No. 103327-3
COA No. 57412-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross Petitioner,

v.

MICHAEL BROWER
AKA ZILLA CROWLEY,

Appellant/Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder, Judge
Cause No. 20-1-00760-34

ANSWER TO PETITION FOR REVIEW AND CROSS PETITION FOR REVIEW

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2. If this Court accepts review of the issue raised by the petitioner, whether this Court should also review the Court of Appeals' finding that a statement made by the 9-year-old child of the victim and defendant, while still under the stress of the event, was testimonial despite the child obviously being under the affect of trauma and the Deputy's testimony that the brief question asked was made while he was still determining if there were other actors or other victims in the residence, was testimonial under Confrontation Clause analysis.

B. STATEMENT OF THE CASE

Thurston County Sheriff's Deputies responded to a 911 call, where the caller, the Petitioner, Zilla Crowley,[1] reported that they shot their wife in the chest. RP 848, 851, 854, 878.[2] Thurston County Deputy Jordan Potis arrived with Deputy Kyle Kempke and directed Crowley out of the residence. RP 882. Potis moved past Crowley and began caring for the victim, who was lying on her back a few feet inside of the doorway. RP 883. Potis testified he began checking for signs of life and found none so he began CPR. RP 883. Deputy Potis asked Deputy Kempke to bring an AED to assist. RP 884. Potis noticed that there appeared

[1] At the time of the incident, the defendant used the name Michael Austin Brower. During the proceedings, they indicated a preference for the name Zilla Crowley. In portions of the transcripts, the Appellant is referred to as Michael Brower, Ms. Brower, Zilla Brower, and Zilla Crowley. In this brief, the Appellant is referred to as Zilla Crowley to avoid any confusion. The victim Tuyen Brower is referred to as Tuyen or Tuyen Brower.

[2] Citations to the multiple volumes of the report of proceedings are done in the same fashion as the Brief of Respondent in the Court of Appeals.

to be an AR-style rife laying on the ground about an arm's length from the female, who was identified as Tuyen Brower. RP 885, 890. Potis handed over lifesaving efforts to medics when they arrived on scene. RP 887.

Deputy Kempke noted that as he and Potis initially approached the residence, Crowley was with Tuyen Brower - -performing CPR. RP 933. Deputy Potis asked Crowley to step outside and Kempke asked Crowley to step over to him. RP 933-944. Kempke detained Crowley and Crowley made "howling sobby sounds and then kind of calmly said, I understand." RP 933-934. Crowley indicated that their kids were in the back room of the house. RP 935.

Kempke assisted Potis with applying the AED and then went down the hallway and located 9-year-old PB. RP 935-936. Kempke testified that PB said "Mom and Dad were arguing, and mom was throwing things." RP 973. PB indicated she stepped out of the room and her dad told

them to go back in the room. At that point she said that she heard a loud bang, and her dad was screaming on the phone to somebody. RP 973. Kempke described PB getting increasingly distraught while speaking, barely able to sob out the part about hearing the loud bang and her father yelling to somebody on the phone. RP 973. Kempke indicated that he stayed near PB and her siblings until he was relieved. RP 975.

Lacey EMT Paramedic John Casey arrived and took over medical assistance for Tuyen Brower. RP 1000. Based on the readings of a manual defibrillator, pacer and monitor, Casey pronounced Tuyen Brower deceased. RP 1002-1003.

Detective Mark Stagner, who was a patrol deputy at the time, assisted in clearing the house with Deputy Evan Dexter. RP 1012, 1015. Stagner indicated that there was a M16A4 type variant rifle similar to what law enforcement uses on patrol or to what the military uses, so he moved

the rifle, a magazine and a live round that was next to it to a safe location. RP 1020-1021. Detective Howard Reynolds indicated that he assisted in getting the children out of the house. RP 1076.

Detectives Frank Frawley and Mickey Hamilton arrived on scene and decided that Frawley would interview Crowley and Hamilton would take notes. RP 1177. Frawley indicated that when he introduced himself, Crowley said, "I'll be honest, I shot her." RP 1178. Hamilton testified that they opened the door to talk to Crowley, and "immediately the defendant said 'I shot her. I'll be honest. I'll make it easy for you,'" at which time Frawley conducted administrative things prior to further questioning. RP 1281.

