No. 11-1407

In the Supreme Court of the United States

RICKY LEE ALLSHOUSE, JR.,
Petitioner,

v.

PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Western District

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

INTRODUCTION

This case involves the consideration of the proper application of the Confrontation Clause as interpreted by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and its progeny with regard to the admissibility of hearsay statements made by a four-year-old child witness to a child protection worker. This Court has not previously applied the precepts of *Crawford* to statements made within this particular factual guise. Many courts have grappled with the issue of whether such statements and the statements of young children in general are testimonial since this Court handed down the *Crawford* decision. Because the Confrontation Clause jurisprudence of this Court since *Crawford* has not directly dealt with the unique issues associated with a child's statements or statements made to a child protection worker, state and lower federal courts have had to do their best to glean how this Court would rule in such a situation based upon analogy and speculation. Most of those courts have decided those cases under the guidance of *Crawford* and *Davis v. Washington*, 126 S.Ct. 2266 (2006), both of which involved "police interrogation", either in fact or presumed.[1] Not surprisingly, the

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[1] The *Davis* court assumed *arguendo* that 9-1-1 operators were law enforcement ("For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police."). The Court also specifically stated that "…our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* at 2274 and n. 2.

approaches employed by those courts have not been uniform. Also, not surprisingly, the approach employed by a number of courts has been mechanical and clumsy, blindly applying rules while ignoring the reasoning underlying those rules. This erroneous, wooden application of *Crawford* and *Davis* is illuminated by this Court's recent pronouncements in *Michigan v. Bryant,* 131 S.Ct. 1143 (2011), as will be discussed further below.

Since *Crawford,* the simple, overarching question that is so frequently forgotten yet must be answered in any valid Confrontation Clause inquiry is whether the declarant of a statement was "bearing testimony." It is beyond dispute that this touchstone is the ultimate issue that must be resolved in every such case. In *Crawford,* this Court emphasized that the Confrontation Clause only applies to "witnesses" against the accused, who thus, "bear testimony." *Id*. at 51, 124 S.Ct. at 1364**.** "Testimony" was discussed as being "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."(internal citation omitted). *Ibid*. From this, it was posited that, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid*.

To further elucidate the concept of testimonial statements, the Court referred to a "core class" of such statements as,

> "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior

> testimony that the defendant was unable to cross examine, or similar pre trial statements that declarants would reasonably expect to be used prosecutorially, ...extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions...statements that were made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial, ..." *Id*. at 51-52, 124 S.Ct. at 1364 (internal citations omitted).

Importantly, the Court made what seemed to be an absolute pronouncement, stating, "Whatever else the term covers, it applies at a minimum ….to police interrogations." *Id*. at 52, 68, 124 S.Ct. at 1354, 1374. However, in *Davis*, this Court reconsidered this statement within two new factual settings and found that, in certain circumstances, police interrogations can indeed produce nontestimonial statements. See *id.* at 822, 126 S.Ct. at 2273-74. The *Davis* court stated its holding as follows:

> "Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance

> to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822, 126 S.Ct. at 2273-2274.

The Court took great pains to establish that this general holding was limited in its scope. As stated above, the Court did not consider whether and when statements to law enforcement were testimonial. Additionally, the Court also stated , in footnote 5, that, "We have acknowledged that our holding is not an 'exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,'…, but rather a resolution of the cases before us and those like them. For those cases, the test is objective and quite 'workable.'" *Id.* at 830, 126 S.Ct. at 2278, n. 5. Thus, it is clear that this Court was addressing cases involving police interrogation and intended its holding to apply to cases that are factually similar ("the cases before us and those like them").

