma n/Grappling1.pdf* at 2. It is clear that the 911 call in this case fulfilled the function of transmitting such information.

¶ 56 I agree that in some instances a 911 call that is truly only an "amplified cry for help" might not be testimonial; [FN4] however, ***854** most 911 calls--or at least the great majority of the content of most 911 calls--will not fall into this category. Most 911 calls today are conducted according to a "script" composed and directed by agents for investigating authorities, as was the case here. These "scripts" constitute an interrogation just as effective as if a police officer were questioning the absent witness directly. [FN5] And *Crawford* held that interrogations by agents of the government, such as police officers, are "testimonial under even a narrow standard." *Crawford,* 541 U.S. at 52, 124 S.Ct. 1354.

> FN4. *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection,* 19 CRIM. JUST., Summer 2004, 4, 10. Professor Friedman actually identified the Court of Appeals opinion in the case at bar as one in which the caller "is fully aware that what she says has potential evidentiary value against the alleged assailant." *Id.*

> FN5. The Valley Communications Center "Standard Operating Procedures--Policy Number 602: Police Incident Interview Techniques" contained a series of questions that were followed almost exactly by the 911 questioner in this case. Those questions began with what transpired, where the incident occurred, when it occurred, who was involved, where the suspect went, and the circumstance which led to the incident. Br. of Wash. Ass'n of Criminal Def. Lawyers, app. at 1.

¶ 57 As the majority notes, someone at the McCottry residence called 911. State's Ex. 2 (911 tape). [FN6] The 911 tape does not establish that

McCottry herself made the initial call. The 911 operator then called the residence back, and McCottry answered. While McCottry was upset, the majority mischaracterizes the tape when the majority describes McCottry as "hysterical and crying." Majority at 846, 850. In fact, the first sounds heard in the call-back are not those reflected in the official transcript of the tape, but rather McCottry instructing an unknown person to "put [unintelligible] down," and a male voice responding "c'mon baby." Ex. 2. [FN7] It is a full 10 seconds before McCottry answers the 911 operator's "hello."

> FN6. The majority opinion assumes the caller was McCottry. Majority at 851. But there is no indication on the 911 tape, or in the testimony of the two officers who were the only trial witnesses, that McCottry was the caller.

> FN7. It is not clear that Davis is the person to whom McCottry was initially talking. During the 911 call McCottry acknowledged that, in addition to three children (Report of Proceedings (RP) at 75), there was also at least one other male in the house she had invited over ("Mike"). Ex. 2; Clerk's Papers (CP) at 2 (Certification). There were at least five persons in the house to whom McCottry might initially have been speaking. Further, according to the Certification for Determination of Probable Cause, McCottry had been arguing with the male friend "Mike" when Davis arrived. CP at 2. "Mike" and Davis drove away together in Mike's car. CP at 2. In addition, McCottry and the officers who responded to the call indicated that McCottry was in the process of moving, perhaps providing context for the instruction to put something or someone down. RP at 76. When the officers arrived, McCottry was alone in the house with the children. RP at 75. "Mike" was not identified in the police report, and was not called to testify at the trial, in spite of the fact that Mike presumably witnessed the events that took place.

¶ 58 During that 10 seconds McCottry does not ask for help. In fact, at no time does McCottry ask for help. In response to the 911 operator's *question* McCottry stated that Davis had been "jumpin' on me again" and had been "usin' his fists." Ex. 2.

¶ 59 This is not the amplified "call for help" that most courts and commentators have identified as potentially "nontestimonial." McCottry's response was no different than if she had been called by the police directly and asked by an officer what had transpired, for example if a neighbor had reported a disturbance. That interrogation would clearly have been testimonial under *Crawford.*

¶ 60 The majority focuses on the fact that the "911 call was part of an ongoing emergency situation." Majority at 850. While this may have relevance to show that the call was potentially an "excited utterance," that inquiry is relevant to whether the call met an exception to the evidentiary rule excluding hearsay, not whether it was testimonial. [FN8] Certainly a witness reporting an ongoing crime is part of an "ongoing emergency situation." ***855** It is nonetheless testimonial. *Cortes,* 4 Misc.3d at 595, 781 N.Y.S.2d 401.

> FN8. The United States Supreme Court in *Crawford* explicitly disconnected these inquiries, noting that such indicia of "reliability" are "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford,* 541 U.S. at 62-63, 124 S.Ct. 1354. *Crawford* also questioned whether "spontaneous declarations"--the exception to the hearsay rule, from which the "excited utterance" doctrine was derived, *see State v. Branch,* 182 N.J. 338, 865 A.2d 673 (2005)--which were testimonial would have been admissible in 1791. *Crawford,* 541 U.S. at 58 n. 8, 124 S.Ct. 1354.

¶ 61 Finally, the majority concludes that "certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant." Majority at 851. Putting aside the fact that McCottry never "sought assistance," the majority appears to conclude that everything after the initial identification is testimonial. And presumably the majority's term "initial identification" is shorthand for both the identification and the statement that Davis had hit McCottry, since without the statement there was no proof that Davis assaulted McCottry. But the majority does not explain how the "initial identification," provided in response to structured questioning by a governmental agent, is nontestimonial.

