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Evidence-Testimonial Statements and Unavailable Child Witnesses: Why the Cognitive Awareness of the Child-Declarant Should Be the Determinative Factor in Defining an Ongoing Emergency - Commonwealth v. Allshouse

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**EVIDENCE – TESTIMONIAL STATEMENTS AND
UNAVAILABLE CHILD WITNESSES: WHY THE
COGNITIVE AWARENESS OF THE CHILD-
DECLARANT SHOULD BE THE DETERMINATIVE
FACTOR IN DEFINING AN ONGOING
EMERGENCY – *COMMONWEALTH V.
ALLSHOUSE*, 36 A.3D 163 (PA. 2012).**

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”¹ A prior, out-of-court statement may circumvent the traditional requirements of face-to-face confrontation guaranteed by the Confrontation Clause if a court determines that a statement is “nontestimonial.”² The Confrontation Clause guarantee is particularly important when child witnesses are involved because they are easily influenced by adults and possess a “highly susceptible” nature.³

¹ U.S. CONST. amend. VI. (guaranteeing fair treatment of defendants during trial with regard to confronting witnesses testifying against them). The right to offer testimony of witnesses to the defendant is a “fundamental element of due process of law,” but this right is “not absolute.” See *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005) (quoting *United States v. Bautista*, 145 F.3d 1140, 1151 (10th Cir. 1998)).

² See *Davis v. Washington*, 547 U.S. 813, 821 (2006) (defining testimonial statement as separate from other hearsay).

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

Id. at 814. The court in *Davis* explained that its definition of testimonial statements only refers to interrogations because the pertinent statements in this particular case were the “products of interrogations.” *Id.* at 822 n.1. There is no implication that statements made in the absence of an interrogation, such as “volunteered testimony” or “answers to open-ended questions,” are necessarily nontestimonial. *Id.*

³ See *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008) (citing Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 47 (2000)) (“[C]hildren, especially young children, are suggestible to a significant degree—even on abuse-related questions”). Asking a child victim to assist in the decision of inflicting the death penalty is a “moral choice” that the child “is not of mature age to make.” *Kennedy*, 554 U.S. at 443. Court decisions involving child witnesses pose a “special risk” due to the “problem of unreliable, induced, and even imagined child testimony” *Id.* The *Kennedy* court referenced studies concluding that children are “highly susceptible to sugges-

This fragile psychology is further complicated by a child's inherent naïveté; because of a child's developing psychology, courts must take into account that a child often cannot obtain a basic understanding of the legal system.⁴ In *Commonwealth v. Allshouse*,⁵ the Supreme Court of Pennsylvania considered whether a child witness's statement to a caseworker violated the appellant's rights under the Confrontation Clause because it was a testimonial statement.⁶ The Pennsylvania Supreme Court held the child's statements were part of an "ongoing emergency," meaning the statements were nontestimonial, and thus did not violate the appellant's rights under the Confrontation Clause.⁷

On May 20, 2004, the appellant and the victim's mother were arguing in the family home while the couple's seven-month-old son, "J.A.," and his twin brother were lying in a playpen in the living room; the couple's four-year-old daughter, "A.A.," was playing nearby.⁸ From the kitchen, the mother heard appellant stand up from the recliner in the living room, followed by a "snapping/slapping noise," and then the sound of J.A. crying.⁹ She ran to the living room to find J.A. lying on A.A.'s lap in the playpen.¹⁰ J.A. was taken to the emergency room and, upon examination, the doctors found that J.A. "suffered a spiral fracture to the right humerus caused by 'sharp and severe twisting of the arm.'"¹¹ Hospital officials contacted caseworker John Geist, who investigated the case and determined that the

tive questioning techniques" *Id.*

⁴ See Brief for National District Attorneys Association at 24, *Iowa v. James Bentley*, 552 U.S. 1275 (2008) (No.07-886) (explaining results of scientific studies on children's perceptions of the legal system).

⁵ (*Allshouse III*), 36 A.3d 163 (Pa. 2012).

⁶ *Id.* at 173 (stating issue).

⁷ *Id.* at 182 (stating court's holding that child witness's statement to caseworker was nontestimonial).

⁸ See *Commonwealth v. Allshouse (Allshouse I)*, 924 A.2d 1215, 1217 (Pa. Super. Ct. 2007) (describing facts as stated in police investigation). Appellant was shouting at the mother from the living room where the rest of the children were playing. *Id.*

⁹ *Id.* (describing occurrence of injury from mother's perspective).

