

No. 19-13474

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

OCT 25 2018

OFFICE OF THE CLERK

CHRISTOPHER ANDREW TANK,

Petitioner,

v

MICHIGAN,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE MICHIGAN SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI

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By: Christopher A. Tank  
Petitioner in *Pro Se*  
1727 W. Bluewater Hwy.  
Ionia, Michigan 48846

**QUESTION(S) PRESENTED FOR REVIEW**

- I. WHETHER TESTIMONIAL DYING DECLARATIONS VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT; AND, WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED?**
  - (A) WHETHER THE STATEMENTS MADE BY MR. ARCH WERE TESTIMONIAL?**
  - (B) WHETHER THE STATEMENTS ELICITED HAD A PREJUDICIAL EFFECT ON THE TRIAL?**

## **LIST OF PARTIES**

All parties appear in the caption of the case on the coverpage.

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## **REFERENCE TO OPINIONS**

The July 29, 2019, Michigan Supreme Court Order Denying Leave to Appeal is published as *People v Tank*, 931 NW2d 307 (July 29, 2019); MSC Dkt No. 157935.

The April 19, 2018 Michigan Court of Appeals opinion is published as *People v Tank*, 2018 Mich App Lexis 1704 (April 19, 2018); COA Dkt No. 335366.

Both opinions are reproduced in the appendix to this petition.

## **STATEMENT OF JURISDICTION**

Petitioner seeks review of the July 29, 2019 Judgment by the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal, *People v Tank*, 931 N. W. 2d 307 (July 29, 2019); MSC Dkt. No. 157935.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S.C.S. Fed. Rules Evid. R. 804(b)(2)**

*Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil case, a statement that the declarant's death to be imminent, made about its cause or circumstances.

### **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 of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### **U.S. Const. Amend. XIV § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF CASE

On May 13, 2015, Robert Arch was shot outside of his girlfriend's house. 9-year old Andrew Kirchoff witnesses a man sitting in the passenger seat of a green car shoot Mr. Arch while another person drove the car (Record 867). 10-year old Brianna Daniels witnesses the car leave the scene after the shooting, and then witnesses everybody coming out of the house (Record 372-373). Stacy Phillips (Mr. Arch's girlfriend) heard the shots and then ran outside where Mr. Arch tells her "Call the cops. Tell them Chris Tank." (Record 218). Another neighbor, Heidi St. Charles, who did not see the shooting, also witnesses Ms. Phillips come out of the house after the shooting (Record 323). Her boyfriend, Adam Dorr, then calls the police.

In response to the call, Alpena Police dispatched officers to secure the scene. The first responding officer to the scene was Sergeant Gohl. The scene was blocked off and they were holding EMS until Officer Gohl secured the scene.

**Officer Gohl:** . . . They had already sent EMS towards the scene. However, they were holding them until my arrival. Once on the scene, I pulled up to the residence and could see a male subject on the lawn of 725 Sable, on his back. There was a couple females near him (Record 390).

After being advised that the suspect had left the scene and determining that the situation was under enough control that he did not fear for their safety he called in EMS to tend to Mr. Arch.

**Officer Gohl:** . . . I then advised dispatch that the ambulance crew could come into the scene. I did not see any dangers at that point. I was advised by one of the females that the suspect had left the scene (Record 391).

**Officer Gohl:** He was gravely injured. At that point I did not see any kind of threat. This is a very common thing when we get dispatched to an incident to where there could be some sort of danger to responding paramedics and firemen where they would hold them back. Let's say, a block away from the scene. And then once we arrive, we do not see any kind of threats, then we would tell dispatch, our dispatch center, through our

radio that they can go ahead and send in the ambulance crew. And they were probably approximately a block away (Record 392).

The Trial Court's official record for July 25, 2016, reflect Officer Gohl's testimony.

Upon arriving on the scene with two other paramedics, Dean Rivard noticed multiple law enforcement agents. Amongst them was Officer Gohl tending to Mr. Arch (Record 144).