¶ 62 It was not a "cry for help." It was a result of government-initiated interrogation. It was testimonial. Its admission violated the confrontation

clause contained in the Sixth Amendment to the United States Constitution. [FN9] Given that there was no evidence introduced at trial other than the 911 tape which showed that Davis assaulted McCottry or violated the no-contact order, the admission of the tape was not harmless.

FN9. "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. While the parties in this case contend only that introduction of the 911 tape violated the federal constitution, we should recall article I, section 22 of the Washington State Constitution ("In criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face.") differs significantly in text and deserves independent consideration when properly raised, as five justices of this court concluded in *State v. Foster,* 135 Wash.2d 441, 473, 481, 957 P.2d 712 (1998).

¶ 63 I dissent.

111 P.3d 844

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Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Adrian Martell DAVIS, Appellant.
No. 49679-4-I.

March 10, 2003.

Defendant was convicted in the Superior Court, King County, Jay White, J., of felony violation of a no-contact order. Defendant appealed. The Court of Appeals, Agid, J., held that: (1) victim's statements to 911 operator while defendant was allegedly inside victim's home in violation of no-contact order were sufficiently reliable so as not to violate defendant's right to confrontation; (2) statements were admissible under the excited utterances exception to the hearsay rule; (3) missing witness instruction was not required; and (4) failure to include assault element in to-convict jury instruction for felony violation of no-contact order did not violate defendant's due process rights.

Affirmed.

West Headnotes

[1] Criminal Law ⚿662.1
110k662.1
In all criminal prosecutions, a defendant has a right to confront his accusers to ensure the reliability of evidence against him. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[2] Criminal Law ⚿662.8
110k662.8
Admission of a hearsay statement does not violate an accused's confrontation right if it bears adequate indicia of reliability. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[3] Criminal Law ⚿662.8
110k662.8
Reliability of statement, for purposes of determining whether admission of a hearsay statement does not violate an accused's confrontation right, may be inferred when the statement either (1) falls within a firmly-rooted hearsay exception, or (2) contains particularized guarantees of trustworthiness. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[4] Criminal Law ⚿368(1)
110k368(1)

[4] Criminal Law ⚿662.8
110k662.8
Victim's statements to 911 operator while defendant was allegedly inside victim's home in violation of no-contact order were admissible under the excited utterances exception to the hearsay rule, which was a firmly-rooted exception to hearsay rule, and thus statements were sufficiently reliable so as not to violate defendant's right to confrontation. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22; ER 803(a)(2).

[5] Criminal Law ⚿366(1)
110k366(1)
Victim's statements to 911 operator while defendant was allegedly inside victim's home in violation of no-contact order were admissible under the excited utterance exception to the hearsay rule, where victim sounded frantic when she responded to operator's questions about what was happening, and law enforcement officers corroborated her condition by describing her as crying and visibly upset. ER 803(a)(2).

[6] Criminal Law ⚿363
110k363
Excited utterance exception to hearsay rule assumes that a reaction to the stress of a startling event offers little or no opportunity for a statement that is a misrepresentation or conscious fabrication. ER 803(a)(2).

[7] Criminal Law ⚿363
110k363
A statement is an "excited utterance" if it relates to a startling event or condition and is made while the declarant was under the stress or excitement caused by the event or condition. ER 803(a)(2).

[8] Criminal Law ⚿662.8
110k662.8
An excited utterance is a firmly-rooted hearsay exception, for purposes of determining whether admitted hearsay statement is sufficiently reliable such that admission does not violate an accused's confrontation right. U.S.C.A. Const.Amend 6;

West's RCWA Const. Art. 1, § 22.

[9] Criminal Law ⚷662.8
110k662.8
If a statement falls within a firmly-rooted hearsay exception, adequate indicia of reliability is presumed, for purposes of determining whether hearsay statement's admission violates accused's right to confrontation. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[10] Criminal Law ⚷662.8
110k662.8
When a hearsay statement satisfies the requirements for showing that statement is sufficiently reliable so as not to violate accused's confrontation rights, further inquiry into whether the statement is trustworthy is not necessary. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22
.

[11] Criminal Law ⚷662.8
110k662.8
Statements against penal interest are not among the firmly-rooted exceptions to the hearsay rule, for purposes of determining whether admission of such hearsay statements violate accused's right to confrontation. U.S.C.A. Const.Amend 6; West's RCWA Const. Art. 1, § 22.

[12] Criminal Law ⚷788
110k788
Missing witness instruction, which informs the jury it can infer from the witness's absence at trial that her testimony would have been unfavorable to the party who would logically have called her, is appropriate when (1) witness is peculiarly available to a party, (2) witness's testimony relates to issue of fundamental importance, and (3) circumstances at trial establish that, as a matter of reasonable probability, party would not fail to call witness unless her testimony would have been damaging or unfavorable; but no inference is permitted if witness's absence can be satisfactorily explained.