Frawley testified that it was kind of a calm conversation, and Crowley wasn't excited or crying and spoke in a "matter-of-fact manner." RP 1179. Crowley indicated that they had been married to Tuyen for 10 years

and had previously been in the Marine Corps. RP 1181. Frawley asked about firearm weapon safety and Crowley said, “that you treat all weapons as they’re loaded, you never point a weapon at anything you’re not willing to shoot and you keep your finger off the trigger until you’re ready to shoot.” RP 1181. Crowley acknowledged that there were four children in the residence.

Frawley testified that Crowley said that they had been arguing previously because Crowley was transgender, and the night of the incident Crowley said that they were arguing and Tuyen Brower had threatened to grab a knife, but never grabbed a knife and never stabbed Crowley. RP 1182. Crowley continued, telling Frawley that they had owned the rifle for four years and had been cleaning it and had done a function check on the rifle. RP 1182-1183. Frawley noted that he did not see a weapon cleaning kit when he did a walk-through of the residence. RP 1184. Crowley indicated that they loaded the magazine

with 28 rounds instead of 30 to avoid malfunctions. RP 1189.

Crowley told Frawley that they had been in an argument with Tuyen Brower and Crowley had "become angry" and had grabbed the weapon by the handgrip and said that when they grabbed it, the weapon "went off." RP 1192. When Crowley said, "I shot her in the chest," Frawley commented, "well, you center-punched her," and Crowley said that they had "great muscle memory." RP 1193. Frawley testified that Crowley was asked about firearm safety and Crowley responded, "it wasn't exactly an accident," and Detective Hamilton asked a follow up about whether it was in the realm of possibilities that if this was not an accident and Crowley indicated "it's possible in all the realms of possibilities that this was not an accident." RP 1195.

Hamilton testified that Crowley said that they sometimes get angry and do not necessarily remember

what happened during the time that they were angry. RP 1305. Hamilton said that when Crowley was asked if they disregarded the rules of firearm safety, Crowley responded, “I already told you it wasn’t an accident,” and again said, “I already told you it wasn’t an accident. I intentionally pointed the rifle at her. I just don’t remember it going off.” RP 1307. Hamilton testified that he then asked whether it was within the realm of possibilities that Crowley intentionally pointed the rifle at their wife, intentionally pulled the trigger, but just didn’t remember it going off, and Crowley responded, “it’s certainly with the realm of possibility.” RP 1307-1308. Hamilton also indicated that when Frawley mentioned that it looked like he “center punched” the victim, Crowley responded “Yeah, it’s probably muscle memory,” or something to the effect of, “it’s muscle memory.” RP 1308. When asked how many shots were fired, Crowley stated that they only heard one bang. RP 1309. Crowley indicated that in the moment

that she was shot, Tuyen Brower had not taken aggressive action toward them. RP 1314-1315.

Dr. Eric Kiesel conducted the autopsy of Tuyen Brower. RP 1361. He noted an "obvious gunshot wound, gunshot entrance wound to the right chest." RP 1377. The wound track caused significant and fatal damage. RP 1389-1390. Dr. Kiesel testified that he saw no signs of a struggle or fight. RP 1390-1391.

Washington State Patrol Forensic Scientist Johan Schoeman testified that the rifle was determined to be "functional as intended by the manufacturer," with a required trigger pull of about "seven and a quarter pounds." RP 1233. Examinations of Tuyen's shirt and the rifle determined that the shot was a "distant" shot and when the firearm was discharged the muzzle was greater than seven feet from the victim. RP 1236. Schoeman determined that the cartridge case was fired from the rifle and the bullet

fragments were “at one stage one bullet” which had been fired from the rifle. RP 12-44-1245.

During a pretrial hearing pursuant to CrR 3.5, the trial court found that statements made by Crowley immediately after introduction to law enforcement were spontaneous statements which were not in response to or in a setting of custodial interrogation. RP 155-156. The trial court then found, by a preponderance of the evidence, that *Miranda* warnings had been given and by a preponderance of the evidence that Crowley had understood those rights and waived them. RP 156-157. The trial court concluded, “So based upon that, the court is finding that the statements heard at this hearing are admissible at trial.” RP 157.

