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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Petitioner,

v.

RONALD DELESTER BURKE,

Respondent.

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Appeal from the Superior Court of Pierce County  
The Honorable G. Helen Whitener

No. 14-1-04008-5

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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## I. INTRODUCTION

In the middle of the night on July 3, 2009, K.E.H. entered into Tacoma General Hospital. She was alone, injured, crying, and covered with dirt and leaves. K.E.H. told two members of the hospital staff that she was homeless and had just been raped at nearby Wright Park. She was examined by medical staff and cleared to leave the hospital later that morning. However, after having briefly talked to a sexual assault nurse examiner (SANE), Kay Frey, that morning, K.E.H. agreed to wait at the hospital to undergo a sexual assault exam.

Frey began her sexual assault examination of K.E.H. later that afternoon. This type of examination includes both a forensic evidence gathering component and a medical care, diagnosis, and treatment component. During this examination, Frey obtained a history from K.E.H. as to what happened to her at the park. Frey also discovered a cervical injury to K.E.H. that medical staff missed during her earlier examination, and which subsequently had to be examined by a medical doctor, prescribed additional medication to K.E.H., and helped her develop a safety plan as she was homeless and her attacker had not been apprehended.

As K.E.H. died prior to trial, the trial court admitted her statements to Frey as statements for purposes of medical diagnosis and treatment pursuant to ER 803(a)(4) and found that the Confrontation Clause did not

bar their admission. The jury convicted Burke of rape by forcible compulsion.

On appeal, the Court of Appeals held that K.E.H.'s statements to Frey were testimonial, and therefore their admission violated the Confrontation Clause, because "they were made under circumstances that objectively demonstrate that the primary purpose of the exam was to provide evidence for a criminal prosecution." The Court of Appeals also found that the admission of K.E.H.'s description to Frey as to how the rape occurred was not harmless beyond a reasonable doubt. This Court granted the State's Motion for Discretionary Review.

The Court of Appeals erred in its application of the "primary purpose" test when it attempted to extract a primary purpose from the entirety of the conversation between Frey and K.E.H., rather than evaluating the primary purpose of each individual question and resulting statement as this conversation involved both an evidence gathering component and a medical care, diagnostic, and treatment component, neither of which had primacy over the other. The Court of Appeals also erred in finding that the admission of K.E.H.'s description of her attack given for the purpose of medical care, diagnosis, or treatment, was not harmless beyond a reasonable doubt because other overwhelming evidence demonstrated that K.E.H. was raped by forcible compulsion. Finally, public policy supports a reversal of

the Court of Appeals' application of the "primary purpose" test as such a holding would require either a drastic change in how sexual assault examinations are conducted, to the detriment of rape victims, or a denial of justice to society's most vulnerable populations.

## **II. ASSIGNMENTS OF ERROR**

1. The Court of Appeals erred in its application of the "primary purpose" test when it attempted to extract a primary purpose from the entirety of the conversation between a sexual assault nurse examiner and a rape victim rather than evaluating the primary purpose of each individual question and resulting statement in the conversation involving both an evidence gathering component and a medical care, diagnostic, and treatment component, neither of which had primacy over the other.
2. The Court of Appeals erred in finding that the admission of a rape victim's description of her attack given for the purpose of medical care, diagnosis, or treatment, was not harmless beyond a reasonable doubt when other overwhelming evidence demonstrated that the victim was raped by forcible compulsion.

## **III. STATEMENT OF THE ISSUES**

- A. Did the sexual assault examination in this case have dual purposes – a forensic evidence gathering purpose and a medical care, diagnosis, and treatment purpose?
- B. Does the record in this case suggest that the medical purpose of assisting a rape victim was in any way secondary or subordinate to the purpose of gathering evidence of a rape?
- C. Does every conversation, examination, and document as a whole have a primary purpose?
- D. Does the Confrontation Clause require a finding that every multi-purpose conversation must have a primary purpose?

