No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS JEFFREY
Petitioner
v.

COMMONWEALTH OF PENNSYLVANIA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether statements made by a suspected sexual assault victim at the emergency room to hospital personnel during the sexual assault evidence collection exam are "testimonial" evidence subject to the demands of the Confrontation Clause under *Crawford v. Washington,* 541 U.S. 36 (2004).

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The opinion of the Pennsylvania Supreme Court is reported as *Commonwealth v. Thomas Jeffrey*, 395 WAL 2017 (Nov. 18, 2020); petition for allowance of appeal, denied (Jun. 2, 2020). The opinion of the Pennsylvania Superior Court is reported as *Commonwealth v. Thomas Jeffrey*, 1787 WDA 2015 (July 14, 2017). The opinion of the Allegheny County Court of Common Pleas is reported as *Commonwealth v. Thomas Jeffrey*, CP-02-CR-13390-2014.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court issued an order denying petitioner's Petition for Allocator conviction on November 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The conviction challenged by the petitioner therefore constitutes a "final judgment" under Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 20, 2014, Thomas Jeffrey (hereinafter "Mr. Jeffrey") was charged with Rape Forcible Compulsion, 18 Pa. C.S.A. §3121(a)(1), Statutory Sexual Assault: 11 Years Older, 18 Pa. C.S.A. §3122.1(b), Incest, 18 Pa. C.S.A. § 4302, Criminal Attempt – Contact/Comm. w/Minor – Sexual Abuse, 18 Pa. C.S.A. §901(a), Corruption of Minors, 18 Pa. C.S.A. § 6301(a)(1)(i), Endangering Welfare of Children, 18 Pa. C.S.A. § 4304(a), Indecent Assault Person Less 16 Years Age, 18 Pa. C.S.A. § 326(a)(8), Corruption of Minors, 18 Pa. C.S.A. §6301(a)(1), Endangering Welfare of Children, 18 18 Pa. C.S.A. §4304(a), Indecent Assault Person Less 16 Years Age, and Rape of Child, 18 Pa. C.S.A. §3121(c). At the Preliminary Hearing on October 1, 2014, Magisterial District Judge Carolyn Bengel dismissed Rape of Child, but held all other counts for court.

On October 24, 2014, Mr. Jeffrey filed a Petition for Writ of Habeas Corpus. On January 13, 2015, Mr. Jeffrey filed an Omnibus Pre-Trial Motion to Suppress Evidence. On May 5, 2015, Mr. Jeffrey filed a joint Motion for Continuance/Motion for Medical Records. On May 13, 2015, Mr. Jeffrey filed a Motion in Limine. On May 21, 2015 the Trial Court orally denied the Motion in Limine and Petition for Writ of Habeas Corpus. However, the Trial Court denied Mr. Jeffrey a continuance to seek an Interlocutory Appeal to this Honorable Court. At the conclusion of the jury trial, Mr. Jeffrey was convicted of all counts.

On August 17, 2015, Mr. Jeffrey filed Notice of Defendant's Intention to Seek an Oral Motion for Extraordinary Relief and a Motion to Bar Application of Mandatory Minimum Sentence. On August 20, 2015, the Trial Court denied Mr. Jeffrey's Oral Motion for Extraordinary Relief and subsequently sentenced him to an aggregate sentence of confinement of ten (10) to twenty-two and half (22 ½) years at SCI Camp Hill, followed by seven (7) years of probation consecutive to confinement. Following sentencing, Mr. Jeffrey filed a Post-Sentence Motion on August 21, 2016, including a Motion for New Trial based on after discovered evidence, specifically a letter of recantation by J.J. On August 21, 2016, the Trial Court held an In-Camera Hearing with J.J. in chambers. On October 13, 2015 the Trial Court concluded a hearing on Mr. Jeffrey's Post-Sentence Motion, and orally denied it at the conclusion of the hearing.

On November 12, 2015, Mr. Jeffrey filed a Notice of Appeal to the Superior Court. On November 13, 2015, the Trial Court ordered Mr. Jeffrey to file a Concise Statement of the Errors to be Complained of on Appeal. Mr. Jeffrey subsequently filed his timely Concise Statement on January 5, 2016. On April 22, 2016, the Trial Court issued its Opinion. Mr. Jeffrey filed his Brief for Petitioner on August 22, 2016. The Commonwealth filed its Brief for Appellee on November 21, 2016. Mr. Jeffrey filed

his Petitioner's Reply Brief on December 2, 2016. The Superior Court filed its opinion, affirming the Judgement of Sentence, on July 14, 2017.