The defense also sought to exclude testimony regarding statements made by PB. Consideration of that motion in limine included testimony from Deputy Kempke outside the presence of the jury. RP 939-942. The trial court found that Deputy Kempke’s testimony was credible

to the Court. RP 959. The trial court stated, “it is hard to imagine a more clear cut example of an exited utterance.” RP 958. The trial court noted the emotion that could be heard in the 911 call that had previously been admitted at trial, stating, “Not only did the four children hear what led up to the 911 call, but they also heard that 911 call, and Ms. Crowley was extremely upset. Those children hear all of that as well.” RP 958.

The trial court indicated that the “purpose of the declarant” is the test for whether a statement is testimonial but indicated that Deputy Kempke was trying to get information for his and his partner’s protection. RP 959-960. The trial court then stated, “it is hard to imagine a situation that is more startling or upsetting, especially seen through the eyes of a nine-year-old. This is not testimonial in any way, shape or form. It also is in this court’s view exactly why we have an exited utterance exception to hearsay.” RP 961.

The jury found Crowley guilty of murder in the second degree, made findings that Crowley was armed with a firearm, was an intimate partner with Tuyen Brower, and found that it was an aggravated domestic violence offense. RP 1701-1702; CP 122, 124-126.

Crowley appealed. Division II of the Court of Appeals found that there is not a constitutional right to a recording of a custodial statement and held that PB's statements to law enforcement were testimonial, however, the admission of the statements was harmless. State v. Brower, No. 57412-8-II (Unpublished Opinion) at 20. The State contends that review is not appropriate under RAP 13.4(b) regarding whether there is a constitutional requirement to record a custodial statement; however, if this Court accepts review, the State conditionally asks that this Court also review whether P.B.'s statements to law enforcement were testimonial in nature.

C. ARGUMENT

1. The Court of Appeals correctly followed existing precedent in determining that there was no State Constitutional right to a recording of a custodial interrogation. Crowley cannot demonstrate that prior cases, which indicate that such a rule would be the purview of the Legislature or rule making authority of this Court rather than the Constitution, were faulty or incorrect.

Article I, § 3 of the Washington State Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment to the United States Constitution provides, "No person shall be … deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment states, "nor shall any state deprive any person of life, liberty or property, without due process of law."

It is well established under both federal and state law that the due process clauses do not require electronic recording of custodial interrogations. United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977) (rejecting

request that the court adopt a rule requiring confessions to police to be recorded because such a rule is a matter for consideration by Congress); United States v. Tykarsky, 446 F.3d 458, 477 (3rd Cir. 2006) (it is clear that recording interrogations … is not mandated by the United States Constitution); United States v. Montgomery, 390 F.3d 1013, 1017 (7th Cir. 2004), *cert denied*, 544 U.S 798 (2005) (recording of police interrogations is not "constitutionally required"); State v. Spurgeon, 63 Wn. App. 503, 820 P.2d 960 (1991), *review denied*, 118 Wn.2d 1024 (1992) (the due process clause of the Washington Constitution does not require electronic recording of police interrogations, refusing to adopt a rule requiring electronic recording); State v. Turner, 145 Wn. App. 899, 187 P.3d 835 (2008), *review denied,* 165 Wn.2d 1016, 199 P.3d 411 (2009) (Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment).

Our courts recognize a distinction between statutory due process and constitutional due process. State v. Henthorn, 85 Wn. App. 235, 239, 932 P.2d 662 (1997). "Volunteered statements of any kind are not barred by the Fifth amendment." Miranda v. Arizona, 384 U.S. 436, 478, 16 L.Ed.2d 694, 726, 86 S. Ct. 1602 (1966). After being advised of *Miranda* rights, an individual may knowingly and intelligently waive these rights, and the State has the burden to prove waiver by a preponderance of the evidence. State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 8794 (1979). A determination of waiver must be made on the basis of the whole record before the court and must be determined on the basis of testimony accepted as correct by the trial court. Id. at 324, *citing,* State v. Capshaw, 4 Wn. App. 243, 247, 480 P.2d 528 (1971).