[13] Criminal Law ⚷788
110k788
Missing witness instruction, which informs the jury it can infer from the witness's absence at trial that her testimony would have been unfavorable to the party who would logically have called her, was not required, even though
state failed to obtain a material witness warrant, where witness unexpectedly failed to appear at trial due to defendant's alleged threat, prosecutor attempted to contact witness personally and through witness's advocate to no avail, and warrant would have been futile as state could not have served warrant.

[14] Criminal Law ⚷1038.1(4)
110k1038.1(4)
Failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal.

[15] Criminal Law ⚷1139
110k1139
Court of Appeals reviews a challenged jury instruction de novo.

[16] Criminal Law ⚷822(1)
110k822(1)
Jury instructions are to be read as a whole, and each one is read in the context of all others given.

[17] Criminal Law ⚷770(1)
110k770(1)

[17] Criminal Law ⚷809
110k809
Jury instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case.

[18] Criminal Law ⚷772(1)
110k772(1)
As a general rule, the to-convict instruction need not specify every element of the charged crime in every case.

[19] Criminal Law ⚷822(1)
110k822(1)
If the to-convict instruction acts as a yardstick of the law, it must include a complete summation of that law; where a trial court has not undertaken to provide a yardstick to the jury, the instructions are to be read as a whole and each instruction is to be read in the context of all the others given.

[20] Criminal Law ⚷27
110k27
Felony violation of a no-contact order is not a separate, distinct crime; rather, statute defines a

misdemeanor crime and then enumerates the grounds on which the crime is elevated to a felony. West's RCWA 26.50.110(4, 5).

[21] Criminal Law ⚿872.5
110k872.5
When the charge is murder, robbery, assault, and other traditionally-defined crimes and the jury fails to unanimously find any one of the elements, it must acquit on the greater crime.

[22] Criminal Law ⚿878(3)
110k878(3)
With crimes structured like violation of a no-contact order, the failure to find only one specific element requires the jury to acquit on the greater (felony) crime. West's RCWA 26.50.110(4, 5).

[23] Criminal Law ⚿772(1)
110k772(1)

[23] Criminal Law ⚿805(1)
110k805(1)
All the pertinent law need not be incorporated into one instruction; it is only when the jury may have assumed that the to-convict instruction is itself a complete statement of the elements of the crime charges that it must in fact include them.

**663 *83 Nancy Collins (WAP), for Appellant.

*84 Julie Cook (KCPA), for Respondent.

AGID, J.

Adrian Davis was convicted of felony violation of a no-contact order. He appeals his conviction on three grounds: He argues the trial court (1) deprived him of his right to confrontation by admitting a 911 tape that was unreliable hearsay; (2) failed to give the jury a missing witness instruction when the victim failed to appear for trial; and (3) failed to give a complete to convict instruction because the felony violation of a no-contact order "assault" element was included in the special verdict form but not in the to convict instruction. We affirm.

FACTS

On February 1, 2001, a 911 dispatcher received a hang-up call from Michelle McCottry's residence in Kent. The 911 dispatcher called back and talked to McCottry who was upset and crying. She stated, "He's here jumping on me again." In response to the 911 operator's questions, McCottry said Davis ran out the door after hitting her with his fists, she had a protection order against him that prohibited him from seeing her, and because she was moving, Davis came to pick up some of his things. McCottry was arguing with a visitor when Davis arrived. Davis joined the argument, and McCottry stated that he "jump[ed] up and start[ed] beating [her] up." McCottry identified herself and Davis during the call.

Officers Mark Jones and Steve Tamanaha responded to the scene. When they arrived, McCottry was visibly upset and crying. Officer Jones noticed that the house was in a state of disarray and there was damage to one of the walls. McCottry had fresh injuries on her forearm and face that *85 were beginning to swell. While she spoke with the officers, she was frantically moving around the house and packing her family's belongings. When Officer Tamanaha photographed McCottry's injuries, she tried to cover her face. The officers later confirmed there was a protection order against Davis and cited him for violating a no-contact order. Davis was convicted of felony violation of a no-contact order and sentenced within the standard range. He filed a timely appeal.

ANALYSIS

I. Admission of the 911 Tape

[1][2][3] In all criminal prosecutions, a defendant has a right to confront his accusers **664 to ensure the reliability of evidence against him. [FN1] However, admission of a hearsay statement does not violate an accused's confrontation right if it bears adequate "indicia of reliability." [FN2] Reliability may be inferred when the statement either (1) falls within a firmly-rooted hearsay exception or (2) contains particularized guarantees of trustworthiness. [FN3] We review the trial court's decision that a statement is an excited utterance under the abuse of discretion standard. [FN4]

FN1. U.S. Const. amend. VI; Wash. Const. art I, § 22; *Maryland v. Craig,* 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

FN2. *State v. Davis,* 141 Wash.2d 798, 10 P.3d 977 (2000).

FN3. *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

FN4. *State v. Strauss,* 119 Wash.2d 401, 417, 832 P.2d 78 (1992).