¹⁰ See *Commonwealth v. Allshouse (Allshouse II)*, 985 A.2d 847, 849 (Pa. 2009) (describing facts of J.A.'s injury from mother's perspective), *vacated*, 131 S. Ct. 1597 (2011). A.A. had moved inside the playpen to hold J.A. as J.A.'s mother ran past appellant, who headed toward the stairs. *Id.* When the mother lifted J.A. from the playpen "his arm flopped backwards." *Id.*

¹¹ *Allshouse I*, 924 A.2d at 1217. Spiral fractures are often called "toddler's fractures" because they are common in very young children. See James Lukefahr, *Child Abuse and Neglect – Fractures*, UNIVERSITY OF TEXAS MEDICAL BRANCH (2008), available at http://www.utmb.edu/pedi_ed/CORE/Abuse/page_08.htm. This type of fracture occurs when one end of an extremity is fixed, such as a foot on the ground, but the rest of the extremity remains in motion. *Id.* This injury is linked to abuse because the fracture is a "result of forceful twisting or jerking of an extremity." *Id.*

injury indicated abuse.¹² He suggested to J.A.'s mother that she remove the children from the home pending investigation.¹³ A week after the injury, appellant suggested to Geist that A.A. had caused the injury, so Geist immediately went to J.A.'s grandparents' home to interview A.A., who stated appellant had caused J.A.'s injury.¹⁴

On June 11, 2004, the appellant was arrested and charged with aggravated assault, simple assault, endangering the welfare of a child, reckless endangerment, and harassment.¹⁵ The trial court conducted a hearing pursuant to the Tender Years Hearsay Act ("TYHA"), in which the court sought to determine whether the statements A.A. made to Geist and to Dr. Ryen, otherwise hearsay, were admissible under the tender years exception to the hearsay rule.¹⁶ The court ruled that A.A.'s statements to Geist and Dr. Ryen were admissible.¹⁷ The appellant filed a motion for reconsideration, but the Superior Court denied it, and the jury convicted him of simple assault and endangering the welfare of a child.¹⁸ The appellant appealed the judgment of sentence to the Superior Court of Pennsylvania in 2006 challenging, among other things, the trial court's admission of A.A.'s

¹² *Allshouse I*, 924 A.2d at 1217 (introducing caseworker's involvement in case).

¹³ *See Allshouse II*, 985 A.2d at 849. The caseworker advised the mother to remove J.A. from the family home because the emergency-room physician who treated J.A. speculated the spiral fracture was the result of abuse. *See id.*

¹⁴ *See id.* at 850. Geist and A.A. spoke outside of the grandparents' home while the other family members remained inside. *Id.* Geist asked A.A. what happened to her brother and A.A. looked afraid as she demonstrated to Geist how her father had grabbed J.A. above the elbow and pulled, causing J.A.'s injury. *Id.* at n.4. Per Geist's request, a psychologist, Dr. Ryen, then immediately scheduled A.A. for an evaluation and during their interview, A.A. again stated the appellant caused J.A.'s injury. *Id.* at 850.

¹⁵ *Id.* at 850-51 (describing procedural history of case following A.A.'s interview with psychologist).

¹⁶ *See* 42 PA. CONS. STAT. § 5985.1 (2013) (providing Tender Years Hearsay Act ("TYHA")); *Allshouse III*, 36 A.3d 163, 168 (Pa. 2012) (explaining significance of TYHA). The TYHA states that an out-of-court statement made by a child victim or witness is admissible if the evidence is "relevant" and provides a "sufficient indicia of reliability," and the child either testifies at the proceeding or is unavailable as a witness. 42 PA. CONS. STAT. § 5985.1(a)(2013). The Supreme Court of Pennsylvania held the TYHA does not violate the United States's or Pennsylvania's ex post facto clauses because the amended version of the TYHA "expanded the class of persons whose out-of-court statements are admissible in court" by striking the requirement "that the offense had to be performed 'with or on the child by another.'" *See Allshouse III*, 36 A.3d at 188. Pennsylvania's ex post facto law states, "No ex post facto law, nor any law ... making irrevocable any grant of special privileges or immunities, shall be passed," meaning no new law may be passed that has any retroactive legal implications. PA. CONST. art. I, § 17. The ex post facto law was not violated because this amendment had no impact on the evidence required to convict the appellant. *Allshouse III*, 36 A.3d at 188.