Mr. Jeffrey filed his Petition for Reargument/Reconsideration by the Panel *en banc* on July 28, 2017. The Superior Court filed an order denying Reargument on September 19, 2017. Mr. Jeffrey filed a Petition for Allocatur with the Supreme Court of Pennsylvania on October 18, 2017. The Supreme Court of Pennsylvania issued an order denying Mr. Jeffrey's petition on or about November 18, 2020.

B. FACTUAL HISTORY

On June 20, 2014, Harrison Township Police Officer Christopher Burns ("Officer Burns") received a report of sexual abuse. He responded to the Jeffrey Residence and spoke with J.J., the complainant, and contacted the Allegheny County Police Department for further instruction.

Detective Corrine Orchowski ("Detective Orchowski"), of the Allegheny County Police, directed Officer Burns to transport J.J. to Children's Hospital by ambulance for the purposes of a rape kit. Detective Orchowski and Detective Michael Kuma ("Detective Kuma"), met J.J. at the hospital at 2:25 a.m. and interviewed her for approximately one hour. During this interview, J.J. told the detectives that her father, the Petitioner, had sexually assaulted her earlier that evening. After concluding J.J.'s interview, law enforcement requested a rape kit to collect forensic evidence. However, J.J. refused.

Mr. Jeffrey was arrested on June 20, 2014 and was transported to County Police Headquarters. There, he waived his *Miranda* rights and provided an audiotaped statement. At the Preliminary Hearing, J.J. did not testify. Instead, the Commonwealth called Detective Orchowski, over defense objection, to testify what J.J. had said to law enforcement at the hospital on June 20.

Prior to trial, the Commonwealth informed the Trial Court that J.J. would not testify at trial. Mr. Jeffrey presented a Motion in Limine to prevent the Commonwealth from introducing J.J.'s statements obtained at the hospital. The Trial Court held an abbreviated hearing, denied Mr. Jeffrey's attempts to call witnesses, and orally denied the motion.

At trial, the Commonwealth presented eight witnesses. Dr. Toto testified to J.J.'s statements from the hospital, indicating Mr. Jeffrey had sexually assaulted her. Detective Orchowski and Detective Kuma detailed the overall investigation, including Mr. Jeffrey's statement, that they first questioned J.J. at the Hospital at 2:25 a.m., and their interview lasted for one hour. Crime Laboratory technicians Elizabeth Wisbon and Sara Bittner detailed the physical evidence. Mr. Jeffrey testified for himself that he did not commit the crime and was coerced into making his statement. The Jury returned a verdict of guilty on all counts.

Following the verdict, but prior to sentencing, Mr. Jeffrey's was provided a handwritten letter from J.J.'s licensed social worker, in which J.J. stated she fabricated the allegation against Petitioner. Mr. Jeffrey filed a Notice of Defendant's Intention to Seek an Oral Motion for Extraordinary Relief, which was orally denied prior to sentencing.

The Trial Court sentenced Mr. Jeffrey on August 20, 2015. Mr. Jeffrey subsequently filed a Post-Sentence Motion requesting a new trial citing J.J.'s disclosure of fabrication. During an In-Camera Interview J.J. stated, under oath and in response to questions from the Trial Court, that she fabricated the allegations because she was mad at her father, and wanted attention.

J.J. also divulged at the interview that she had told the Assistant District Attorney and Detective Kuma before the Preliminary Hearing on October 1, 2014 that she had fabricated her allegation. She also testified that Detective Kuma had threatened to imprison her mother and herself if she recanted. At a continued hearing on the Post-Sentence Motion, Detective Kuma denied that J.J. had recanted her allegations before the Preliminary Hearing. The Trial Court denied the Post-Sentence Motion.

REASONS FOR GRANTING THE WRIT

This case presents a question that has caused substantial disagreement among the Nation's state supreme courts and federal circuit courts: in those cases where a sexual assault victim is unavailable at trial and not subject to cross-examination, does the Confrontation Clause of the Sixth Amendment permit the government to introduce into evidence the statements of a victim of sexual assault through a sexual assault nurse examiner who provides medical treatment to the victim, but also acts as a law enforcement agent tasked with obtaining statements from the victim and collecting forensic evidence to be used by the government in a criminal trial?