[4] Davis argues that although the trial court admitted the 911 tape as an excited utterance, it does not properly satisfy Confrontation Clause concerns because it is unreliable. The State asserts that the 911 tape testimony falls within a firmly-rooted hearsay exception and therefore is inherently reliable. We agree with the State because (1) McCottry's statements were properly characterized as excited utterances and (2) excited utterances are firmly-rooted ***86** exceptions to the hearsay rule which meet the reliability test the Supreme Court adopted in *Ohio v. Roberts.* [FN5]

FN5. 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[5][6][7] The excited utterance exception assumes that a reaction to the stress of a startling event offers little or no opportunity for a statement that is a misrepresentation or conscious fabrication. [FN6] A statement is an excited utterance under ER 803(a)(2) if it relates to a startling event or condition and is made while the declarant was under the stress or excitement caused by the event or condition. [FN7] In this case, when McCottry answered the 911 call-back there was yelling in the background and she sounded frantic as she responded to the operator's questions about what was happening. When McCottry identified Davis and told the operator he was running from the scene in his car, she abruptly dropped the phone, saying she needed to close the door to the house. The police officers who responded to the scene several minutes after the call corroborated her condition by describing her as "crying" and visibly "upset." Because the statements made on the tape were clearly made during and immediately after a startling event and related to that event, they are properly admitted as excited utterances.

FN6. *State v. Palomo,* 113 Wash.2d 789, 796-98, 783 P.2d 575 (1989), *cert. denied,* 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990).

FN7. *State v. Jackson,* 113 Wash.App. 762, 54 P.3d 739 (2002).

[8][9][10] An excited utterance is a firmly-rooted hearsay exception. [FN8] If a statement falls within a firmly-rooted hearsay exception, adequate indicia of reliability are presumed under *Roberts.* [FN9] When a hearsay statement satisfies the requirements of *Roberts,* further inquiry into whether the statement is trustworthy is not necessary. [FN10] We accordingly ***87** reject Davis' argument that this court should examine "circumstantial indicators" that the 911 tape is unreliable under the factors set forth in *State v. Ryan.* [FN11]

FN8. *Davis,* 141 Wash.2d at 846, 10 P.3d 977.

FN9. *Id.* at 848 n. 281, 10 P.3d 977 (citing *State v. Whelchel,* 115 Wash.2d 708, 715, 801 P.2d 948 (1990)).

FN10. *Id.* at 847, 10 P.3d 977; *see also State v. Smith,* 148 Wash.2d 122, 59 P.3d 74, 79 (2002) (when an out-of-court statement *does not* fall under one of the firmly-rooted hearsay exceptions, the Confrontation Clause requires the proponent of the statement to demonstrate that the declarant is unavailable and that the statement bears adequate indicia of reliability under *State v. Ryan,* 103 Wash.2d 165, 691 P.2d 197 (1984)).

FN11. 103 Wash.2d 165, 691 P.2d 197 (1984) (listing nine factors useful in determining whether prior out-of-court statements violate a defendant's right to confrontation).

[11] Davis claims *State v. Brown* [FN12] and ****665** *Lilly v. Virginia* [FN13] support his argument that an excited utterance can be unreliable. Neither case is persuasive. In *Brown,* the victim told authorities that she was abducted and raped. At the pretrial hearing, the trial court admitted a 911 tape of her telephone conversation with an operator. At trial, the victim testified that she fabricated the statements she made on the 911 tape. The Washington Supreme Court concluded the trial court abused its discretion by admitting the tape as an excited utterance because it was an actual fabrication. There is no evidence of fabrication in this case. In *Lilly,* the U.S. Supreme Court held an accomplice's confession obtained in police custody and admitted under the "statement against penal interest" exception to the hearsay rule was unreliable because of the accomplice's natural motive to attempt to exculpate himself." [FN14] Statements against penal interest are not among the firmly-rooted exceptions to the hearsay rule. [FN15] Nor is McCottry an accomplice or coconspirator, and the record reveals no reason for her to lie.

[FN16]

FN12. 127 Wash.2d 749, 903 P.2d 459 (1995).

FN13. 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

FN14. *Lilly,* 527 U.S. at 121-22, 119 S.Ct. 1887.

FN15. *Id.* at 134, 119 S.Ct. 1887.

FN16. Davis admits that no motive to lie was offered at trial.

Davis also relies on *State v. Ross* [FN17] in which this court held that the State violated a defendant's right to confrontation by introducing hearsay statements on a 911 tape ***88** when the declarant failed to testify. Although no case has expressly overruled *Ross,* its holding was effectively overruled by the Washington Supreme Court's opinion in *State v. Palomo.* [FN18] in *palomo,* THE COURT Rejected "the broad proposition that the confrontation clause bars admissibility of hearsay statements unless unavailability of the declarant is shown." [FN19] The *Palomo* court held that a statement is properly admitted under the excited utterance exception to the hearsay rule regardless of the declarant's availability at trial.

FN17. 42 Wash.App. 806, 714 P.2d 703 (1986).

FN18. 113 Wash.2d 789, 783 P.2d 575 (1989), *cert. denied,* 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990).

FN19. *Palomo,* 113 Wash.2d at 794, 783 P.2d 575 .

In sum, we conclude that the trial court properly admitted the 911 tape as an excited utterance, and its admission does not offend Davis' right to confrontation because the statements fall within a firmly-rooted hearsay exception.