In *Michigan v. Bryant,* 131 S.Ct. 1143 (2011), yet another case involving police interrogation where the statements were held not to be testimonial, this Court provided invaluable illumination of its analytical paradigm by identifying and expanding on the various nuances that bear on the issue of whether a declarant bears testimony. The Court also explained and clarified aspects of the "primary purpose test" of *Davis.* First, the Court cleared up any false notion that the

outer limits of an "ongoing emergency" were defined by *Davis,* stating that,

> "…the Michigan Supreme Court repeatedly and incorrectly asserted that *Davis* 'defined' '"ongoing emergency."'…In fact, *Davis* did not even define the extent of the emergency in that case…" "….by assuming that *Davis* defined the outer bounds of "ongoing emergency," the Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 1158.

Next, the Court made it clear that the existence of an "ongoing emergency", as discussed in *Davis,* is not dispositive of the testimonial inquiry,

> "When, as in Davis, the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. **But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."** *Id.* at 1155 (emphasis

> added). "…our discussion of the Michigan Supreme Court's misunderstanding of what *Davis* meant by 'ongoing emergency' should not be taken to imply that the existence *vel non* of an ongoing emergency is dispositive of the testimonial inquiry. As *Davis* made clear, **whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation**. *Id.* at 1160 (emphasis added).

Contrary to various courts' interpretation of *Davis*, the lack of an ongoing emergency does *not* necessarily render a statement made during police interrogation testimonial. Rather, what is important is what can objectively be determined about the purposes of the parties to the interrogation. Specifically, the Court said,

> "In addition to the circumstances in which an encounter occurs, **the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation**….The Michigan Supreme Court did, at least briefly, conduct this inquiry…. As the Michigan Supreme Court correctly recognized,…***Davis* requires a combined inquiry that accounts for both the declarant and the interrogator**…In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, "Tell us who did this to

> you so that we can arrest and prosecute them," the victim's response that "Rick did it," appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers. The combined approach also ameliorates problems that could arise from looking solely to one participant…" *Id.* at 1160-61 (emphasis added).

This Court also addressed the importance of formality or the lack thereof in the interrogation, stating,

> "Another factor the Michigan Supreme Court did not sufficiently account for is the importance of *informality* in an encounter between a victim and police. Formality is not the sole touchstone of our primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution,'… informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent… The court below, however, too readily dismissed the informality of the circumstances in this case in a single brief footnote and in fact seems to have suggested that the encounter in this case was formal…**As we explain further below, the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case**

> **distinguishable from the formal station-house interrogation in *Crawford*...."** *Id.* at 1160 (internal citations and various parenthetical comments omitted herein; emphasis added).

Of importance to the instant case, the *Bryant* court made it abundantly clear that the individual characteristics of the declarant are relevant insofar as they bear on the issue of his mindset when he gave the subject statements. The Court stated,

> "The Michigan Supreme Court's failure to focus on the context-dependent nature of our *Davis* decision also led it to conclude that the medical condition of a declarant is irrelevant…('The Court said nothing at all that would remotely suggest that whether the victim was in need of medical attention was in any way relevant to whether there was an "ongoing emergency"'). But *Davis* and *Hammon* did not present medical emergencies, despite some injuries to the victims…Thus, we have not previously considered, much less ruled out, the relevance of a victim's severe injuries to the primary purpose inquiry…Taking into account the victim's medical state does not, as the Michigan Supreme Court below thought, 'rende[r] non-testimonial' 'all statements made while the police are questioning a seriously injured complainant.'…**The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police**

> **questions and on the likelihood that any purpose formed would necessarily be a testimonial one.**" *Id.* at 1159 (emphasis added).

Later, the Court further elucidated its thinking on this issue, stating,

> "…a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution…**Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state.**
>
> When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. His answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive… He was obviously in considerable pain and had difficulty breathing and talking…From this description of his condition and report of his statements, we cannot say that a person in

> Covington's situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'…" *Id.* at 1161 (emphasis added).