**Mr. Black** (Prosecutor): So, you arrive on the scene, you're there with your team. There's five of you. Tell me what transpires. So, you see that Sergeant Gohl is there and you said he's doing what?

**Mr. Rivard** (Paramedic): Well, he was holding the patient's head and appeared to be holding his airway open.

**Mr. Black**: Okay. And what did you do?

**Mr. Rivard**: At that point it was just approaching the patient and being sure that the patient is breathing at that time. What do we have for wounds? I mean, we didn't know where the gunshot wounds are at this point, or if the patient's even hit at this point, you know. So, obviously, he's injured because he's motionless on the sidewalk. Like I said, he was very pale in color and diaphoretic (Record 429).

Mr. Rivard continues to tend to Mr. Arch and while placing him on the backboard to transport him to the hospital he asked Mr. Arch "Who did this to you?" To which, Mr. Arch responds "Tank." (Record 433). Officer Gohl overhears this interaction while helping place Mr. Arch on the backboard (Record 394).

The Trial Court's official record for July 25, 2016, reflect the testimony of Brianna Daniels, Stacy Phillips, Heidi St. Charles, Officer Gohl, and Dean Rivard.

Petitioner Tank was arrested and subsequently charged and tried in the Alpena County (Michigan) Circuit Court on a charge of First-Degree Murder in the shooting death of Robert Arch.

On July 22, 2016, an evidentiary hearing was held to determine the admissibility of the statements made by Mr. Arch implicating Mr. Tank as the shooter. After hearing testimony from Dean Rivard and Sergeant Gohl, the Trial Court made its ruling:

**The Court:** The question about the admissibility of those statements, either "Tank" or "Chris Tank" is controlled by MRE 804(2). And surprisingly enough, we have not found a lot of law on dying declarations. It's odd. But what we did find is set out pretty clearly here. The declarant is unavailable as a witness, which Mr. Arch is. He's deceased. Statements was made while believing that the declarant's death was imminent, and the statement concerned the cause or circumstances of the declarant of what the declarant believed to be impending death.

This, frankly, is the classic definition of a dying declaration such that, you know, the jury may weigh it factually. But in terms of its admissibility, I find that it is admissible.

(Apx. C) at 166.

The Trial Court's official docket entries for July 22, 2016, reflect the statements made to responding officers as a dying declaration.

#### **DEFENDANT'S MOTION ON VICTIM'S RESPONSES (Apx. C).**

After allowing the statements to be admitted as a dying declaration, a trial ensued. The defense at trial was that there was a second person shooter. This was supported by the testimony of 9-year old Andrew Kirchoff. He describes the shooter to have been sitting in the passenger seat, having short brown hair and a goatee, and wearing a green t-shirt (Record 867). Mr. Tank has blond hair, no facial hair, was wearing a white t-shirt, and was driving his car when arrested (Record 551). The only person besides Mr. Arch who identifies the shooter as Mr. Tank, is Stacy Phillips, however, both Brianna Daniels and Heidi St. Charles testified to her coming out of the house after the incident had taken place (Record 323, 372-373).

The Trial Court's official record for July 27, 2016 reflects the testimony of Andrew Kirchoff.

During closing arguments, the prosecutor places a photograph of the deceased lying on the operating table after surgery:

**Mr. Black:** Who do we have that saw that?

(At 11:13 a.m., Exhibit on Screen)

**Mr. Black:** That guy. That guy. That guy was looking down the barrel of the gun and he saw it. He's speaking to you from the grave. He's speaking to you through the words from Sergeant Gohl and Dean Rivard (Record 934-935).

Petitioner Tank was subsequently convicted on July 28, 2016, and was sentenced to life imprisonment without parole.