II. The Missing Witness Instruction

[12] Davis argues that the trial court erred by failing to give the jury a missing witness instruction when McCottry did not testify at trial. The instruction informs the jury it can infer from the witness' absence at trial that her testimony would have been unfavorable to the party who would logically have called her. The instruction is appropriate when (1) the witness is "peculiarly available" to a party, (2) the witness' testimony relates to an issue of fundamental importance, and (3) circumstances at trial establish that, as a matter of reasonable probability, the party would not fail to call the witness unless her testimony would have been damaging or unfavorable. [FN20] But no inference is permitted if the witness' absence can be satisfactorily explained. [FN21] We conclude that the trial court properly refused to give the missing witness instruction because McCottry's absence was satisfactorily explained at trial and the record shows that the State used all available means to locate her.

FN20. *State v. Davis,* 73 Wash.2d 271, 276-78, 438 P.2d 185 (1968).

FN21. *Id.*

[13] ***89** McCottry was unavailable because the State could not locate her even though it reasonably believed she would appear at trial. The State was in contact with McCottry until the day of trial. [FN22] During that time, she appeared when asked to appear, met with the ****666** prosecutor several times, and promptly returned the prosecutor's and victim advocate's phone calls. McCottry told the prosecutor that she would appear at trial, and the State subpoenaed her. When McCottry unexpectedly failed to appear for a defense interview, the prosecutor tried to locate her to no avail. The following day, the victim's advocate got a phone message from McCottry in which she said that Davis had contacted her and threatened that her children would be taken away and she would look like a liar if she came and testified. The prosecutor explained that McCottry and her children were involved in a house fire two weeks before, there were concerns about housing arrangements, and the State did not know where she was living. This was a fully adequate explanation. [FN23]

FN22. The prosecutor spoke with McCottry by telephone the night before her scheduled appearance.

FN23. *See State v. Lopez,* 29 Wash.App. 836, 631 P.2d 420 (1981) (upholding a court's refusal to give a missing witness instruction by concluding that the State satisfactorily explained that the witnesses did not appear after agreeing to testify at trial and the State could not locate them).

Second, the State used all available means to locate

McCottry. When she failed to appear for a defense interview, the prosecutor immediately attempted to contact her personally and through the victim's advocate. Both attempted to contact her by telephone, the State sent a detective to her last known address, and the detective attempted to find her address through a reverse phone directory. [FN24] Despite this, the State could not locate McCottry.

FN24. Davis argues that the State did not use all available means because it did not obtain a material witness warrant. The State explained to the trial court that because McCottry agreed to testify, it did not obtain one. It did not issue one when McCottry unexpectedly failed to appear because even with the warrant, they had no ability to pick her up without knowing where she was. *See State v. Hobson,* 61 Wash.App. 330, 338, 810 P.2d 70, *review denied,* 117 Wash.2d 1029, 820 P.2d 510 (1991) (noting that "Washington case law is silent on the issue of whether the State must obtain a material witness warrant to hold a witness in custody whenever the State knows such action may be necessary to ensure the witness's presence at trial."). In this case, it would have been futile because the State could not have served the warrant.

***90** Because the State provided a satisfactory explanation for the witness' absence and used all available means to contact her, the trial court properly refused a missing witness instruction.

III. The To Convict Instruction

[14][15][16][17] Finally, Davis contends he was deprived of due process because the to convict jury instruction for felony violation of a domestic violence no-contact order omitted the statutory "assault" element. The State argues that (1) Davis waived his right to appeal under RAP 2.5(a) by failing to object to the instruction below and (2) in any case, the trial court instructed the jury on all of the crime's elements. Failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal, [FN25] so we reject the State's first argument. This court reviews a challenged jury instruction de novo. [FN26] Jury instructions are to be read as a whole, and each one is read in the context of all others given. [FN27] Instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case. [FN28]

FN25. *State v. Deryke,* 110 Wash.App. 815, 819, 41 P.3d 1225 (2002) (citing *State v. Aumick,* 126 Wash.2d 422, 429-30, 894 P.2d 1325 (1995)), *review granted,* 148 Wash.2d 1001, 60 P.3d 1211 (2003).

FN26. *Id.* (citing *State v. Pirtle,* 127 Wash.2d 628, 656, 904 P.2d 245 (1995), *cert. denied,* 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

FN27. *Id.* (citing *State v. Brown,* 132 Wash.2d 529, 605, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)).

FN28. *Id.* (citing *State v. Mark,* 94 Wash.2d 520, 526, 618 P.2d 73 (1980)).

At the conclusion of testimony, the trial court instructed the jury on the law. First, the court instructed the jury that ***91** in order to find Davis guilty of violation of a no-contact order, each of the following elements must be proved beyond a reasonable doubt

(Instruction 9):

(1) That on or about February 1, 2001 the defendant willfully had contact with Michelle McCottry;

****667** (2) That such contact was prohibited by a no-contact order;

(3) That the defendant knew of the existence of the no-contact order;

(4) That the acts occurred in the County of King.