¹⁷ *Allshouse III*, 36 A.3d at 168-69 (allowing A.A.'s statements to be admissible at trial under TYHA).

¹⁸ *See id.* at 169 (reiterating testimonial determination must be looked at from "4-year-old's point of view").

statements to Geist and Dr. Ryen; the Superior Court ultimately affirmed the appellant's sentence.¹⁹ Appellant then filed a Petition for Allowance of Appeal.²⁰ The Supreme Court of Pennsylvania granted appellant's petition, but proceeded to reject appellant's argument that A.A.'s statements to Geist were testimonial and held that the court did not violate appellant's rights under the Confrontation Clause.²¹

In his final effort, appellant filed for a petition for writ of certiorari with the United States Supreme Court ("SCOTUS"), which succeeded.²² In 2011, SCOTUS returned the case to the Supreme Court of Pennsylvania following the Court's *per curiam* order, which vacated the Supreme Court of Pennsylvania's decision and remanded the case for reconsideration in light of SCOTUS's decision in *Michigan v. Bryant*.²³ The Pennsylvania Supreme Court issued an order, *sua sponte*, allowing the parties to submit supplemental briefs to address the impact of the SCOTUS decision.²⁴ Ultimately, the Supreme Court of Pennsylvania affirmed the order of the Superior Court of Pennsylvania and held A.A.'s statements to both Dr. Ryen and Geist were properly admitted at trial.²⁵

The Confrontation Clause restricts the range of admissible hearsay in two ways: to encourage "face-to-face accusation" and ensure that out-of-court statements are trustworthy when a witness is unavailable.²⁶ In *Ohio*

¹⁹ See *id.* (recounting superior court's admission of A.A.'s statements); see also *Allshouse I*, 924 A.2d 1215, 1224 (Pa. Super. Ct. 2007) (holding A.A.'s statements to Geist nontestimonial, and A.A.'s statements to Dr. Ryen harmless error).

²⁰ See *Allshouse III*, 36 A.3d at 169.

²¹ See *id.* at 170 (rejecting Appellant's argument that his Confrontation Clause rights were violated).

²² See *id.* (vacating Pennsylvania Supreme Court's decision); *Allshouse v. Pennsylvania (Allshouse IV)*, 131 S. Ct. 1597, 1598 (2011) (same).

²³ See *Allshouse IV*, 131 S. Ct. at 1598 (granting petition for writ of certiorari, vacating judgment, and remanding); see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1159 (2011) (holding "primary purpose" and "ongoing emergency" requirements in testimonial statement determinations). The significance of the *Bryant* decision is that it clarified the test to determine the admissibility of testimonial statements at trial established in *Crawford v. Washington* and *Davis v. Washington*. See *Bryant*, 131 S. Ct. at 1152-60 (citing *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) and *Davis v. Washington*, 547 U.S. 813, 822 (2006)). *Crawford* barred the admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable or the defendant had a prior opportunity for cross-examination. See *Crawford*, 541 U.S. at 68-69. *Davis* clarified that where statements described past events and there was no immediate threat to the witness, the likelihood is substantially increased that these statements will be used for trial and are therefore testimonial. See *Davis*, 547 U.S. at 822. *Bryant* demonstrated how to determine both the primary purpose of an interview and whether there is an ongoing emergency. See *Bryant*, 131 S. Ct. at 1165-66.

²⁴ See *Allshouse III*, 36 A.3d at 170 (allowing parties to address impact of *Bryant*).

²⁵ See *id.* at 183, 189 (stating ultimate holding of case).