Petitioner exercised his right to appeal to the Michigan Court of Appeals. Petitioner argued that although the statement may qualify as a "Dying Declaration" under MRE 804(b)(2), it qualifies as "Testimonial," and therefore, its admission violated his Sixth Amendment right of confrontation. Alternatively, Petitioner argued that defense counsel was ineffective for failing to object on constitutional grounds.

The Michigan Court of Appeals disagreed, stating that "Dying declarations are admissible as an historical exception to the Confrontation Clause" citing *People v Taylor*, 275 Mich App 177, 183; 737 NW2d 790 (2007). The Court of Appeals explained:

Defendant cites *Michigan v Bryant*, 562 U.S. 344; 131 S. Ct. 1143; 179 L. Ed. 2d 93 (2011), in support of his argument that dying declarations are not admissible unless they are non-testimonial. In that case, however, the Supreme Court acknowledged the historical-exception thesis proposed in *Crawford v Washington*, 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004), but noted that the state failed to preserve its argument with regard to dying declarations, and therefore, it expressly declined to "decide that question here." *Bryant*, 562 U.S. at 351 n. 1. Thus, *Bryant* does not repudiate this Court's holding in *Taylor* that dying declarations are admissible as an historical exception to the Confrontation Clause.

(Apx. B) at 2-3.

Petitioner appealed to the Michigan Supreme Court and was denied leave to appeal because it did not find that the questions presented should be reviewed by that court. (Apx. A).

## **ARGUMENT**

### **I. TESTIMONIAL DYING DECLARATIONS VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT. PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED.**

This case presents a basic problem underlying much of this Court's recent Confrontation Clause jurisprudence: Whether the Sixth Amendment incorporates an exception for testimonial dying declarations. This question was raised in *Crawford v Washington*, 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004), as well as *Michigan v Bryant*, 562 U.S. 344; 131 S. Ct. 1143; 179 L. Ed. 2d 93 (2011), however, both declined to decide the question at that time. In *Crawford*, this Court left open the question of whether the "testimonial" distinction is applicable to statements that fall within the common-law rule that dying declarations are admissible. Similarly, this question was raised in *Bryant*, however, this Court had not decisively taken a position on the issue since the prosecution only established the factual foundation for the statements as excited utterances and did not address their admissibility as dying declarations. *Bryant*, fn. 1.

In this case, the statement was admitted as a "dying declaration" from the Trial Court. The argument on appeal was that the statements qualified as "testimonial" and should be protected under the Sixth Amendment's Confrontation Clause. The Michigan Court of Appeals did not opine on whether the statements were testimonial or not. Rather, it held that since the issue has yet to be determined by the Supreme Court, *Bryant* had not repudiated that Court's holding in *People v Taylor*, 275 Mich App 177, 183; 737 N. W. 2d 790 (2007), that dying declarations are admissible as an historical exception to the Confrontation Clause. Were this

question to be addressed by this court, the statements by Mr. Arch could be considered testimonial and may be barred by the Confrontation Clause. To determine this, we need to determine whether the statements were testimonial.

#### **A. WHETHER THE STATEMENTS MADE BY MR. ARCH WERE TESTIMONIAL?**

This Court has laid out a framework for determining when the admission of testimony made by an unavailable witness who has not been subject to cross-examination violates the Confrontation Clause. In *Crawford v Washington*, 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004), this Court held that the admission of testimonial statements made by unavailable witnesses without cross-examination violate the Confrontation Clause of the Sixth Amendment. Testimonial at the least included statements to the police upon questioning. *Crawford*, *supra*. In the instant case, the questioner responded to the scene as a firefighter/paramedic but the first responding police officer, Sergeant Gohl, was tending to Mr. Arch when the question was asked. At the least, the questioner was acting as an agent of the police. In the case of *Davis v Washington*, 547 U.S. 813; 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006), this Court further defined "testimonial" as meaning statements made when the surrounding circumstances objectively indicate that there is no ongoing emergency, and the primary purpose of the questions that elicit the statement is to establish or prove past events potentially relevant to a later criminal prosecution. *Davis*, *supra*. at 822.