The evolution of this trilogy[2] of cases shows that Confrontation Clause analysis is not to be mechanical and superficial, blindly applying a set of sterile rules. Rather, as was shown so unmistakably by this Court's decision in *Bryant,* such analysis should be comprehensive and should involve consideration of "all of the relevant circumstances" that bear on the ultimate inquiry of the declarant's mindset and whether he was "bearing testimony." See *id.* at 1162. Each successive decision from this Court has shown that this inquiry is far more nuanced than what most courts exhibited in their prior decisions. As is apparent from the above-quoted language, the ultimate question in these cases is not: whether a police officer is the questioner, whether there is an ongoing emergency, or whether the declarant is describing past events.[3] Indeed, those inquiries are relevant to the extent that they bear on whether the declarant was "bearing

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[2] Respondent is mindful that there are other Confrontation Clause cases this Court has decided since *Crawford* (e.g. *Melendez–Diaz v. Massachusetts*, 557 U.S. ——, ——, 129 S.Ct. 2527, 2539–2540, 174 L.Ed.2d 314 (2009)), however, most lower courts passing on this and similar issues have relied upon *Crawford* and *Davis* in their decisions. Specifically, courts have used *Davis's* "primary purpose" analysis as the rubric through which they have decided these cases.

[3] Indeed, as will be seen below, findings by state and federal courts of these factors alone have been viewed as dispositive and have generally ended the inquiry.

testimony", however, those considerations are not the ultimate issue.

Unfortunately, because of a misunderstanding of the *Crawford* and *Davis* decisions (as made evident by *Bryant*), many courts have treated those other issues as if they were the ultimate one. Indeed, the Petitioner expends much effort advancing the arguments that: 1) the subject child protection worker was an agent of law enforcement; 2) that there was no ongoing emergency and; 3) that the declarant was merely relating past events. While these considerations are relevant to the testimonial inquiry, there is little or no discussion in the Petition (as well as the brief of the *amici*) regarding the ultimate issue, *viz:* whether A.A. was "bearing testimony." This is typical of the short-sighted and superficial analysis of the courts that Petitioner and *amici* cite with approval. Indeed, many courts have "lost the forest for all the trees", engaging in much discussion about (and indeed basing their decisions on) the details of the above issues while never touching that ultimate issue.

Ultimately, pursuant to this trilogy of cases, it is beyond dispute that an objective analysis of all the relevant facts and circumstances must be undertaken to determine whether the declarant objectively purposed to bear testimony. These cases completely turn on the objectively-determined intent of the declarant. See *Bryant, supra,* at 1168-69 (Scalia, J., dissenting) ("The declarant's intent is what counts. In-court testimony is more than a narrative of past events; it is a solemn declaration made in the course of a criminal trial. For an out-of-court statement to qualify as testimonial, the declarant must intend the

statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused."). Despite this obvious truth, most courts interpreting *Crawford* and *Davis* prior to *Bryant* have not adequately addressed this focal inquiry.

MANY COURTS HAVE WRONGLY APPLIED CRAWFORD AND DAVIS

It is obvious that this Court has included police interrogations within its "core class" of testimonial statements because when a person discusses a matter with police, he knows that he is "on the record" and that he is giving statements to a person who has the duty and ability to start the legal machinery of criminal proceedings if criminal conduct is described. Thus, as opposed to conversation with a regular civilian, friend or acquaintance, a declarant speaking to a police officer has an expectation that her statements very well could be used later in some formal proceeding. See *Crawford, supra,* at 51, 124 S.Ct. at 1364 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"). In light of this simple logic that is evident from this Court's precedent, it would be reasonable to presume that courts tasked with determining whether statements are testimonial would make the declarant's mindset, objectively determined, the touchstone of their inquiry. Surprisingly, though, many courts have opted for form over substance and have not addressed that key issue.