²⁶ See *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (explaining Court's concerns about conforming to Framers' preference for face-to-face confrontation).

v. *Roberts*, SCOTUS's underlying concern was to guarantee an 'indicia of reliability' surrounding a prior statement, so that the trier of fact has a "satisfactory basis for evaluating the truth."²⁷ In 2004, the "indicia of reliability" test was replaced with a more stringent test requiring the witness be unavailable and the defendant be afforded an opportunity to cross-examine the witness; this rule was established by *Crawford*.²⁸ *Crawford* affected the validity of many states' "Tender Years" statutes because out-of-court statements made by children in child abuse cases were no longer admissible unless the statements were nontestimonial or the criminal defendant was allowed an opportunity to cross-examine the declarant.²⁹ SCOTUS did not

²⁷ See *id.* at 65-66 ("The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' . . . and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability.'") (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972) (quoting, in turn *Dutton v. Evans*, 400 U.S. 74, 89 (1970) and *California v. Green*, 399 U.S. 149, 161 (1970))) see also *Lilly v. Virginia*, 527 U.S. 116, 138 (1999) (applying "indicia of reliability" test to determine "inherent trustworthiness" of hearsay evidence); *Idaho v. Wright*, 497 U.S. 805, 815 (1990) (citing *Roberts*, 448 U.S. at 66) (same).

²⁸ See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (prohibiting out-of-court testimonial statements, regardless of reliability, unless they satisfy test). In *Crawford*, the Petitioner stabbed a man who allegedly tried to rape his wife. *Id.* at 38. At trial, the State played a tape-recorded statement for the jury that was made by the wife to the police describing the stabbing as not self-defense, which controverted the Petitioner's defense. *Id.* at 39. The Court reversed and remanded the case because the Petitioner did not have an opportunity to cross-examine his wife, which was in direct violation of his Confrontation Clause rights. *Id.* at 68. This case overruled prior precedent, redefined the right of confrontation, and established a clearer test focusing on the determination of whether a statement is testimonial: "unavailability and a prior opportunity for cross-examination." *Id.*

²⁹ See Mary E. Sawicki, *The Crawford v. Washington Decision—Five years Later*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, at 1 (2009), available at http://www.ndaa.org/pdf/update_vol_21_no_9_10.pdf (reexamining *Crawford* decision and its relevance for prosecutors specializing in child abuse cases). "Although the facts of *Crawford* were unrelated to child abuse, this case established new standards for the admission of statements made by witnesses unavailable to testify at trial." *Id.* at 2. A two-prong test evolved from *Crawford* for use in child abuse prosecution cases: (1) whether the statement was taken by a government agent, and (2) would a reasonable person in the child-declarant's position believe her statements would be used during the criminal proceedings. *Id.* See 14B Mass. Prac., Summary Of Basic Law § 10.125 (4th ed.) (2012) ("Since the Massachusetts statute [M.G.L. c. 233, § 82] permits hearsay statements of the child to be admitted, without any opportunity for the defendant to have cross-examined the child, if the hearsay is otherwise found reliable, the statute's constitutional validity is questionable so far as it sanctions the use of the child's out-of-court testimonial statements."); see also MCCORMICK ON EVIDENCE § 272, at 264 (George E. Dix et al. eds., 6th ed. 2006) ("The decision of the United States Supreme Court in *Crawford v. Washington* renders the exception [in statutes admitting the hearsay statements of child victims of sexual abuse] unconstitutional in criminal cases as to any statement by a non-testifying child that is found to be testimonial. However, when the child testifies, the Confrontation Clause is satisfied."). Because

provide an exhaustive list of what statements constitute “testimonial” hearsay until several years later.³⁰

In 2006, *Davis v. Washington* defined “testimonial” hearsay as statements made “when the circumstances objectively indicate that there is no . . . ongoing emergency” and the “primary purpose of the interrogation” is for use in later criminal prosecution.³¹ Since *Davis*, the primary purpose of the interview and the existence of an emergency from the perspective of the declarant or the interviewer have become the key factors in gauging the testimonial nature of statements made by an unavailable child witness.³² Recent studies have formulated a convincing argument that a reasonable child standard should be used because younger children, specifically under the age of ten, do not understand the concept of the legal system and therefore are unable to understand that their statements will be used in that forum for the purpose of litigation.³³

Crawford increased the burden on prosecutors to present their witnesses at trial, prosecutors were forced to use other tactics, including allowing a support person or comfort items, and limiting the number of interviews for child victims. See National Center For Prosecution Of Child Abuse, *State Statutes: Child Witnesses*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, http://www.ndaa.org/ncpca_state_statutes.html (listing state statutes regarding child witnesses and victims). Some critics call for a systemic approach to court preparation for children called to testify in court because a comprehensive approach will aid prosecutors in “eliciting accurate testimony” and benefit children by mitigating secondary victimization. See Joddie Walker, *If I’m ‘The Party,’ Where’s the Cake: The Need For Comprehensive Child-Witness Court Preparation Programs*, CENTERPIECE, vol. 3, no. 1, 2011, available at <http://www.gundersenhealth.org/upload/docs/NCPTC/CenterPiece/CenterPiece.NL.Vol3.Iss1.pdf> (explaining benefits of comprehensive court preparation system for child-witnesses).