The situation in *Davis* and *Bryant* differ significantly from the situation in the instant case. *Davis* describes an "ongoing emergency" as where the "primary purpose" focuses the participants on ending a threatening situation. *Davis* at 832. And *Bryant* reaffirms that view. *Bryant* at 346. In *Davis*, the statements were taken when Michelle McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. Thus, the statements

were necessary to be able to *resolve* the present emergency as opposed to learning what happened in the past. *Davis*, *supra*. She was describing events as they were actually happening, while she was *not* separated from her attacker and while she was still in the midst of a "threatening situation." In the present case the threatening situation had ended; the assailant had left the scene and the accuser was answering questions pertaining to an event that had already taken place. The situation here is more similar to the situation in *Hammon v Indiana*, 547 U.S. 813; 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006), where the scene was *secured* and the immediate threat had subsided. Just as Amy Hammon had told police that things were fine and there was no immediate threat to her person, Stacy Phillips told Officer Gohl that the suspect had left the scene. And he, Officer Gohl, testified that the scene was secure and he confirmed that after being advised that the suspect had left the scene, he did not see any further threat, he proceeded to call in EMS. Likewise, there were several other witnesses who confirmed that there was a shooting and that the suspect had left the scene. Unlike *Bryant* where there were no witnesses, making the interrogators primary purpose was motivated by their unawareness of what had happened. Here, the shooting was well established. The case of *Hammon* is slightly more formal in the sense that the police had Amy Hammon sign an affidavit. However, in that case this Court reaffirmed its view in *Crawford* that the Confrontation Clause does not distinguish between statements either reduced to in writing or embedded in the memory of the interrogating officer, and could be considered testimonial regardless. Referring to the terms of *Webster, An American Dictionary of the English Language* (1828), 'Testimony" is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Davis* at 827, citing *Crawford*. *Davis* also involves statements made to 911 operators and considers the statements to be made to "agents of law enforcement." However, as in *Crawford*, this Court

found it unnecessary at that time to make a definitive definition of whether and when statements made to someone other than law enforcement personnel would be considered "testimonial," stating "for the purposes of this opinion (and without deciding the point)" were considered to be "acts of the police." *Davis* fn. 2.

The case of *Michigan v Bryant*, 562 U.S. 344; 131 S. Ct. 1143; 179 L. Ed. 2d 93 (2011), provides us with additional clarification of what *Davis* meant by "primary purpose of the interrogation" is to enable police assistance to meet an ongoing emergency. *Bryant* confirms that the ultimate testimonial inquiry is whether an interrogation's "primary purpose" was to enable police assistance to meet an ongoing emergency; and that an emergency focuses the participants on *ending* a "threatening situation" as opposed to providing facts relevant to a later criminal prosecution. *Bryant* also reiterates that the absence of formality does not necessarily indicate the presence of an emergency or the lack of testimonial intent, rather it tells us to objectively evaluate the statements and actions of *both* the declarant and the interrogators to determine whether the statements in question were testimonial or not, since both interrogators and declarants may have mixed motives; police officers dual responsibilities as both first responders and criminal investigators may lead them to act with different motives simultaneously or in quick succession. *Bryant*, *supra*.

*Bryant* presents a case where a gun was used, as opposed to *Davis* and *Hammon* where the situation was domestic abuse. The *Bryant* Court determined a dying statement made while the declarant *was* separated from his attacker to be non-testimonial. The circumstances were objectively viewed to determine the "primary purpose" of the interrogation. The Court considered the circumstances surrounding the shooting and whether or not the primary purpose was to obtain testimony. The Court pointed to the fact that there was nothing that Covington (the