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *U.S. Const., Amend. VI.* In 1980, the United States Supreme Court, in *Ohio v. Roberts*, 448 U.S. 56 (1980), held that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant, provided the statement was surrounded by "adequate indicia of reliability." *Roberts*, 448 U.S. at 66. Such indicia existed when the testimony being considered either fit within a "firmly rooted hearsay exception," or contained "particularized guarantees of trustworthiness." *Id.*

However, in *Crawford v. Washington,* 541 U.S. 36 (2004), this Honorable Court overruled its *Roberts* decision. In doing so, the *Crawford* Court criticized the *Roberts* "indicia of reliability" test as a departure from the common law principles that formed the basis of the Confrontation Clause. Accordingly, the *Crawford* Court held the Confrontation Clause prohibits out-of-court *testimonial* statements by a witness, *regardless of whether the statements are deemed reliable by the trial court*, unless, (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.*

Crawford, 541 U.S. at 67-68 (emphasis original).

Two years after the Supreme Court's *Crawford* decision, the Court had the opportunity to clarify the difference between testimonial and nontestimonial hearsay in *Davis v. Washington,* 547 U.S. 813 (2006). The *Davis* Court ultimately concluded that in determining whether statements are testimonial or nontestimonial:

> 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**.

Davis. 547 U.S. at 822 (emphasis added).

As established by *Crawford* and its progeny, "testimony," is understood as a solemn declaration made with the "purpose" of establishing a fact. *Crawford*, 541 U.S. at 51. Thus, *Crawford* formulated a "core class of 'testimonial' statements" which might be characterized as "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." *Id*. at 52.

This Honorable Court, most recently in *Michigan v. Bryant*, 562 U.S. 344 (2011), further delineated the distinction between testimonial/non-testimonial statements by instructing our courts to "determine the **primary purpose of the interrogation** [from which the statements were generated] by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs."

The Supreme Court of Pennsylvania, cognizant of *Bryant*, further held:

> [I]n analyzing whether a statement is testimonial, and, therefore, subject to the protections of the Confrontation Clause under *Crawford,* a court must determine **whether the primary purpose of the interrogation was to establish or prove past events relevant to a later criminal prosecution**. In making the determination as to the primary purpose of an interrogation, a court first should determine whether the interrogation occurred during the existence of an ongoing emergency, or what was perceived to be an ongoing emergency. Although the

> existence—actual or perceived—of an ongoing emergency is one of the most important factors, this factor is not dispositive because there may be other circumstances, outside of an ongoing emergency, where a statement is obtained for a purpose other than for later use in criminal proceedings. In determining the primary purpose of an interrogation, a court must also objectively evaluate the circumstances surrounding the interrogation, including the formality and location, and the statements and actions of both the interrogator and the declarant.

Commonwealth v. Allshouse, 36 A.3d 163, 175-76 (2012) (emphasis added).

Bryant and its progeny, establish a controlling totality of the circumstances test to determine the "primary purpose of the interrogation." The court must not only determine whether or not the interrogation occurred during the existence of an "ongoing emergency," but the court must also objectively evaluate the circumstances surrounding the questioning, "including the formality and location, and the statements and actions of both the interrogator and the declarant."