³⁰ *Crawford*, 541 U.S. at 68 (postponing task of establishing comprehensive definition of “testimonial”).

³¹ *Davis*, 547 U.S. at 822 (clarifying that nontestimonial statements are made in course of ongoing emergency); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (declaring that affidavits in question were testimonial because affiant knew of their evidentiary purposes). In *Melendez-Diaz*, SCOTUS held that the admission of affidavits violated petitioner’s Sixth Amendment right to confront the witnesses against him. See *Melendez-Diaz*, 557 U.S. at 311. Affidavits fall within the core class of testimonial statements covered by the Confrontation Clause, and in *Melendez-Diaz*, affidavits were created under circumstances that would have led an objective witness to reasonably believe they were made for use in a criminal trial. *Id.* at 310-11; cf. *Michigan v. Bryant*, 131 S. Ct. 1143, 1166-67 (2011) (holding mortally wounded person’s statements to police were nontestimonial because made during ongoing emergency).

³² Sawicki, *supra* note 29, at 3 (explaining importance of primary purpose of interview); see also Allie Phillips, *Child Statements in a Post-Crawford World: What the United States Supreme Court Failed to Consider with Regard to Child Victims and Witnesses*, BEPRESS LEGAL SERIES, at 10 (Dec. 8, 2006) available at <http://goo.gl/2U0T0B> (explaining *Davis*’s impact is limited to “law enforcement interrogations”). While the primary purpose of the interview is important, “the court limited the application of the . . . ‘primary purpose’ ruling to similar cases (interrogations by law enforcement arising out of emergency situations) and did not extinguish the reasonable objective declarant standard set forth in *Crawford*.” Phillips *supra* (quoting *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006)).

³³ See National Center For Prosecution Of Child Abuse, *State Statutes: Competency of Child*

Regarding the status of the interviewer, the majority of appellate courts have held statements made to child protection workers investigating past abuses are testimonial.³⁴ One federal court of appeals and eight state courts of last resort have reached this conclusion; most of these cases contained similar facts, particularly with children below the age of ten and in-

Witnesses to Testify in Criminal Proceedings, NATIONAL DISTRICT ATTORNEYS ASSOCIATION (March 2011), [http://www.ndaa.org/pdf/Competency%20of%20Child%20Witnesses\(2011\).pdf](http://www.ndaa.org/pdf/Competency%20of%20Child%20Witnesses(2011).pdf) (showing only a handful of states have child specific competency statutes); National Center For Prosecution Of Child Abuse, *State Statutes: U.S. States with Juvenile Competency Statutes*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION (2012), <http://www.ndaa.org/pdf/Juvenile%20Competency%202012.pdf> (listing existing juvenile competency statutes from only twenty-one states); Brief for National District Attorneys Association as Amici Curiae Supporting Petitioner at 16, *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) (No. 07-886) (emphasizing importance of child's cognitive awareness of consequences of statements). Dr. Karen Saywitz's study on developmental differences in children's understanding of the legal system found children under the age of seven have "little to no understanding of the court system's players