- E. Did the Court of Appeals err when it concluded that the collection of evidence was the primary purpose of the sexual assault nurse examination in this case?
- F. Did the Court of Appeals err in its Confrontation Clause “primary purpose” analysis by failing to consider the individual questions posed and the resulting statements made in the course of the victim’s sexual assault examination?
- G. Did the Court of Appeals err when it applied an all-or-nothing primary purpose Confrontation Clause analysis to a mixed-purpose sexual assault examination, rather than conducting a statement-by-statement analysis?
- H. Should this matter be remanded to the Court of Appeals to conduct a statement-by-statement analysis?
- I. Did the Court of Appeals err when it concluded that the Confrontation Clause “error” in this case was not harmless beyond a reasonable doubt?
- J. Does public policy support a reversal of the Court of Appeals’ application of the “primary purpose” test?

#### IV. STATEMENT OF THE CASE

In the interests of judicial economy, the State adopts the Statement of the Case set forth in the State’s Motion for Discretionary Review.

#### V. ARGUMENT

- A. **THE COURT OF APPEALS ERRED IN APPLYING THE “PRIMARY PURPOSE” TEST TO THE ENTIRETY OF THE CONVERSATION BETWEEN A SEXUAL ASSAULT NURSE EXAMINER AND A RAPE VICTIM RATHER THAN EVALUATING THE PRIMARY PURPOSE OF EACH QUESTION AND RESULTING STATEMENT IN THIS DUAL PRUPOSE CONVERSATION**

The Sixth Amendment to the United States Constitution<sup>1</sup> guarantees criminal defendants the right to confront and cross-examine witnesses against them. The Confrontation Clause prohibits admission of “testimonial” statements unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *see also Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). “[N]ontestimonial statements are outside of the scope of the confrontation clause.” *State v. Wilcoxon*, 185 Wn.2d 324, 331, 373 P.3d 224 (2016) (citing *Davis*, 547 U.S. at 821-24). Confrontation Clause challenges are reviewed de novo. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

This Court recently held that the test to be used for determining whether a statement made to a nongovernmental witness is “testimonial” is the “primary purpose” test. This test asks “whether, in light of all the circumstances, viewed objectively, the “primary purpose” of the conversation was to “create an out-of-court substitute for trial testimony.”” *State v. Scanlan*, 193 Wn.2d 753, 766, 445 P.3d 960 (2019) (citing *Ohio v.*

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<sup>1</sup> The Court of Appeals addressed Burke’s claim solely under the Sixth Amendment as he failed to present any argument establishing that article I, section 22 of the Washington Constitution provides greater protection than the Sixth Amendment. *State v. Burke*, 6 Wn. App. 2d 950, 963 n.2, 431 P.3d 1109 (2018).

*Clark*, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015) and quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). In determining the “primary purpose” of a conversation, “[c]ourts must evaluate challenged statements in context, and part of that context is the questioner’s identity.” *Clark*, 135 S. Ct. at 2182 (citation omitted). “Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.” *Id.* (citation omitted).

In the instant case, it was undisputed that Frey was not a law enforcement official. *Burke*, 6 Wn. App. 2d at 969 n.4. Furthermore, the Court of Appeals specifically recognized that Frey’s examination of K.E.H. had both a forensic (evidence gathering) component *and* a medical treatment and diagnosis component. *Id.* at 969. However, the Court of Appeals concluded that the primary purpose of Frey’s dual-purpose sexual assault examination of K.E.H. was “to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* That conclusion resulted in the Court of Appeals’ holding that every single statement made by K.E.H. to Frey was an inadmissible testimonial statement. *Id.* at 971. This included statements made by K.E.H. to Frey for medical care, diagnosis, and treatment purposes.

Post-*Crawford*, the United States Supreme Court has on several occasions characterized statements made to medical providers for purposes of diagnosis or treatment as nontestimonial and, therefore, not subject to a Confrontation Clause objection. *See Bryant*, 562 U.S. at 362 (statements made for purpose of medical diagnosis are “by their nature, made for a purpose other than use in a prosecution”); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 312 n.2, 174 L. Ed. 2d 314 (2009) (discussing cited cases: “[o]thers are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today”); *Giles v. California*, 554 U.S. 353, 376, 28 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (“[O]nly testimonial statements are excluded by the Confrontation Clause. . . . [S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”); *see also State v. O’Cain*, 169 Wn. App. 228, 241-42, 279 P.3d 228 (2012); *State v. Fisher*, 130 Wn. App. 1, 10-13, 108 P.3d 1262 (2005); *State v. Saunders*, 132 Wn. App. 592, 603, 132 P.3d 743 (2006); *State v. Kimball*, 117 A.3d 585, 595 (Maine 2015); *State v. Muttart*, 116 Ohio St.3d 5, 18, 875 N.E.2d 944, 957 (2007).