For instance, although in *Davis* this Court specifically restricted the applicability of its "primary purpose" test to cases involving police interrogations, various courts are applying it to cases in which police are not directly involved in the production of the subject statement. Despite this Court giving clear reasons for why police interrogations are looked at as possibly producing testimonial statements, these courts engage in a technical analysis that centers on whether, pursuant to some theoretical or statutory link, the interviewer (mostly a child protection worker or forensic interviewer) is a "proxy" or "agent" of police *and* they don't even give lip service to whether this has any effect on the mindset of the declarant. See e.g. *State v. Pitt,* 209 Or.App. 270, 147 P.3d 940 (Or.App. 2006); *State ex rel. Juvenile Department of Multnomah County v. S.P.,* 346 Or. 592, 215 P.3d 847 (2009); *State v. Contreras,* 979 So.2d 896 (Fla. 2008); *Hernandez v. State,* 946 So.2d 1270 (Fla.App. 2007); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007).[4] In this same vein, Petitioner expends some effort to show the statutory link and relationship between a child protection services caseworker and law enforcement in Pennsylvania to gain the perceived benefit of the primary purpose test that is applicable in the event of police involvement pursuant to *Davis*. See Petition at p. 16-18 (discussing a Pennsylvania child protection

[4] But see *State v. Buda,* 949 A.2d 761, 779 (N.J. 2008), in which the court specifically found such a statutory link to be "insufficient" to show a child protection caseworker has become "an extension of law enforcement" when "standing alone".

worker's statutory obligation to coordinate investigations with law enforcement).[5]

As can be seen from the above-cited cases, this argument has gained traction with a number of courts. However, when considering the ultimate issue of whether the declarant is bearing testimony, such reasoning seems particularly spurious.[6] Clearly, a young child who is talking to a "cop" would objectively have a different mindset than one who is talking to a child protection worker in blue jeans on her grandparents' front porch. However, as seen above, some courts would shun this fact-driven approach in favor of looking for the statutory or theoretical link. Respondent submits that *Crawford* and *Davis* do not sanction such a pursuit and that it stands in contradiction to *Bryant's* directive that "In determining whether a declarant's statements are testimonial,

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[5] But see Justice Baer's concurring opinion in the instant case, *Commonwealth v. Allshouse,* 985 A.2d 847, 869 (Pa. 2009), in which he made it clear that Pennsylvania's statutory scheme in no way makes a child protection worker an "agent" of law enforcement. His point is that although the statutory scheme encourages cooperation between agencies, it doesn't mandate it nor does it make child protection workers subject to the demands of law enforcement officials.

[6] Respondent is not arguing that all of the statements involved in the above cases were nontestimonial. Rather, Respondent merely questions the courts' methods and reasoning as not being consonant with this courts'. These courts did not even engage in any analysis of the formality or other circumstances that bore on the issue of the declarant's state of mind. Rather, once the link to law enforcement was established with no "ongoing emergency", the issue was settled.

courts should look to all of the relevant circumstances." *Bryant, supra,* at 1162.

Courts are also ignoring other clear limitations that this Court explicitly imposed on its holding in *Davis.* For instance, even in cases where the courts have explicitly found no substantial link to law enforcement whatsoever, they have still applied the primary purpose test of *Davis,* which, of course, was created presumably to address cases with police involvement. See e.g. *State v. Buda,* 195 N.J. 278, 949 A.2d 761 (2008) (although finding that CPS worker was acting completely independently of law enforcement, court employed primary purpose test and found statements made to a child protective services worker to be nontestimonial because of an ongoing emergency).[7] In addition to the above language of *Davis'* which imposes limits on its application to cases involving police interrogation, the Court further circumscribed the reach of its decision by stating that the holding was germane to "the cases before us and those like them" as well as "the rule we adopt for the narrow situations we address." See *id*. at 830, n. 5, 126 S.Ct. at 2278. Despite this obvious limiting language, a cursory scan of the above cases and many of those cited by Petitioner reveals that courts have mechanically applied its holding to cases that bear absolutely no factual relationship to the facts in either *Davis* scenario. See e.g. *State v. Hopkins,* 154 P.3d 250 (Wash.App. 2007);

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[7] The Ohio Supreme Court is a noteworthy exception to this trend. In *State v. Stahl*, 111 Ohio St. 3d 186, 855 N.E.2d 834 (2006), it shunned the primary purpose test when police interrogation was not involved in favor of an "objective witness test" pursuant to the "third *Crawford* formulation" of core class statements.