declarant) said that would indicate that the cause of the shooting was purely the result of a private dispute or to indicate that the threat had ended. The Court also pointed to the fact that his answers were punctuated with questions about when Emergency Medical Services would arrive. Thus, the Court could not say that the primary purpose of the declarant was to establish or prove past events for a later prosecution but rather for the purpose of resolving an ongoing emergency. The Court then looked to the primary purpose of the interrogators. The Court explained that the scope of an emergency in terms of its immediate threat, will often depend on the type of dispute involved. The Court noted that upon arrival, one of the police officers questioned the gas station attendant before questioning Covington, and he could not describe any sort of confrontation to suggest that the shooting was purely the result of a private dispute or to suggest that the threat had expired. Hence the primary purpose of their questions to Covington was to determine if there was an ongoing emergency. When questioning the declarant, the Court concluded that nothing Covington said to interrogators indicated that the shooting was purely the result of a private dispute or that the threat from the shooter had ended. Covington did not tell them what words were exchanged between him and *Bryant* only that he fled the perceived threat. The police did not know who Covington was or who *Bryant* was nor were they informed of any confrontation or reason for the shooting. Unlike the present where the confrontation and the events leading up to the shooting and the shooting itself was well documented and supported by several witnesses. The *Bryant* Court took this as evidence of an ongoing emergency, making the statements non-testimonial.

Additionally, in *Bryant* the police asked their questions to the declarant prior to securing the scene. Here, the first responder to the scene was a police officer, Sergeant Gohl. He testified that he called in Emergency Medical Services (EMS) to tend to Mr. Arch after determining that

he "did not see any kind of threat" (Record 392). The situation was under enough control that he, the first responder, did not see an immediate threat. Rivard, the questioner, had acknowledged that the police "had cleared the scene" before EMS was allowed in (Record 427). At this point the "threatening situation" was over. The statements were *not* made in the midst of an ongoing emergency. Furthermore, if he was truly concerned about their safety, the most obvious person to ask upon arriving on the scene would have been Officer Gohl. Dean Rivard's questions were solicited for the purpose of a later prosecution. He didn't ask "Where is the shooter?" which would've been the most logical question. His question "Who did this to you?" clearly asks Mr. Arch to implicate a person in the crime. As the Honorable Justice Scalia recognizes in *Bryant* "they instead primarily asked questions with little, if any, relevance to Covington's dire situation. Police, paramedics, and doctors do not need to know . . . the name of the shooter . . . to provide proper medical care." *Bryant* at 385. Here, the interrogator's primary purpose was not to resolve any ongoing emergency, as the immediate threat was neutralized. The statements were clearly elicited for the purpose of a later prosecution.

In deciding whether the *declarant's* primary purpose of the declarant was to resolve an ongoing emergency the Court in *Bryant* pointed to the fact that the declarant's questions were punctuated by knowing when EMS would arrive. In this case, EMS had already arrived so it cannot be said that Mr. Arch's primary purpose was intended to resolve the immediate threat to his person. In determining whether the declarant's statements were motivated at resolving the threat to others and the public, the *Bryant* Court pointed to the fact that the first question posed to Covington "What happened?" was an informal one and not a question that would have focused him on the future prosecutorial use of his statements. The Court took this as evidence that the primary purpose was not to prosecute the suspected shooter. In this case, the question posed to

Mr. Arch "Who did this to you?" does not have that informal nature. The question clearly asks Mr. Arch to implicate a shooter in the presence of police officers. From Mr. Arch's perspective his statements had little value except to ensure the arrest and eventual prosecution of Mr. Tank. As the Honorable Justice Scalia recognizes "He (Covington) knew the 'threatening situation' had ended. And even if *Bryant* had pursued him (unlikely), . . . it was entirely beyond imagination that *Bryant* would again open fire while Covington was surrounded by five armed police officers. And Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others." *Bryant* at 385.