much less the actual processes contemplated at the time of a forensic interview." Phillips, *supra* note 32 at 32-33 (citing Karen Saywitz, CHILDREN'S CONCEPTIONS OF THE LEGAL SYSTEM: COURT IS A PLACE TO PLAY BASKETBALL, PERSPECTIVES ON CHILDREN'S TESTIMONY, 131-157 (S.J. Ceci, D.F. Ross & M.P. Toglia eds., 1989)). In another study, Dr. Saywitz found that younger children fail to realize they have "insufficient information to correctly interpret the world," meaning even if a child is told during an interview that their statements will be used in a court proceeding, it is unfair to expect the child "intuitively to understand the function of court or that interview." Phillips, *supra* note 32, at 34-35 (citing Karen Saywitz, Carol Jaenicke & Lorinda Camparo, Children's Knowledge of Legal Terminology, 14 L. & HUM. BEHAV. 523 (1990)); see Phillips, *supra* note 32, at 35-37 (presenting studies showing that children do not understand legal terminology until age ten); Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 53-56 (2000) (arguing children are easily influenced by "suggestive interviewing techniques"). Studies have revealed that while young children are highly suggestible, this trait becomes even more marked when investigators use "strongly suggestive techniques." *Id.* at 71. Further research has also shown that interviewers use strongly suggestive techniques quite frequently. *Id.* at 60-71. Several state legislatures have attempted to regulate this area by enacting statutes, and multiple state supreme courts have decided when it is permissible for an attorney to use leading questions with child witnesses. National Center For Prosecution Of Child Abuse, *State Statutes: Leading Questions and Child Witnesses*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION (June 2011), <http://www.ndaa.org/pdf/Leading%20Questions%20and%20Child%20Witnesses6-2011.pdf> (showing how certain states approach leading questions and child witnesses). But see *State v. Bentley*, 739 N.W.2d 296, 299-301 (Iowa 2007) (describing interview circumstances occurring before victim's brutal murder). In *Bentley*, a child protection center counselor interviewed the victim, J.G., and the interview was videotaped and observed by two unseen police officers through an "observation window." *Id.* at 297. After the interview, the accused's brother abducted and brutally murdered J.G. *Id.* The court discounted the argument that the victim, who was functioning at an age-seven level, did not understand that her statements would be used to prosecute the defendant because the statements "lie at the very core of the definition of 'testimonial.'" *Id.* at 300.

³⁴ Petition for Writ of Certiorari at 33-35, *Allshouse v. Pennsylvania*, 133 S. Ct. 2236 (2013) (No. 11-1407) (providing comprehensive list of cases holding investigations conducted by child protection workers are testimonial).

interviews conducted in a formal, and police-type situation.³⁵ Six other intermediate state appellate courts have also held that these kinds of statements are testimonial.³⁶ The Supreme Judicial Court of Massachusetts guarantees the right of face-to-face confrontation, with no exceptions for child witnesses.³⁷ In direct contrast, four state supreme courts have held

³⁵ See, e.g., *Bobadilla v. Carlson*, 575 F.3d 785, 792-94 (8th Cir. 2009) (holding three-year-old victim's statements taken by police officers in course of interrogations were testimonial); *State v. Contreras*, 979 So. 2d 896, 905 (Fla. 2008) (holding nine-year-old victim's statements in videotaped interview by "Child Protection Team" were testimonial); *In re Rolandis G.*, 902 N.E.2d 600, 611 (Ill. 2008) (holding six-year-old victim's videotaped statements to child advocate were testimonial); *Bentley*, 739 N.W.2d at 297 (holding ten-year-old victim's videotaped statements at Child Protection center were testimonial); *State v. Henderson*, 160 P.3d 776, 792 (Kan. 2007) (holding three-year-old victim's videotaped statements to social worker were testimonial); *State v. Snowden*, 867 A.2d 314, 326 (Md. 2005) (holding victims' statements during interview to investigator were testimonial); *State v. Justus*, 205 S.W.3d 872, 881 (Mo. 2006) (holding three-year-old victim's videotaped statements to social worker were testimonial); *State ex rel. Juvenile Dep't of Multnomah Cnty. v. S.P.*, 215 P.3d 847, 849 (Or. 2009) (holding three-year-old victim's statements to child abuse center staff were testimonial).

³⁶ See, e.g., *T.P. v. State*, 911 So. 2d 1117, 1123 (Ala. Crim. App. 2004) (holding eight-year-old victim's statements to social worker were testimonial); *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004) (holding four-year-old victim's statements to police officer were testimonial); *Anderson v. State*, 833 N.E.2d 119, 121 (Ind. Ct. App. 2005) (holding three-year-old victim's statements to detective and social worker were testimonial); *State v. Clark*, 2011 Ohio 6623, *22 (Ohio App. Ct. 2011) (holding four-year-old victim's statements to social workers and police were testimonial); *Rangel v. State*, 199 S.W.3d 523, 533 (Tex. App. 2006) (holding six-year-old victim's videotaped statements to social worker were testimonial); *State v. Hopkins*, 154 P.3d 250, 257 (Wash. Ct. App. 2007) (holding two-year-old victim's statements to relatives and social worker were testimonial).