Rangel v. State, 199 S.W.3d 523 (Tex.App. 2006); *Contreras, supra; In re Rolandis G.,* 902 N.E.2d 600 (Ill. 2008), *Bobadilla v. Carlson,* 575 F.3d 785 (8th Cir. 2009).[8 9 10]

In the light of *Bryant,* it is now clear that many courts have been engaging in insubstantial, insufficient and misguided analysis of all the relevant circumstances.

THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO CORRECT THE WIDESPREAD MISAPPLICATION OF CRAWFORD AND DAVIS

Notwithstanding that *Bryant,* like *Crawford* and *Davis* involves police interrogation, the precepts found therein provide an excellent rubric through which this Court can now, through the instant case, correct state

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[8 9 10] Although Petitioner lists *Bobadilla* as the one federal circuit court authority that held that statements made by a child to a child protection worker are testimonial, it should be noted that, in that case, a police officer was in the room and observed the entire interrogation. This took place after the police officer had questioned the child himself previously. See *id.* at 787-88. Similar circumstances are also present in other of the cases cited b Petitioner such as *Henderson, Snowden, T.P. v. State,* and *Sithavath,* etc. It also bears mention that a number of the cases that Petitioner cites for the proposition that the subject courts have held child declarant statements to a child protection worker to be testimonial, in fact, involve "forensic interviews" (i.e. interviews done at a child advocacy center that involve structured questioning, videotaping or observation through one-way glass). These sorts of interviews bear far more formality than the interview in question in the instant case and are therefore not analogous to the case *sub judice.*

and lower federal courts' faulty application of *Crawford* and *Davis* in cases involving child declarants and child protection workers. Despite the facts being quite distinguishable, there is much useful instruction that can be gleaned from the commentary of the Court and careful study of how it analyzed the facts and made its ultimate determination. As summarized above, it would appear that the *Bryant* court employed a "totality of the circumstances"-style test in which it proposed that all relevant aspects of the encounter in which the subject statements were made must be analyzed in order to determine whether the declarant was "bearing testimony" ("In determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances." *Bryant, supra,* at 1162).

Indeed, the decision of the Pennsylvania Superior Court in the instant case is remarkably consistent with the reasoning of the *Bryant* court notwithstanding the fact that it was decided almost four years prior to that decision. For instance, where the *Bryant* court stated that a finding of an ongoing emergency was not necessarily dispositive of the testimonial inquiry, that the objectively determined motives of both the declarant and interrogators are relevant and that the level of formality attendant to the interrogation is also important, the Superior Court stated,

> "The Court's application of the primary purpose test, as gleaned from the above passages, implies that a number of factors must *all* be considered in determining whether a statement is testimonial; the use of the word "and" indicates that both prongs of the test must be satisfied

> before a statement can be considered testimonial. In satisfying the first half of the *Davis* test by determining whether the statement being examined was given during an ongoing emergency, only one factor needs to be examined—the temporal relation of the statement being examined to the wrong the statement describes….
>
> "In sum, we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in Davis." *Commonwealth v. Allshouse,* 924 A.2d 1215, 1221, 1223 (Pa.Super. 2007).

It is also striking that four years prior to the *Bryant* court stated that the purposes of both the declarant and the questioner should both be examined, the Superior Court said this,

> "Satisfying the primary purpose prong of the *Davis* test, in contrast, encompasses examination of two factors. The first factor that must be considered is the objective intent of the declarant and the objective intent of the questioner in giving and eliciting the statement being considered…." *Id.* at 1221.

And, in the same manner that the *Bryant* court urged the importance of examining the formality or lack thereof in the given situation, the Superior Court said,

> "Furthermore, the environment in which the statement was given, including the attendant formalities, must also be considered. ("And finally, the difference in the level of formality between the two interviews is striking ... McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even ... safe.")…In sum, the Court's primary purpose test seems to be a variant of the totality of the circumstances test with parameters that are more specifically defined. *Id.* at 1221.