The decision in *Bryant* relies heavily on the fact that the police could not determine whether the shooting was the result of a private dispute or whether the threat had ended. Here, the declarant knew the shooting was the result of a private dispute between him and Mr. Tank; and likewise knew that the "threatening situation" had ended. From Mr. Arch's perspective it would be completely unreasonable to think that the shooter would come back at this point to shoot him some more or to shoot anyone else; especially in the presence of "multiple law enforcement agents" (Record 144). Unlike *Bryant* where the primary purpose was motivated by law enforcement's unawareness of the situation, here the events of the shooting were well established. There were witnesses at the crime scene who attested to the private nature of the shooting and confirmed that the immediate threat was over. Stacy Phillips testified that Mr. Tank and Mr. Arch were angry at each other, and that there was a confrontation that resulted in the shooting of Mr. Arch. There were also several other witnesses who confirmed that the shooter had left the scene. Likewise, Officer Gohl testified that after being informed that the suspect had left the scene, he saw no further threat and proceeded to call in EMS. At this point the "threatening situation" was over. The statements were not made in the midst of an ongoing

emergency. Here, the statements were elicited for the purpose of a later prosecution. The primary purpose of the interrogation was *not* to resolve an ongoing emergency but rather the statements were solicited for the purpose of establishing facts relevant to a later prosecution. The statements made by Mr. Arch were testimonial.

**B. THE STATEMENTS ELICITED HAD A PREJUDICIAL EFFECT ON THE TRIAL.**

Petitioner Tank is entitled to relief for the violation of his Confrontation rights and/or the reasonable probability prejudice standard for ineffective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v Washington*, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984); Const. 1963, Art. 1 § 20. The Trial Court committed error in allowing Mr. Arch's dying declaration as his statements were clearly a Confrontation Clause violation. The defense was that there was a second shooter. Hence the main issue of the case was Mr. Tank's identity as the shooter. This was supported by Andrew Kirchoff's testimony. Mr. Arch was the only one with a good view of the shooting, since the only other witness who identified the shooter, Stacy Phillips, witnesses the shooting after shots had been fired. Mr. Arch then tells Ms. Phillips "Call the cops. Tell them Chris Tank." He tells her to implicate Mr. Tank clearly for the purpose of a later prosecution. At this point her future testimony becomes tainted with the dying declaration. She might have felt like she had an obligation to the deceased to convict Mr. Tank. Furthermore, Mr. Arch's statements were the only thing that brought credibility to Ms. Phillips' testimony. It was the sole piece of evidence that led the jury to believe her testimony, since both, Brianna Daniels and Heidi St. Charles both witness Stacy Phillips come out of the house after the shooter had left the scene. And it was her testimony the prosecution used to charge and eventually convict Mr. Tank. Her testimony was backed by his statement, without it the prosecution wouldn't have worked. As a result, Mr. Arch's statements were the most important testimony the

State offered. Mr. Tank being denied his right to cross-examine Mr. Arch, was never afforded the opportunity to question Mr. Arch's perception of the events, his mental state at the time, or the opportunity to impeach Mr. Arch. Similarly, Mr. Tank was never given the opportunity to clarify what Mr. Arch meant by his statements: Did he mean Mr. Tank was the shooter, or did he just suspect Mr. Tank of being responsible? For instance, if Mr. Tank is the only one in the car that Mr. Arch knows, he's probably just going to implicate Mr. Tank. He's not going to take the time to explain the intricacies of the situation in the state he's in. Coincidentally Mr. Arch's unchallenged statements served to convince the jurors to disregard Andrew Kirchoff's testimony which said that Mr. Tank was not the shooter. There is at least a reasonable probability that the outcome of the case would have been different absent the statements admission.

Furthermore, the statements cannot be deemed harmless. The federal harmless-error statute, 28 U.S.C.S. § 2111, emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence that possibly influenced the jury *adversely* to a litigant cannot be conceived of as harmless. In deciding what is harmless error, the question for the Court is whether there is a *reasonable possibility* that the evidence complained of might of contributed to the conviction. *Chapman v California*, 386 U.S. 18; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967).