In its holding, the Court of Appeals did not consider Frey’s *specific* questions and the responsive statements made by K.E.H. during the course of the sexual assault examination. *Burke*, 6 Wn. App. 2d at 969-970. In

doing so, the Court of Appeals erred as such consideration is required. While the “primary purpose” analysis the Court of Appeals undertook would be appropriate in a homogeneous conversation where there is one easily discernable “primary purpose,” in a conversation with a “dual purpose,” neither of which takes primacy over the other, attempting to nevertheless ascertain a “primary purpose” to categorize the entire conversation while ignoring the context of the particular question and answer is untenable as it can result in either the admission of testimonial statements or the exclusion of nontestimonial statements. For example, in this case, it does not make sense that statements made to a medical provider for the purpose of obtaining treatment should be constitutionally inadmissible only because they were made in temporal proximity to testimonial statements.

Although neither this Court nor the United States Supreme Court has squarely addressed the issue of how to apply the primary purpose test for conversations with multiple purposes, the Confrontation Clause requires a statement-by-statement analysis. See *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1268-69 (9th Cir. 2013) (citing *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) and *Bryant*, 562 U.S. at 365-66) (“We agree that the relevant question under the Confrontation Clause is whether an individual statement is testimonial, not whether an

entire document is testimonial. *See Bryant*, 131 S. Ct. at 1159–60 (indicating that trial courts should determine when a series of statements “transition from nontestimonial to testimonial” and exclude “the portions of any statements that have become testimonial” (internal quotation marks omitted)).”

Document-by-document analysis or conversation-by-conversation analysis is simply insufficient for evaluation under the Confrontation Clause – the primary purpose test should not devolve into an attempt to determine “what a conversation most closely resembles.” If that becomes the case, then the main goal of Confrontation Clause analysis – the exclusion of a declarant’s testimonial statements that have not been subject to cross-examination – will become lost in an amorphous sea of multiple purposes. Simply put, the Court of Appeals erred in concluding that all statements in a conversation between two non-law enforcement officers were inadmissible based on the primary purpose test because this conversation as a whole did not have a “primary purpose.”<sup>2</sup>

Although the Court of Appeals recognized the dual components of the conversation between Frey and K.E.H., its struggle to assign a “primary purpose” to this conversation led it to overlook or gloss over one of these

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<sup>2</sup> Black’s Law Dictionary defines “primary purpose” as “That which is first in intention; which is fundamental. The principal or fixed intention with which an act or course of conduct is undertaken.”

major components. This State does not dispute that this conversation had a forensic/evidence gathering component, but it also had a medical care, diagnosis, and treatment component, which was at least equally important. Nothing in the record supports the proposition that Frey's role as an evidence gatherer had primacy over her role as caregiver. The evidence at best supports the inference that neither purpose had primacy over the other. Nevertheless, the Court of Appeals felt bound to find "the" primary purpose of the conversation. *Burke*, 6 Wn. App. 2d at 570. However, if no one aspect of a conversation has factual primacy over any other aspect of the conversation, then it is error to assign a primary purpose to that conversation. Not every conversation has a primary purpose. If a conversation shifts purpose, or if a conversation has multiple intertwined threads, the reviewing court should address the conversational elements separately.

Here, Frey described the purposes behind her examination:

The purposes are to do the forensic piece: Photographing, taking a history, doing any DNA retrieval that could be done. Another purpose is to provide them with the medical care they need, subsequent to their assault, and provide support and connections for them via advocates and social workers and that kind of thing. So it's to basically manage their case.

6 VRP 545. Patient history is probably the most important thing in the examination. *Id.* When asked why, Frey responded:

Well, this is just medical training in general. History guides everything, and that's true for sexual assault patients as well. So what they tell you, what they can tell you, what they aren't able to tell you, directs you further to what they might need, medically, to figure it out.