The Washington State Constitution provides the same level of protection against self-incrimination as the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196

P.3d 645 (2008). In State v. Spurgeon, Division I of the Court of Appeals considered a request to require recordings before any statements made by a defendant could be admitted at trial based on due process. State v. Spurgeon, 63 Wn. App. at 505. The Court conducted an analysis pursuant to State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), and determined that none of the six factors of the *Gunwall* test supported a conclusion that the Washington State Constitution requires police officers to tape-record interrogations on penalty of exclusion of the evidence. Spurgeon, 63 Wn. App. at 505-506. The Court noted that Washington Courts traditionally have "practiced great restraint in expanding state due process beyond federal perimeters …. Although, not controlling, federal decisions regarding due process are afforded great weight due to the similarity of the language." Id. at 506, *citing*, Rozner v. Bellevue, 116 Wn.2d 342, 351, 804 P.2d 24 (1991).

In conducting the *Gunwall* analysis, the Spurgeon Court noted that the language of the state and federal constitutions "is the same, and there is no contemporary record showing a broader meaning was intended by those adopting the Washington Constitution," finding, the first three *Gunwall* factors do not support requiring recordings. Spurgeon, 63 Wn. App. at 506. The Court indicated "A citizen's right to due process is equally important and valid against a government of limited power as against one of general power. We find no basis in the difference in governmental structure suggesting a more expansive reading of the Washington Constitution to require recording of interrogations." Id. at 506-507. The Court noted, "Although a Washington citizen is more likely to come in contact with the criminal law in the Washington Courts rather than the federal courts, that does not mean that the quantum of protection should be different." Id. at 507. In looking at pre-existing Washington law, the Court noted

that no prior Washington Courts had discussed the need to record interrogations. Id. at 507.

The Court instead looked at Washington cases dealing with preservation of evidence and found, "the duty to create additional evidence in the form of a tape of an interrogation is certainly not required by these authorities." Id. at 508. The Court found:

> it is our view that such a sweeping change in longstanding police practice should be made only after a full hearing of all the policy and financial implications and with adequate advance notice to law enforcement in the form of the adoption of a rule of evidence or a statute mandating recording. We hold the Washington Constitution does not require taping of custodial interrogations.

Id. at 508-509.

In State v. Turner, Division I again held that Article I, § 3 of the Washington State Constitution does not require electronic recording of custodial interrogations. Turner, 145 Wn. App. at 910. The Court noted that several cases decided after Spurgeon had rejected the argument that the

state due process clause provides greater protection than the federal due process clause. Id. a t 910-911, *citing* In re Pers. Restraint of Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) ("Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment."); In re Pers. Restraint of Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (rejecting the claim that state due process rights are greater than federal due process rights because, "there are no material differences" between the state and federal due process clauses); State v. Manussier, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) ("The *Gunwall* factors do not favor an independent inquiry under Article I, § 3 of the state constitution").

After finding that there was no constitutional requirement that a recording be made, the *Turner* Court discussed whether the Court should independently create a rule requiring recordings and found, "either the legislature or the Supreme Court in its rule making capacity is in a

better position to resolve these policy questions." Turner, 145 Wn. App. at 913.

The cases that Crowley cites to for the proposition that Spurgeon and Turner are flawed do not support that proposition. In State v. Davis, 38 Wn. App. 600, 604-605, 686 P.2d 1143 (1984), Division I declined to follow federal precedent when interpreting Article I, § 3 of the Washington constitution where federal law limited the exclusion of post-arrest silence to instances where *Miranda* warnings were given because "such a rule also has the potential to discourage the reading of *Miranda* warnings." In Turner, the Court noted that *Davis* did not address whether the state constitution required recording of interrogations and was decided before *Gunwall*. Turner, 145 Wn. App. at 909. The Turner court noted that after consideration of *Gunwall* this Court found that the state due process clause affords the same protection as the federal due process clause in

State v. Wittenbarger, 124 Wn.2d 467, 481, 880 P.2d 517 (1994), Turner, 145 Wn. App. at 910.