Presently, there is a deep conflict among the Nation's state supreme courts and federal circuit courts on the admissibility of a SANE's testimony based on the victim's statements when the victim is unavailable for cross-examination and trial. Indeed, commentators have noted that "courts are not currently consistent in their analyses of the admissibility of SANE factual testimony." *See, e.g.,* Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Exception and the Confrontation Clause,* 50 Am. Crim. L. Rev. 277, 296 (Winter 2013). The conflicting rules that have divided the courts have not been lost on the Nation's state supreme courts. As the Kansas Supreme Court recently observed, "numerous other states have considered the question of whether statements made by sexual assault victims to medical professionals are testimonial. Our review of the decisions cited by the parties and many other decisions reveals that jurisdictions are divided on this issue." *State v. Miller,* 264 P.3d 461, 562 (Kan. 2011). Some state supreme courts have held that the Confrontation Clause prohibits a SANE from offering testimonial statements from a victim of sexual assault, regardless of the fact that some medical treatment was provided by the SANE during the forensic examination. *See generally State v. Hooper,* 176 P.3d 911 (Idaho 2007); *Hartsfield v. Commonwealth,* 277 S.W.3d 239 (Ky. 2009); *Medina v. State,* 143 P.3d 471 (Nev. 2006); *State v. Romero,* 156 P.3d 694 (N.M. 2007); *State v. Cannon,* 254 S.W.3d 287 (Tenn. 2008); *In re Rolandis G,* 902 N.E.2d 600 (Ill. 2008); *State v. Blue,* 717 N.W.2d 558, 565 (N.D. 2006); *State v. Payne,* 694 S.W.2d 935, 942 (W. Va. 2010). However, other state supreme courts have held to the contrary, finding that a SANE

or other similar medical forensic examiner may testify concerning statements made by an unavailable victim of sexual assault because the medical purpose of a SANE or forensic examiner's evaluation trumps any concerns that arise under the Confrontation Clause. *See generally State v. Stahl,* 855 N.E.2d 834 (Ohio 2006); *State v. Miller,* 264 P.3d 461 (Kan. 2011); *State v. Arroyo,* 935 A.2d 975 (Conn. 2007).

In the present case, the victim was **not** transported to Children's Hospital because she was independently seeking medical treatment to ailment. The victim did not, of her own volition, report this matter to law enforcement. Nor did the victim, independent of law enforcement direction, report to any hospital for treatment in connection with the aforementioned allegations. Rather, the victim was transported to the hospital *at the express instruction of law enforcement* with the primary purpose of establishing and ultimately proving "past events" for use in a subsequent criminal prosecution of the Petitioner.

To be sure, Harrison Township Police Officer Burns arrived at the victim's residence at approximately midnight on June 20, 2014. After the officer "confirmed that we believe a crime had been committed," he contacted the Allegheny County Police Department for instruction on how to proceed:

Defense:	You had a conversation with Detective Orchowski I believe you said?
Officer:	Yes.
Defense:	She told you, "Okay, I understand what's going on. Have them transported to Children's by ambulance," correct?
Officer:	Yes.
Defense:	Okay. And you did that?
Officer:	Yes.

Likewise, Detective Orchowski testified that Allegheny County Police involvement began when Officer Burns requested assistance "with a child sexual assault **investigation**." Detective Orchowski then instructed Officer Burns to have the victim transported to Children's Hospital:

Defense:	When you received the call from Officer Burns indicating that there was potential sexual assault that occurred, you instructed Officer Burns to have the alleged victim transported down to Children's Hospital of Pittsburgh, correct?
Detective:	Yes, that is correct, along with her mother.

Finally, Officer Burns testified J.J. was transported to the hospital for the purpose of administering a *rape kit*.[1] There is only *one* purpose to administer a rape kit: "collect any type of evidence when a patient comes in and states they are a victim of sexual assault" This is even more evident when the "evidence collection kit" was to be performed *at the conclusion* of the detective's questioning of J.J.

In *Hammon v. Indiana*, the consolidated case decided alongside *Davis*, this Honorable Court concluded the victim's statements were testimonial, holding that, "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." *Davis*, 547 U.S. at 829. There was "no emergency in progress." *Id*. The officer questioning the victim "was not seeking to determine ... '*what is happening*,' but rather '*what happened*.'" *Id*. (emphasis original).

The present matter is factually similar to *Hammon*. There, law enforcement was asking questions to build a case against the defendant, rather than attempting to resolve a then-existing, fluid and unfolding incident. When government agents generate out-of-court statements with an eye toward criminal prosecution, *Crawford* and its progeny rightly forbid the use of those statements absent confrontation.

When compared to *Bryant*, it becomes clear that the detectives here were not responding to an "ongoing emergency" at Children's Hospital. In *Bryant*, the police responded to a call that a man had been shot, but "did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred." *Bryant*, 562 U.S. at 375. The police questioned the victim in a scenario "where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [him]." *Id*. at 374.