In this same vein, it is noteworthy to also point out that, just as this Court assigned great importance to the fact that the interrogation of Covington took place outside in a gas station parking lot and not in a police station, likewise, the Superior Court placed importance on the fact that Geist's interview of A.A. was very informal (it took place outside on a porch with others being able to interrupt at any time, Geist was in blue jeans, etc.). See *id.* at 1223.

Based on its proper consideration of all the factors the *Bryant* court advocated should be considered, the Superior Court held that "it would be absurd to assume A.A. had intended to give statements for use in a legal proceeding" and that "Geist's *primary purpose* in interviewing A.A. was not to establish past events which would be potentially relevant in a criminal trial, but to ensure both A.A. and her siblings' welfare was secure while they remained in the custody of their grandparents." *Id.* at 1223.

The Pennsylvania Supreme Court's analysis of the instant case after this Court's GVR with instructions to consider the case in light of *Bryant* was also spot-on. After engaging in a careful and thoughtful analysis of the relevant factors highlighted by this Court in *Bryant* as well as the Superior Court (i.e. the objectively determined purposes of the parties involved in the production of the statement[11], the level of formality of the interview, etc.), the court came to the unanimous conclusion that A.A.'s statements were not testimonial. In so doing, the Court also, following the lead of *Bryant* and its directive to examine all of the relevant circumstances, took into account A.A.'s tender age in determining that her statements were not testimonial. In that regard, the court stated that,

> "…we agree with the position taken by the Colorado Supreme Court in *People v. Vigil:*
>
> An assessment of whether or not a reasonable person in the position of the declarant would

[11] The Court also credited the Superior Court's holding that Geist's primary purpose was to protect A.A.'s and her sibling's welfare. In his concurring opinion, with regard to the issue of Geist's purpose for the interview with A.A., Justice Saylor noted and quoted 23 Pa.C.S. §6362(a) (responsibilities of county child protective services is to "receive and investigate all reports of child abuse….for the purpose of providing protective services to prevent further abuses to children and to provide…those services necessary to safeguard and ensure the well-being and development of the child and to preserve and stabilize family life wherever appropriate."). Although he also noted that county agencies are duty-bound to coordinate investigations with law enforcement, this reference was obviously meant to highlight that the child protective services function is clearly independent of law enforcement. *Allshouse, infra.* at 189-90.

> believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis. 127 P.3d 916, 925 (Colo.2006) (citing, *inter alia, Lagunas v. State,* 187 S.W.3d 503 (Tex.App.2005) (considering a declarant's age as a circumstance relevant to the inquiry of whether the child's statement constituted testimonial evidence)).
>
> Indeed, we conclude this approach is consistent with *Bryant* 's requirement that a court consider *all of the relevant circumstances* when determining whether a declarant's statements are testimonial…" *Commonwealth v. Allshouse*, 36 A.3d 163, 181 (Pa. 2012).

In this regard, it bears mention that Petitioner persists in his claim that the age of the declarant is not a proper consideration ("Nothing in this framework turns on the age of the witness…"). See Petition at p. 36-37. Indeed, Respondent does not understand how Petitioner can even advance this argument in light of *Bryant's* general directive that "all of the relevant circumstances" (including the objectively determined purposes of both declarant and questioner) should be considered in the testimonial inquiry as well as its specific statement that, "The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose

formed would necessarily be a testimonial one." *Bryant*, *supra*, at 1159, 1161. Certainly, if the personal characteristic of one's medical condition should be examined to determine the declarant's capacity and purpose, if any, in making the subject statements, then the age of declarant is just as germane to the inquiry. In his dissent, Justice Scalia also saw the capacity of the declarant to form a purpose in making his statements as a possibly important question although he did not believe that the facts in *Bryant* warranted such analysis. See *id.* at 1169 ("How to assess whether a declarant with diminished capacity bore testimony is a difficult question, and one I do not need to answer today.") (Scalia, J., dissenting).