*Id.*

During the course of her examination of K.E.H., Frey discovered a bleeding cervical laceration which required the intervention of an OB-GYN doctor. 6 VRP 547. Frey also gave K.E.H. some medications. 6 VRP 557. A safety plan was also discussed. Ex. 19A. As K.E.H. was homeless and her rapist was not yet apprehended, it certainly would appear, despite the Court of Appeals' finding to the contrary (*Burke*, 6 Wn. App. 2d at 969-970), that this exam was conducted during an ongoing emergency.<sup>3</sup> See *Scanlan*, 193 Wn.2d at 768-769 (medical/patient care purposes include helping ensure that the patient has a safe place to go to after discharge).<sup>4</sup>

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<sup>3</sup> Although K.E.H. remained at the hospital for several hours after she was medically cleared to leave so that Frey could examine her because she did not want her attacker "to be out there doing this to someone else" Ex. 19F, "[d]uring an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated." *Bryant*, 562 U.S. at 367-70.

<sup>4</sup> Although K.E.H. had been medically cleared from the hospital, and according to respondent could have just "gone home" (Supplemental Brief of Respondent re: *State v. Scanlan* at 5; Supplemental Brief of Respondent at 11), that was not an option for the homeless victim here.

Rather than using a test designed to force a court to artificially ascertain a “primary purpose” of an entire conversation where there is no such primary purpose, using the proper test of evaluating the primary purpose of an individual question and the resulting statement in dual purpose conversations, would lead, for example, to a finding that the response by K.E.H to Frey’s “what happened?” statement is non-testimonial.

Here, Frey asked K.E.H. what happened in Wright Park, and K.E.H. responded:

I was sitting there rolling myself a cigarette. I know he covered my mouth because I would have been screaming for help. I was taken to the ground. I don’t know if he tried choking me or not. The next thing I knew I was taken to the ground, my pants were off and stuff and he was inside me. It was over and done. with. I think he told me to keep my mouth shut. That’s all I remember, then I came here. I walked over to the hospital.

Ex. 19E. This type of question and resulting response, as this Court has recently found, is undoubtedly for the purpose of medical care, diagnosis, and treatment. *See Scanlan*, 193 Wn.2d at 768 (it is medically necessary to determine how injuries occurred, including the timing and mechanism of injuries, to determine the seriousness of injuries, the tests to be run, and the treatment to be provided). In fact, this statement led to the discovery of a cervical injury the initial

treating medical personnel missed, the prescription of additional medications, and the development of a safety plan.

Accordingly, evaluating the primary purpose of this particular question and resulting statement would lead a court to determine that such a statement is made for the primary purpose of medical care and treatment and would thus be admissible as a nontestimonial statement.<sup>5</sup> The Court of Appeals, by attempting to find a primary purpose in a dual purpose conversation erroneously excluded this statement, and every other statement made to Frey by K.E.H. for the purpose of medical care, diagnosis, and treatment, despite the specific content of this statement. For the reasons set forth above, this was in error. This Court should reverse the decision of the Court of Appeals and remand this matter to the Court of Appeals to apply the statement-by-statement test to each statement provided by K.E.H. to Frye during her sexual assault examination.<sup>6</sup>

**B. EVEN IF THE COURT OF APPEALS PROPERLY APPLIED THE “PRIMARY PURPOSE” TEST, THAT COURT ERRED**

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<sup>5</sup> Ferreting out the admissibility of specific statements from a larger whole is not a task for which courts are unfamiliar. See *State v. Roberts*, 142 Wn.2d 471, 491-499, 14 P.3d 713 (2000).

<sup>6</sup> Although respondent argues in his Supplemental Brief of Respondent that K.E.H.’s statements to Frey were also inadmissible under the state rules of evidence (Supplemental Brief of Respondent at 14-17), that state evidentiary issue is beyond the scope of review of this Court. See RAP 13.7(b). In any event, petitioner’s argument regarding this claim of state evidentiary error is fully set forth in its Respondent’s Brief filed in the Court of Appeals (Respondent Brief at 14-17) and will not be repeated her.