Furthermore, in *Ohio v. Clark*, 135 S.Ct. 2173 (2015), this Honorable Court concluded the statements made by a three-year-old declarant to his preschool teachers that the defendant had assaulted him, were non-testimonial:

> [T]he emergency in this case was ongoing, and the circumstances were not entirely clear. [The victim's] teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and

[1] Or "evidence collection kit" as referenced during trial. *See also*, 35 Pa. C.S.A. §10172.2, which defines "Rape Kit" as "a sexual assault evidence collection kit."

> [the victim's] answers were primarily aimed at identifying and ending the threat."

Clark, 135 S.Ct. 2181. The teachers' questions were intended to assess the situation, the threat to the child's immediate safety, and possible danger to the potential victim and to other children if they were returned to the custody of the defendant. Conversely, in the instant matter, there was no pressing need to "assess the situation." Law enforcement already knew *what* they were investigating (a report of sexual assault); the *where* (the Jeffrey residence); the *when* (several hours prior); the *who* (Mr. Jeffrey); and the *identity* of the complaining victim (J.J.).

Thus, the record is clear that by the time J.J. was questioned by police, they already knew the nature of the allegation (sexual assault), had developed a suspect (Mr. Jeffrey), and J.J. had been removed from any immediate danger. Likewise, when J.J. arrived at Children's Hospital, she was present solely at the *direction of law enforcement*, to be interviewed by the detectives, and to collect physical evidence for a criminal prosecution of Mr. Jeffrey. None of the statements provided to law enforcement were made in the present tense. Nor were they contemporaneous to events as they were occurring, or alleged any ongoing threat or presence of the alleged offender. Rather, the statements described an event that *had* occurred several hours earlier, at a different location. Under these circumstances it cannot be said that any emergency was "ongoing."

While the existence, actual or perceived, of an ongoing emergency is one of the most important factors in determining the "primary purpose" of the interview; it is not alone "dispositive because there may be other circumstances, outside of an ongoing emergency, where a statement is obtained for a purpose other than for later use in criminal proceedings." *Allshouse*, 36 A.3d at 175–76. The Supreme Court of Pennsylvania has held that our courts, "[M]ust also objectively evaluate the circumstances surrounding the interrogation, including the formality and location, and the statements and actions of both the interrogator and the declarant." *Id*. 36 A.3d at 176.

The high court's analysis in *Davis* illustrates how a more formal interview, removed from the crime scene, in a structured environment, strengthens a finding of testimonial statements:

> It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house. While these features certainly strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about

> past criminal events—none was essential to the point. It was formal enough that [the declarant's] interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]." What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, is shared by [the declarant's] statement here. **Both declarants were actively separated from the defendant**—officers forcibly prevented [the defendant] from participating in the interrogation. **Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed**. **And both took place some time after the events described were over.** Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.

Davis, 547 U.S. at 830 (internal citations omitted) (emphasis added).

The encounter between J.J. and the detectives here lacked the informal, harried 911 call as in *Davis,* and is similar, though not identical, to the structured, station-house interview conducted in *Crawford*. J.J. herself described the formality and location of the detectives' interview:

> The Court: Where were you when [the detectives] asked you questions?
>
> J.J.: In the hospital room, but they shut the door, and they have those curtains. They closed the curtains. Nobody could see in the door. Somebody did come in. They told them to leave. So it was just me and them.

While J.J.'s hospital room may not have formally been titled "police interview room", it functioned as the equivalent. The detectives here controlled access to the "subject" and limited contact with her by denying the doctors and her mother entry. With the setting secured, the detectives then questioned J.J. regarding the details of her accusation:

> Then we got to the hospital, and I remember [the detectives] didn't let anybody come in. I kind of got set in a room. Then the detectives came

> in. I had three things I check for, camera and any recording device or if they were going to have me sign anything. I noticed none of these were there. They opened the door, shut the door. Nobody was there with me, then – and pretty much gave me options of, you, "Well, did he" – drew some cells and said, "Did he do this, or did" – it was like, "You had to pick one or, you know, you're going to get me in trouble." I didn't know how to back out.