The court also included an instruction that defined the term "assault" for the jury (instruction 8). And it gave the jury the following instruction on the special verdict form (instruction 12), which read:

You will also be furnished with a special verdict form. If you find the defendant not guilty of the crime of violation of a no contact order, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blanks "yes" or "no" according to the decision you reach. In order to answer the question on the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

Finally, the court gave the jury a special verdict form on which it was to indicate whether the State had proven the factor which makes violation of the no-contact order a felony. It read:

We, the jury, return a special verdict by answering as follows:

Was the conduct that constituted a violation of the no-Contact order an assault?

ANSWER:

_____
(Yes or No)

Davis now argues the to convict instruction for felony violation of a no-contact order was incomplete because the ***92** "assault" element was not included. The State asserts there was no error because the court gave instructions 8 and 12 and the accompanying special verdict form, which fully instructed the jury on the factor that elevates the crime to a felony violation of a domestic violence no-contact order. We agree with the State.

[18][19] As a general rule, the to convict instruction need not specify every element of the charged crime in every case. [FN29] In *State v. Emmanuel,* [FN30] the State charged the defendant with bribery, and the court gave a detailed to convict instruction including all but one of the crime's elements. The Washington Supreme Court held this instruction was deficient, reasoning that by undertaking to specifically tell the jury that they could convict the defendant if they found that four elements of the crime had been proven, the judge provided "a yardstick by which the jury were [sic] to measure the evidence in determining appellant's guilt or innocence of the crime charged." [FN31] The *Emmanuel* court stated that when the instruction purported to include all the elements, the jury was not required to search other instructions to see if another element alleged in the information should have been added. [FN32] Thus, if the to convict instruction acts as a yardstick of the law, it must include a complete summation of that law. [FN33] Where a trial court has not undertaken to provide a yardstick to the jury, the instructions are to be read as a whole and each instruction is to be read in the context of all the others given. [FN34]

FN29. *State v. Emmanuel,* 42 Wash.2d 799, 819, 259 P.2d 845 (1953).

FN30. 42 Wash.2d 799, 819, 259 P.2d 845 (1953).

FN31. *Id.*

FN32. *Id.*

FN33. *Id.*

FN34. *Brown,* 132 Wash.2d at 605, 940 P.2d 546.

The State relies on *State v. Oster.* [FN35] There the defendant was also charged with felony violation of a no-contact order. The factor which elevated the crime from ***93** a misdemeanor to a felony was Oster's prior convictions for the same crime. [FN36] The Washington Supreme ****668** Court had to determine the adequacy of a to convict instruction that omitted prior convictions as an element of the crime, but were, as here, included in a separate instruction and special verdict form. The *Oster* court concluded it was not an error to instruct the jury separately and by special verdict form on prior criminal history because the instructions clearly set forth all the elements of the crime and the jury did not have to search the other instructions for missing elements. [FN37] The *Oster* decision therefore recognizes a "limited exception to the rule that all of the elements of the crime must appear in the 'to convict' instruction when the element is prior convictions, and a special verdict form is used to instruct the jury to determine their existence beyond a reasonable doubt." [FN38] Although the missing element in this case involves assault rather than prior convictions, the issue and procedure used in *Oster* are almost identical to this case, and we conclude that its rationale logically applies to the instructions in this case as well.

FN35. 147 Wash.2d 141, 52 P.3d 26 (2002).

FN36. Oster was charged under former RCW 10.99.040 and .050 (1996), which provided that a violation of a no contact order will be punished as a class C felony if (1) the defendant had two or more prior convictions for the same crime, (2) the violator assaulted the person protected by the order, or (3) the violator recklessly created a substantial risk of death or serious injury. The current statute RCW 25.50.110(4)-(5) contains identical factors which elevate the crime to a felony.

FN37. *Oster,* 147 Wash.2d at 147, 52 P.3d 26.

FN38. *Id.* at 148, 52 P.3d 26.

[20] A charge of violation of a no-contact order asks the jury to determine whether the defendant violated a valid no-contact order. If so, the misdemeanor crime is elevated to a felony when (1) the contact that violated the order amounted to misdemeanor assault, (2) the conduct that violated the order was reckless and created a substantial risk of death or serious physical injury to another person, or (3) the defendant has two or more convictions for the same crime. [FN39] Unlike most crimes, felony violation of a no-contact ***94** order is not a separate, distinct crime. [FN40] Rather, the statute defines a misdemeanor crime and then enumerates the grounds on which the crime is elevated to a felony.

FN39. RCW 26.50.110(4)-(5) (2003).

FN40. For example, the Revised Code of Washington includes four separate statutes for the crime of assault. While the different felony classes of assault are set forth under RCW 9A.36.011-.31, misdemeanor assault is set forth under its own statute, RCW 9A.36.041. The Revised Code of Washington also separates felony theft from misdemeanor theft. While RCW 9A.56.030-.040 sets forth the elements of felony theft, RCW 9A.56.050 sets forth the elements of misdemeanor theft.