THIS CASE WOULD ALLOW THE COURT TO CLARIFY IMPORTANT ASPECTS OF CRAWFORD, DAVIS AND BRYANT

In addition to the instant case providing a complete trial record and well-reasoned applications of this Court's precedent by the Pennsylvania state courts, this case also would allow this Court to answer compelling questions that should be answered to provide clarity to this entire realm of Confrontation Clause jurisprudence. The following aspects of *Crawford* and its progeny can be further elucidated: 1) Whether "police interrogation" is limited to actual law enforcement officers or, in the alternative, whether they can have agents or proxies that are treated the same for Confrontation Clause purposes. Respondent submits, for reasons already stated above, that this Court should hold that its definition of "police" should only apply to those persons whom a reasonable, objective person in the position of the declarant (with

the physical characteristics of the actual declarant) would have reason to believe have the duty and ability to act on the information the declarant provides to bring formal charges against the accused. Respondent submits that police interrogation is obviously given the status as belonging within the "core class" of possibly testimonial statements because, if the fact that the interviewer is a police officer is known to the declarant, the declarant would thus necessarily have the knowledge that her statements are going to be documented and acted upon possibly as the basis of a formal accusation. Justice Scalia confirms this contention in his *Bryant* dissent, stating, "(…The identity of an interrogator, and the content and tenor of his questions, can bear upon whether a declarant intends to make a solemn statement, and envisions its use at a criminal trial…"). See *Bryant, supra,* at 1169 (Scalia, J., dissenting); 2) The Court could also resolve the question of if the interviewer is not considered a police officer, then what particular analytical construct should be employed in order to determine whether or not the subject statements are testimonial? As this Court stated in *Davis*, "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis, supra,* at 2274, n. 2. Clearly, that time has now come. This Court's precedents to date have not given it the opportunity to pass on this important question. It still remains to be seen whether this Court would favor an "objective witness" test pursuant to the language of *Crawford*[12] or if it would merely adapt its "primary purpose" test *a la*

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[12] See e.g. *State v. Stahl*, *supra*, at 196, 855 N.E.2d at 844.

Williams v. Illinois, 132 S.Ct. 2221 (2012) (DNA lab report not testimonial because its primary purpose was not for "accusing a targeted individual" but rather to "catch a dangerous rapist who was still at large"); 3) Even if Geist is found to be an agent of police, this case would provide the Court with the opportunity to correct misapprehensions of this Court's precedent by promulgating the more nuanced inquiry of *Bryant* in this particular factual scenario. This would encourage courts to examine all the circumstances and not merely rest their decisions on the issue of whether there is an ongoing emergency present. This type of logic has clearly now been discredited by *Bryant*; 4) In a related inquiry, if this Court would find that there was no ongoing emergency present in the instant case, it would give it the chance to further shed light on its statement in *Bryant* that "…there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony"; 5) This case will also provide a general vehicle for this Court to provide guidance on the proper treatment of the statements of a young child within this Court's Confrontation Clause jurisprudence? *Bryant* certainly seems to indicate that such a declarant's limited understanding and perception about the legal framework in which she was entangled should be taken into account in determining whether she "bore testimony", however, the only way to make this clear is for this Court to act on a case such as this.

CONCLUSION

In conclusion, the Respondent would submit that this Court could bring much-needed guidance and clarity to its Confrontation Clause jurisprudence in the realm of child declarants and child protection workers. Faulty paradigms that have been employed by state and lower federal courts deciding such cases can now be exposed for what they are. Many of these courts undertook a mechanical analysis of peripheral issues and rested their decisions on those issues while ignoring the central question of whether, based on all of the relevant circumstances, the child was "bearing testimony". This area of law is in disarray and cries out for this Court's guidance and direction.

Respectfully Submitted,

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