**BY FINDING THAT THE ADMISSION OF THE RAPE VICTIM'S DESCRIPTION OF HER ATTACK WAS NOT HARMLESS BEYOND A REASONABLE DOUBT**

Even if this Court finds that the Court of Appeals properly applied the primary purpose test in excluding all of the statements made by K.E.H. to Frey during her sexual assault examination as testimonial statements, including those statements which had a medical care, diagnostic, or treatment purpose, the Court of Appeals erred in finding that K.E.H.'s statement to Frey in response to Frey's "what happened" question was not harmless beyond a reasonable doubt.<sup>7</sup>

Under the constitutional harmless error standard, the State has the burden of establishing harmless error beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). "A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error." *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The court must examine whether the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Id.*

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<sup>7</sup> As the Court of Appeals found that this particular statement was both testimonial and not harmless beyond a reasonable doubt, it did not evaluate for harmlessness any other statement made by K.E.H. to Frey. If this Court affirms the Court of Appeal's holding that all statements made by K.E.H. to Frey are testimonial, but agrees with the State that this particular statement is harmless beyond a reasonable doubt, the State would ask that this matter be remanded to the Court of Appeals to evaluate each of the statements made by K.E.H. to Frey determine whether they are harmless beyond a reasonable doubt.

As set forth above, during her sexual assault examination, Frey asked K.E.H. what happened in Wright Park, and K.E.H. responded:

I was sitting there rolling myself a cigarette. I know he covered my mouth because I would have been screaming for help. I was taken to the ground. I don't know if he tried choking me or not. The next thing I knew I was taken to the ground, my pants were off and stuff and he was inside me. It was over and done, with. I think he told me to keep my mouth shut. That's all I remember, then I came here. I walked over to the hospital.

Ex. 19E. The Court of Appeals found that absent this statement, there was insufficient evidence of “forcible compulsion”<sup>8</sup> to support the jury’s verdict of rape by forcible compulsion and thus held that the “improper” admission of this statement was not harmless beyond a reasonable doubt. *Burke*, 6 Wn. App. 2d at 971-973. In doing so, however, the court ignored or glossed over facts from the record that overwhelmingly demonstrate “forcible compulsion” independent of this statement.

In the middle of the night, K.E.H. showed up dirty and disheveled at a hospital. She was injured, crying, alone, and had dirt and grass in her hair. 8 VRP 855. K.E.H. told two hospital staff members that she had been raped in the park. 8 VRP 856; 7 VRP 689. As a result, Officer Phan conducted a rape investigation at Wright Park. 8 VRP 841, 846-847. K.E.H.’s statements about being raped in the context of seeking medical

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<sup>8</sup> “Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact.” *State v. Ritola*, 63 Wn. App. 252, 817 P.2d 1390 (1991).

attention for injuries suffered during that rape provides persuasive evidence that she was raped against her will.

Although many of the injuries sustained by K.E.H. could have been as a result of either consensual or nonconsensual sex, the cervical injury she suffered was consistent with nonconsensual sex. 6 VRP 547, 550. Although evidence was also presented that K.E.H.'s cervix was more fragile than it normally would be due to the cervical cancer that ultimately claimed her life (6 VRP 637, 643), the Court of Appeals overlooked an extremely important fact and one that would likely be very persuasive to the jury. Here, presented to the jury through interviews with law enforcement, Burke denied *ever* participating in *any* sexual activity with K.E.H. 8 VRP 801-811.

Even without K.E.H.'s statement to Frey, the jury was presented with evidence that she showed up dirty and disheveled at a hospital in the middle of the night, injured, crying, and alone, claiming that she had just been raped in the park; she was able to describe the area of the park in which she claimed to have been raped (7 VRP 684-687, 692; 8 VRP 855); she had injuries, including a bleeding cervix, that was consistent with sexual activity; she was homeless and had not had sexual intercourse in the previous 15 years (6 VRP 620); and Burke flatly denied having any type of sexual contact with K.E.H., despite his DNA being present on her.

Even with the prosecutor's reliance during closing argument on K.E.H.'s description to Frey as to what happened, the other overwhelming evidence presented provided proof beyond a reasonable doubt that K.E.H. was raped by forcible compulsion. In doing so, the jury reasonably rejected the alternative scenario that K.E.H., suffering from at least the early stages of cervical cancer (according to the defense) had a consensual sexual encounter for the first time in 15 years with a man who denied any such encounter, despite the presence of his DNA. The State submits that the evidence of K.E.H.'s condition, properly admitted statements, physical injuries, and Burke's denial of sexual activity despite the presence of his DNA, even without the statement at issue, overwhelming shows that K.E.H. was raped by Burke with forcible compulsion and therefore any erroneous admission of this statement was harmless beyond a reasonable doubt.