In Wittenbarger, this Court conducted an analysis of whether Article I, § 3 of the Washington Constitution provides greater due process protections than the federal constitution and held "that the state due process clause affords the same protection regarding a criminal defendant's right to discover potentially exculpatory evidence as does its federal counterpart." Wittenbarger, 124 Wn.2d at 474. The Turner court properly relied on that analysis from the higher court to find that "there is no basis to interpret the due process clause to impose a duty to record interrogations." Turner, 145 Wn. App. at 910. The logic in following the *Gunwall* analysis of this court was not flawed. Crowley's reliance on the pre-*Gunwall* decision of Division I in Davis is misplaced.

Both Spurgeon and Turner indicated that a recording requirement would more appropriately be considered as a

court rule or statute than a constitutional mandate. Spurgeon, 63 Wn. App. at 508; Turner, 145 Wn. App. at 913. That rationale is consistent with the rationale of the federal courts in finding that there is no requirement for a recording under the federal constitution. United States v. Coades, 549 F.2d at 1305 (9th Cir. 1977) (rejecting request that the court adopt a rule requiring confessions to police to be recorded because such a rule is a matter for consideration by Congress).

The rationale of Spurgeon and Turner proved accurate when our State Legislature passed Chapter 10.122 RCW. RCW 10.122.030 currently states that "a custodial interrogation, must be recorded in its entirety if the interrogation relates to a felony crime." RCW 10.122.030(1). However, the legislature chose to not infringe upon the ability of trial courts to exercise discretion within the constitutional limits that have always existed, including several exceptions to the requirement. RCW

10.122.050, 10.122.060, 10.122.070, 10.122.080, 10.122.090, 10.122.100. The legislature merely required that the trial court consider the failure to record as a factor in determining whether a statement was voluntarily made. RCW 10.122.130.

This statutory procedure is not constitutional, and the legislature specifically noted "This chapter does not create a right of an individual to require a custodial interrogation to be recorded electronically." RCW 10.122.180. The adoption of this statute did not change our State Constitution and does not provide a basis for constitutionally requiring a recording of police interviews. In fact, the plain language of the statute demonstrates the legislature's recognition that our State Constitution does not contain such a requirement by directing the trial court to consider the statute when making a determination as to whether or not a statement is voluntary and admissible.

In this case the Court of Appeals correctly noted that "existing state law can weigh against recognizing expanded constitutional rights under *Gunwall* when existing state law suggests the legislature can better address the issue raised by appellant than the courts." Unpublished Opinion at 18, *citing*, Bellevue Sch. Dist. V. E.S., 171 Wn.2d 695, 710, 257 P.3d 570 (2011). The legislature has properly acted in adopting RCW Chapter 10.122. Nothing in our State Constitution requires electronic recording of a custodial interrogation. Any such requirement is properly left to the legislature or the rule making authority of this Court. There is no basis upon which this Court should accept review of the issue raised.

2. If this Court accepts review, the Court of Appeals erred in finding that PB's statements to Deputy Kempke were testimonial in nature.

The confrontation clause of the United States Constitution prohibits the use of hearsay testimony against

a criminal defendant unless the statement falls within a "firmly rooted" exception to the hearsay rule. The excited utterance exception is one of those firmly rooted exceptions. State v. Woods, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001), *vacated on other grounds*, Woods v. Holbrook, 132 S. Ct. 1819, 182 L. Ed. 2d 612 (2012).

Hearsay statements are admissible under the excited utterance exception if (1) a startling event has occurred, (2) the statement was "made while the declarant was under the stress of excitement caused by the event or condition", and (3) the statement relates to the startling event. ER 803 (a)(2); Woods, 143 Wn.2d at 597. The declarant must make the statement while still under the influence of an "external physical shock" and without having had "time to calm down enough to make a calculated statement based on self-interest." State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

Courts generally consider the amount of time between the startling event and the statement and the declarant's observable level of emotional stress at the time the statement is made. *See, e.g.,* State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992) ("The passage of time alone, however, is not dispositive.") While an excited utterance is not per se precluded from being testimonial but can be a factor in "objectively determining the primary purpose." State v. Ohlson, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007).