The to convict instruction here did not purport to contain all of the crime's elements. Rather, the trial court followed the Washington pattern jury instructions [FN41] and separated felony violation of a no-contact order into two instructions with a special verdict form. Davis argues that the jury should have been given one instruction for felony violation of a no-contact order and a lesser included instruction for misdemeanor violation of a no-contact order. This approach, we conclude, would potentially lead to jury confusion because its construction would be unduly awkward.

FN41. 11 Washington Pattern Jury Instructions: Criminal 36.54-.55 (2d ed.1998).

[21][22] When the charge is murder, robbery, assault, and other traditionally-defined crimes and the jury fails to unanimously find any one of the elements, it must acquit on the greater crime. With crimes structured like violation of a no-contact order, the failure to find only one specific element requires the jury to acquit on the greater (felony) crime. [FN42] Constructing a single instruction on the lesser included model under these circumstances has great potential to confuse the jury and result in erroneous verdicts. Indeed, the statutory structure of the latter crimes is more akin to enhancements like committing a crime while armed with a firearm that the jury regularly decides by special verdict. [FN43]

FN42. Other crimes with same statutory construction are harassment (RCW 9A.46.020), indecent exposure (RCW 9A.88.010), and stalking (RCW 9A.46.110).

FN43. Former RCW 9.94A.310(3) recodified as RCW 9.94A.510(3) (2001). Drug crime enhancements for proximity to a school, school bus, or park are similar examples. Former RCW 9.94A.310(5) recodified as RCW 9.94A.510(5) (2001).

***95** A defendant benefits from having the instructions bifurcated because the special verdict instruction safeguards him or her from being mistakenly convicted of an elevated ****669** crime by a confusing and less direct instruction that attempts to coherently combine the special verdict and the to convict instructions into one.

[23] All the pertinent law need not be incorporated into one instruction. [FN44] It is only when the jury may have assumed that the to convict instruction is itself a complete statement of the elements of the crime charges that it must in fact include them. Here the trial court followed the Washington Pattern Jury Instructions' (WPIC) bifurcated pattern instructions and placed the special verdict felony instruction after the to convict for misdemeanor violation of a no-contact order instruction. Because of this, it is clear that the court did not intend to provide a "yardstick" with its to convict instruction. The instructions were meant to be read as a whole and each one read in the context of all others.

FN44. *Emmanuel,* 42 Wash.2d at 819, 259 P.2d 845.

In addition, there is no danger that this approach confused the jury. As in *Oster,* "no searching was necessary" for the jury in this case. [FN45]

"[E]verything the jury was required to decide was clearly laid out for the jury to decide." [FN46] Instruction 1 told the jury to consider the instructions as a whole and to not place undue emphasis on any particular instruction or part thereof. Instruction 3 informed the jury that each element was at issue and that the burden of proving each element beyond a reasonable doubt rested with the State. Instruction 8 defined the term "assault" for the jury. Instruction 9 provided the elements of violation of a no-contact order. Instruction 12 informed the jury about the special verdict form, instructing them to fill out the form only if they found the defendant guilty of the misdemeanor crime and to answer yes only if they unanimously ***96** agreed beyond a reasonable doubt. Instruction 12 and the special verdict form included the enhancing element of assault. When read together, the to convict instruction and the special verdict instruction supply all the crime's elements in the manner suggested by the WPIC. [FN47] This manner of instructing the jury benefits the defendant as well because the jury was required to conclude, not once but twice, that the State met its burden beyond a reasonable doubt.

FN45. *Oster,* 147 Wash.2d at 147, 52 P.3d 26.

FN46. *Id.*

FN47. While the WPIC's are not binding on the court, they are persuasive authority. *State v. L.J.M.,* 79 Wash.App. 133, 140, 900 P.2d 1119 (1995), *rev'd on other grounds,* 129 Wash.2d 386, 918 P.2d 898 (1996).

Accordingly, we conclude there is no constitutional infirmity. We affirm.

COLEMAN and ELLINGTON, JJ., concur.

116 Wash.App. 81, 64 P.3d 661

END OF DOCUMENT

## 1.0 PURPOSE/REFERENCES:

To establish a uniform method of interviewing callers requesting police assistance.

CALEA Standards: 6.2.2

## 2.0 POLICY:

It shall be the policy of Valley Communications Center to conduct thorough and accurate interviews using these guidelines anytime a police related call for service is received.

## 3.0 PROCEDURE:

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. The employee should have thorough knowledge of the POLICE TYPE CODES in order to quickly classify the reporting party's situation and create a CAD incident. A police incident should never be delayed while attempting to determine if a fire department/EMS response is also required. The ACTION CODE "D" should be utilized for all in-progress and recent incidents. This allows basic information to be forwarded to the dispatcher and a response generated while additional information is obtained and added in supplemental form. The following are guidelines to be used during the interview of a reporting party:

### 3.1 Where:

**3.1.1** Location/address where the incident took place in order to establish jurisdictional responsibility?

**3.1.2** Street address, house or apartment number, trailer space or suite number?

**3.1.3** Apartment complex, building or business name?

3.2 **What:**

3.2.1 Type of incident (robbery, burglary, theft)?

3.2.2 What are the potential dangers (situation escalating)?

3.2.3 Are circumstances or injuries present requiring fire/EMS response?

3.3 **When (Time Delay):**

3.3.1 In Progress (0-5 minutes after occurrence, or suspect on location)?

3.3.2 Recent (6-15 minutes after occurrence)?

3.3.3 Report (16 or more minutes after occurrence)?

3.4 **Weapons (Gun or Knife):**

3.4.1 Are weapons present or accessible?

3.4.2 What type of weapons?

3.5 **Who:**

3.5.1 Is the suspect(s) known to reporting party?

3.5.2 Current location of suspect(s)?

3.5.3 Number of suspects?

3.5.4 Name and DOB of suspect(s)?

3.5.5 Description of suspect(s) using head-to-toe method?

**3.5.6** Associated vehicle descriptions using CYMBAL method?

**3.5.7** Direction of travel?

3.6 **Why:**

**3.6.1** What circumstances led to the incident?

**3.6.2** Additional pertinent details relating to incident?

3.7 **RP Information:**

**3.7.1** Name, address, phone number (where can RP be reached)?

**3.7.2** Relationship to incident or those involved?

**3.7.3** Does the reporting party want officer contact?

## Full Text of Tape Recording in Exhibit 2

This is Liz Hennekay of the Valley Communications Center. Today's date is February 6, 2001, and the time is 1340 hours. The following taped incident has been recorded from the Valley Communications master disk of February 1, 2001 at 1154 hours.

911 Operator: 911. Hello, 911.

[unknown] [Hang up]...*[unintelligible]*

*[new phone call; ringing]*

911 Operator: Hello.

Complainant: Hello.

911 Operator: What's going on?

Complainant: He's here jumpin' on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

Complainant: I'm in a house.

911 Operator: Are there any weapons?

Complainant: No. He's usin' his fists.

911 Operator: Okay. Has he been drinking?

Complainant: No.

911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

Complainant: I'm on the line.

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adran

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

*[unintelligible]*

911 Operator: Listen, listen. What direction is running?

Complainant: He's in a car.

911 Operator: What car?

Complainant: I don't know.

911 Operator: What color?

Complainant: It's blue or gray or somethin'.

911 Operator: What direction?

Complainant: He's riding up the street.

911 Operator: Okay. What direction?

Complainant: Goin' down, this is a dead-end street.

911 Operator: It's a dead-end street, so he's going out the dead end?

Complainant: Yeah.

911 Operator: Is he alone?

Complainant: No.

911 Operator: How many people in the car with him?

Complainant: I don't know. He just ran out the door after he hit me.

911 Operator: Okay. Do you need an aid car?

Complainant: No, I'm all right.

911 Operator: Okay sweetie.

*[redaction]*

911 Operator: Stop talking and answer my questions.

Complainant: All right.

911 Operator: Okay. Do you know his birth date?

Complainant: 8/13/65.

911 Operator: Okay, I'm having trouble understanding you.

Complainant: 8/13/65. I've gotta close my door. My...

*[child's voice in background] [unintelligible]*

Child: Hi Daddy.

911 Operator: Hi. Can I talk your mommy?

Child: Yeah.

911 Operator: Okay. Go get mommy. Thank you, sweetie.

Child: *[unintelligible]*

911 Operator: Okay. Go get mommy.

*[child's voice in background] [unintelligible]*

2nd Child: Hello.

911 Operator: Hi. Where's the grownup in the house.

2nd Child: *[unintelligible]* my mommy.

911 Operator: Where's your mommy. Is she inside or outside the house?

2nd Child: Uh, walking(?).

911 Operator: She's where.

Complainant: Hello.

911 Operator: Hi. We're gonna check the area first, okay? And then they're gonna come talk to you. Is this your ex-husband or a boyfriend?

Complainant: Yes.

911 Operator: Well, which one – ex-husband?

Complainant: Boyfriend.

911 Operator: Okay, sweetie. Did he force his way into the house – or…

Complainant: No. I'm movin' today. He said he was comin' to get his stuff. Somebody else came over here, so he tried arguing with me about that. So then I told him, "Look, I gotta go. You gotta go."

911 Operator: Um-hmm.

Complainant: So then he jumped up and started beating me up in front of him. I don't know what he was trying to prove.

911 Operator: Okay, . . .

*[redaction]*

Complainant: …I told him not to come.

911 Operator: Okay.

Complainant: I told him over and over.

911 Operator: Okay. Okay. Take a deep breath. I need to find out restraining order, so I need your last name. What is it?

Complainant: M-c-C-o-t-t-r-y.

911 Operator: M-c-C-o-r-t…

Complainant: M-c-C-o-t-t-r-y.

911 Operator: Okay. And your first name?

Complainant: Michelle.

911 Operator: Michelle. And your middle initial?

Complainant: I don't have one.

911 Operator: Okay. What's your birth date.

Complainant: 5/10/69.

911 Operator: Okay. Is your door locked?

Complainant: Yes.

911 Operator: Okay.

*[redaction]*

911 Operator: ...put that in the call. They're gonna check the area for him first, and then they're gonna come talk to you. Okay.

Complainant: All right.

911 Operator: Okay. Bye-bye.