(R. 321b). Moreover, the detectives made detailed inquires to J.J. and when she became resistive to their investigation, they instructed her to "pick" an answer:

> The Court: Tell me what you remember of [your statements to the detectives].
>
> J.J.: I don't remember a lot. I mean, it was – **I didn't like what the detectives were asking me because it was very detailed** and it was this or this pretty much. I couldn't really tell you a lot about it because I was just picking. I wasn't really paying attention.
>
> The Court: So when you say you were just picking are you telling us that the police didn't ask you what happened?
>
> J.J.: Not from what I remember. I mean, they just kind of introduced themselves and said, "Okay. We heard that this," and they kind of went from that and ust went into whatever. Well, because I didn't really want to say anything, they were like, "Well, here," and they gave choices. That's pretty much – just pick whatever.
>
> The Court: So they just gave you –
>
> J.J.: I wasn't paying attention.
>
> The Court: -- what kind of choices?
>
> J.J.: Did he do – like, "How many years ago," and they go like, "Five years? Two years? Three years? Pick one of those." Something like that is what the choices would be.

(emphasis added).

As in *Davis*, J.J. was actively separated from Petitioner (she was first transported from the family residence to the Harrison Township Police Department,

then to Children's Hospital); the statements were generated in response to police questioning about potentially criminal events (sexual assault), and took place sometime after the events described were over (approximately four hours).

Mr. Jeffrey further submits J.J.'s age, 15 years old, bolsters his contention she was objectively aware that the statements she was providing to law enforcement would be used in a subsequent prosecution of Petitioner. As our Supreme Court has stated:

> An assessment of whether or not a reasonable person in the position of the declarant would 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**.

Allshouse, 36 A.3d at 181 (quoting *People v. Vigil*, 127 P.3d 916, 925 (Co. 2006) (emphasis added).

When J.J. spoke with detectives, she was not making spontaneous and indiscriminate remarks, unaware of the significance of her accusation, or the chain of events to which it would likely lead. Rather, at 15, the victim could objectively understand that her statements ("My father sexually assaulted me.") would be used by law enforcement to arrest, confine and prosecute Mr. Jeffrey. As well-established by this Court:

> 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Crawford, 541 U.S. at 51. Here, J.J. made a "formal statement" in a structured, controlled environment with law enforcement. She "bore testimony" to the detectives in direct response to their questioning regarding what Petitioner had allegedly done. She provided the specific details of the assault including the time and location it had

occurred. She was not making a "casual remark to an acquaintance" unaware of its potential significance.[2]

It is significant that J.J. testified she knew there would be ramifications for providing false statements to the police:

> The Court: Did you tell [J.J.'s aunt and uncle] [the day of trial] that you were here with them waiting to testify that you wanted to testify?
>
> J.J.: No. Well, I mean, they already knew because I had told them like the day before. I'm like – because I had told them like the day before. I'm like – because they asked me, "Are you nervous?" I'm like, "Not really," because -- just tell the truth. I mean, yeah, **I could have stuff brought against me, but, oh, well, excuse me. It was my consequence. I have to face them.**
>
> The Court: What would you have brought against you?
>
> J.J.: Just for lying pretty much. The statements that I made to the police was all I could think that I could – whatever you can get for that. I don't know.

(emphasis added). This admission strengthens Petitioner's argument that J.J. understood the significance of "bearing testimony" against Mr. Jeffrey (and that there are "consequences" for providing false testimony) when the police questioned her at the hospital.

Therefore, Mr. Jeffrey submits that the statements given by J.J. were testimonial for three reasons. First, there was not an "ongoing emergency" as J.J. was in police custody, the whereabouts of Mr. Jeffrey were known, and there was no immediate risk to the community at large. In addition, the act of the police immediately clearing the hospital room and interrogating J.J. in private clearly created a formal atmosphere. Finally, J.J. appreciated the nature of the questions being asked and their purpose as recited in her post-trial testimony. As such, Mr. Jeffrey's right to confrontation under the United States and Pennsylvania Constitutions was violated.

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[2] Conversely, in *Clark*, one would not objectively conclude that a three-year-old declarant would objectively consider that his statements would lead to the arrest and prosecution of the defendant, nor that he would be called before a jury to swear an oath and have the accusation tested by cross-examination (would understand the very concept of a "jury trial"). Furthermore, a three-year-old is not likely to understand the "consequences" for bearing "false witness."

CONCLUSION

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

Respectfully Submitted,

/s/ Matthew Ness
Matthew Ness
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

No. _____

THOMAS JEFFREY,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5104 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 8, 2021

/s/ Matthew Ness
Matthew Ness, Esq.