**C. PUBLIC POLICY SUPPORTS A REVERSAL OF THE COURT OF APPEALS' APPLICATION OF THE "PRIMARY PURPOSE" TEST AS SUCH A HOLDING WOULD REQUIRE EITHER A DRASTIC CHANGE IN HOW SEXUAL ASSAULT EXAMINATION ARE CONDUCTED, TO THE DETRIMENT OF RAPE VICTIMS, OR A DENIAL OF JUSTICE TO SOCIETY'S MOST VULNERABLE POPULATIONS**

If this Court affirms the Court of Appeals' holding that all of the statements made by K.E.H. to Frey during her sexual assault examination, including those that were made for the purpose of medical care, diagnosis, or treatment, were testimonial because a portion of such an examination

includes a forensic or evidence gathering component, the State would be forced to drastically change the way sexual assault nurse examiners are used. Although respondent claims that affirming the Court of Appeals' holding would only impact "a limited number of cases where the victim is unable to testify or be cross-examined" (Supplemental Brief of respondent at 13-14), respondent overlooks the fact that sexual assault nurse examiners do not know at the time of their evaluations whether or not such a victim will be available for testimony at a trial that may not occur until years later.

Accordingly, any such sexual assault examination procedures would have to treat all situations as if the victim may not appear at trial. That procedure would require hospitals to completely segregate post-emergency room medical care and counseling examinations from forensic evidence gathering examinations. Affirming the Court of Appeal's holding would also likely necessitate a separate nurse for each examination, with the medical nurse "untainted" by any association with law enforcement. Although such an approach would help ensure evidence preservation, it would also complicate and delay the rape victim's hospital experience, subjecting her to multiple examinations, and make the whole process more expensive. Abandoning the evidence collection process entirely to law enforcement, as opposed to trained nurses, would also deprive the rape victim of a trained sexual assault nurse's sensitivity and skill when she

might need them the most. At any event, the same medical questions are going to be asked of rape victims for the same medical purposes.

If no such changes to the current practice are made, as respondent suggests, then the Court of Appeal's holding would likely have a disproportionate impact in the pursuit of justice on behalf of the most vulnerable members of society. Those most likely to not be available for a subsequent trial, which can often take place a number of years after a rape, would include the sick and the homeless (as in this case), the mentally ill, the poor, and certain segments of the immigrant population. Among these classes of people are those most likely to be transient and therefore, even if still alive, less likely to be able to appear for trial.

By instead holding that in a conversation involving two or more purposes, neither of which is primary, each question and resulting statement must be analyzed for its primary purpose, this Court will continue to allow trained and experienced sexual assault nurse examiners to do their jobs, which includes care and treatment to rape victims, while also allowing a court to accurately evaluate whether statements made by a victim to this nurse are testimonial. This approach to dual purpose conversations will continue to honor the Confrontation Clause by excluding statements that are given in response to forensic or evidence gathering questions, while

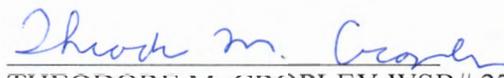
allowing statements made for the purpose of medical care, diagnosis, or treatment to be allowed into evidence.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the Court of Appeal's decision and remand this matter to the Court of Appeals to apply the statement-by-statement primary purpose test to each questions asked by Frey and the resulting statement provided by K.E.H. during her sexual assault examination. If this Court affirms the Court of Appeal's holding that all statements made by K.E.H. to Frey are testimonial, but agrees with the State that the particular statement describing K.E.H.'s rape is harmless beyond a reasonable doubt, the State requests that this matter be remanded to the Court of Appeals to evaluate each of the statements made by K.E.H. to Frey determine whether they are harmless beyond a reasonable doubt.

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
THEODORE M. CROPLEY WSB# 27453  
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

2/3/20 \_\_\_\_\_  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**February 03, 2020 - 1:56 PM**

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