The testimony of Stacy Phillips was the most important piece of evidence the prosecution offered. It was the driving force of the entire prosecution. The only thing that gave weight to her testimony were the statements made by Mr. Arch. As a result the statements by Mr. Arch were the most important testimony the State offered. The prejudicial effect became even more evident when the prosecutor said in closing arguments "Who do we have that saw that. That guy. That guy. That guy." followed by placing a photo of the deceased on the operating table

and saying, "He's speaking to you from the grave. He's speaking to you through the words from Sergeant Gohl and Dean Rivard." At that point the jury became *adversely* influenced by the dying declaration. From beginning to end, the entire proceeding was infected with the dying declaration. There is more than a reasonable possibility that the evidence contributed to the conviction. The statement by Mr. Arch was elicited for the purpose of a prosecution; and then exploited by the prosecution at trial to obtain a conviction.

## CONCLUSION

This Court has never decided on the constitutional nature of dying declarations. Obviously, there have been numerous State cases ruling on dying declarations. However, this Court has yet to take a definitive position on this issue. The closest it has come to doing so was in *Crawford* where it first suggested that dying declarations, even if testimonial, *might* be admissible as a historical exception to the Confrontation Clause. *Crawford* at 56. However, this logic still has its roots in reliability of hearsay, *Ohio v Roberts*, 448 U.S. 56; 100 S. Ct. 2531; 65 L. Ed. 2d 597 (1980), a standard which *Crawford* expressly rejected. Not to mention this faulty logic of reliability fails to take into account the presumption of innocence, a cornerstone of this nation's jurisprudence. It would seem if we're moving away from the reliability standard there would be some if not all protection from dying declarations. The Sixth Amendment states it clearly "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with witnesses against him." There are no exceptions built into the constitution. If *Pointer v Texas*, 380 U.S. 400; 85 S. Ct. 1065; 13 L. Ed. 2d 923 (1965), made the Confrontation Clause binding on the States, why are States allowed to make exceptions based on the faulty logic of a now extinct standard. It is true, as The Michigan Supreme Court claims that this Court has not repudiated dying declarations, however it is likewise true that it has not expressly accepted them

or especially in light of its recent decision in *Crawford*. Until this Court makes a definitive decision on the issue, *Crawford* leaves the door open and dying declarations should be barred by the Sixth Amendment's Confrontation Clause. As recognized by the Honorable Justice Scalia in *Bryant*, "the framers could not have envisioned such a hollow constitutional guarantee. No framing-era confrontation case that I know of, neither here nor in England, took such an enfeebled view of the right to confrontation." *Bryant* at 389. Perhaps this is the reason for not building in exceptions to our rights in the constitution.

Furthermore, if the "primary purpose" of an interrogation is not to create a record for trial, why are we allowing it to be used for that purpose? As recognized in *Crawford*, involvement of government officers in the production of testimony with an eye toward trial presented unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the framers were keenly familiar. *Crawford*, *supra*. As mentioned in *Bryant*, depending on the medical condition of the declarant, the statements may often be reflexive. Where it may be difficult to determine if Mr. Arch's intentions were to provide facts relevant to a later prosecution, his statements were clearly provoked for that purpose.

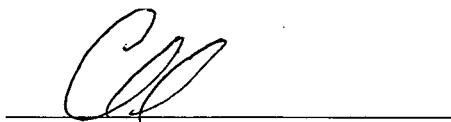
This case presents this Court with an opportunity to decide whether and when statements made to someone other than law enforcement personnel are "testimonial," a question that was explicitly reserved in *Davis* as well as *Bryant*.

The Michigan Court of Appeals opinion and the Michigan Supreme Court's decision to deny the Petitioner's application depends on a decision yet to be determined by this Court. Petitioner therefore respectfully requests that this Honorable Court grant certiorari to resolve this issue.

**RELIEF REQUESTED**

For these reasons, Petitioner asks that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted,



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Christopher Andrew Tank  
Petitioner in *Pro Se*  
1727 West Bluewater Highway  
Ionia, Michigan 48846

Date: October 24, 2019