The Sixth Amendment "bars' admission of testimonial statements of a witness who did not appear at trial, unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 10*, quoting,* Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006). A confrontation clause challenge is reviewed de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007),

cert. denied, 553 U.S. 1035 (2008). In Davis, the United States Supreme Court adopted the "primary purpose" test for determining whether a statement is testimonial. Davis, 547 U.S. at 822. The Court indicated "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." Id. at 822. The Court stressed "of course … it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." Id. at 823 n.1.

In Ohlson, this Court applied the primary purpose test indicating, "the question presented by the confrontation clause is 'whether, objectively considered, the interrogation that took place … produced testimonial statements.'" Ohlson, 162 Wn.2d at 11, *quoting,* Davis, 547 U.S. at 826. The Ohlson Court found that statements of a witness,

which were made in response to an officer's questioning were not testimonial because the purpose of that interrogation was to enable police assistance to meet an ongoing emergency. Ohlson, 162 Wn.2d at 17. The Court noted that the officer was present immediately after the assault and within five minutes of the call, therefore the statements were made contemporaneously with the events described. Id.

In this case, Deputy Kempke encountered 9-year-old PB just after assisting Deputy Potis in applying an AED to Tuyen Brower. RP 935-936. Deputy Kempke described PB getting increasingly distraught while speaking, barely able to sob out the part about hearing the loud bang and her father yelling to somebody on the phone. RP 973. Kempke indicated that he stayed near PB and her siblings until he was relieved. RP 975.

At the time that Deputy Kempke asked PB "what happened tonight" he was attempting to determine if there

were any other actors in play or if anyone else needed medical attention. RP 941. As the trial court noted, "it is hard to imagine a more clear cut example of an exited utterance." RP 958. The trial court noted the emotion that could be heard in the 911 call that had previously been admitted at trial, stating, "Not only did the four children hear what led up to the 911 call, but they also heard that 911 call, and Ms. Crowley was extremely upset. Those children hear all of that as well." RP 958.

Under the primary purpose test, a statement is testimonial if its primary purpose was "to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822, State v. Scanlan, 193 Wn.2d 753, 767, 445 P.3d 960 (2019). Under the chaotic circumstances that PB faced, objectively, the primary purpose of her statements was to obtain assistance or help law enforcement respond to the existing emergency. The decision of the Court of Appeals improperly applies the

primary purpose test by failing to consider "all of the relevant circumstances." Michigan v. Bryant, 562 U.S. 344, 369, 131 S. Ct. 1143, 179 L.Ed.2d 93 (2011); Ohio v. Clark, 576 U.S. 237, 243, 135 S. Ct. 2173, 192 L.Ed.2d 306 (2015).

A 9-year-old child who was still clearly under the affects of a traumatic series of events cannot be said to be making a statement to memorialize events to prove facts for later criminal prosecution. This is especially true where the law enforcement officer speaking with the child testified the statements were made when he did not know if there might be other actors or other injured persons in the residence. The objective facts presented in this case clearly demonstrate that the statement made by PB was designed to address the ongoing emergency. As the trial court stated, "it was to address in a child's mind the horror of what she heard that night and tell an adult about it to

protect herself and her siblings." RP 962. The statement of PB was not testimonial.

The Court of Appeals' focus on State v. Koslowski, 166 Wn.2d 409, 419 n. 7, 209 P.3d 479 (2009), for the proposition that there was no ongoing emergency because Crowley was removed before the statement, conflicts with the directives in Ohlson, Michigan v. Bryant, Ohio v. Clark, and Davis requiring that the Court consider all relevant circumstances. The child did not know that the danger was over and was clearly seeking help from the Deputy. It is the declarant's statements that the Confrontation Clause requires analysis of. Davis, 547 U.S. at 823 n.1. The Court of Appeals failed to consider the perspective of the child. Review is appropriate under RAP 13.4(b)(1), (3) and (4), if this Court accepts review of the issue raised by the petitioner.

D. CONCLUSION

The State respectfully request that this Court deny review. However, if review is accepted, the State requests that this Court also review the Court of Appeals' finding that P.B.'s statements were testimonial.

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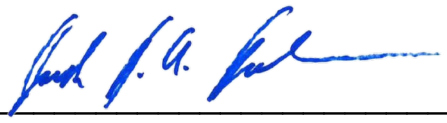
Respectfully submitted this 29th day of August 2024.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 29th day of August 2024.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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