³⁷ MASS. CONST. Declaration of Rights art. XII ("[E]very subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election."); see MASS. GEN. LAWS ch. 233, § 20 (2010) ("Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence"). The test a trial judge applies in determining whether a witness is competent, or of "sufficient understanding", to testify is the same for an adult as it for a child. See *Commonwealth v. Brusgulis*, 496 N.E.2d 652, 655 (1986). "The courts of this Commonwealth have long applied a two-prong test to determine competency: (1) whether the witness has the general ability or capacity to 'observe, remember, and give expression to that which she ha[s] seen, heard, or experienced'; and (2) whether she has 'understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment.'" *Id.* at 655 (quoting *Commonwealth v. Tatisos*, 130 N.E.2d 495 (Mass. 1921); see also *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 373-75 (Mass. 1988) (holding child testifying outside physical presence of defendant and jury violated Article 12); *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1006-07 (Mass. 1994) (holding face-to-face confrontation of witness is "indispensable element"). In *Bergstrom*, the court reasoned that a witness is more likely to be truthful if required to testify "under oath, in a court of law, and in the presence of the accused and the trier of fact" as well as the defendant's right to be personally present through his or her trial outweighs meeting the needs of young witnesses. *Bergstrom*, 524 N.E.2d at 371-72. Therefore, the Commonwealth must show "by more than a mere preponderance of evidence" the compelling need to record a child witness's testimony outside the courtroom, which was not met in this case. *Id.* at 376. The

statements made by children during interviews with child protection workers are nontestimonial.³⁸

In reaching its decision in *Allshouse III*, the Supreme Court of Pennsylvania had to reconsider its prior decision and employ the reasoning established in *Michigan v. Bryant*, as instructed by SCOTUS.³⁹ The Supreme Court of Pennsylvania thoroughly explained each step of the *Bryant* reasoning and suggested courts look to the “primary purpose” of the out-of-court statement when determining if statements made by the victim are testimonial.⁴⁰ *Bryant* emphasized that the focus of the inquiry must be placed on the “perspective of the parties at the time of the interrogation” to deter-

court noted while it may be a legitimate concern that a child may face “difficulties,” feel intimidated, and his or her wellbeing might be negatively impacted, the defendant’s constitutional guarantees “cannot dissolve under the pressure of changing social circumstance or societal focus.” *Id.* at 377. In *Johnson*, the court reiterated *Bergstrom* by recognizing the awareness of the problem of child abuse, but reasoned the “right to cross-examine witnesses under oath and the ability of the jury to observe the witness’s demeanor” are tied to the “indispensable right under art[icle] 12” and cannot be revoked except for in very limited circumstances, of which child abuse cases are not one. *Johnson*, 631 N.E.2d at 1006. *But see* Commonwealth v. DeOliveira, 849 N.E.2d 219, 225-26 (2006) (holding child’s statements to doctor nontestimonial because she did not anticipate statements use in trial). The court explained that “a reasonable person in [the child’s] position, and armed with her knowledge,” could not have anticipated that her statements might be used in a prosecution against the defendant. *Id.* at 226. The court further defines its “‘reasonable person’ standard [as taking] into account all of the facts in a given situation and, therefore, must be understood to allow, as a pertinent fact to be considered, a particular declarant’s lack of knowledge or sophistication that is attributable to age.” *Id.* at n.11. Most interestingly, the court noted that “[l]ogic informs that a six year old child can have little or no comprehension of a criminal prosecution in which the child’s words might be introduced as evidence against another person in a court of law.” *Id.* at 225. There is “no magic age in Massachusetts” in determining a child’s competency; he is evaluated as to his understanding of the truth, ability to “perceive and understand the event,” his memory, and his “capacity to describe the event” and “comprehend and answer basic questions.” *See* 43 HARRY P. CARROLL AND WILLIAM C. FLANAGAN, COMPETENCY OF CHILD WITNESS, MASSACHUSETTS PRACTICE SERIES, TRIAL PRACTICE § 17.4 (2d ed. 2012).

³⁸ *See, e.g.,* State v. Arroyo, 935 A.2d 975, 999 (Conn. 2007) (holding five-year-old victim’s statements to teacher were nontestimonial); State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006), *aff’d by* Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009) (holding three-year-old victim’s videotaped interview with social worker was nontestimonial); State v. Buda, 949 A.2d 761, 777 (N.J. 2008) (holding three-year-old victim’s statements to mother and social worker were nontestimonial); *see also* Ceci & Friedman, *supra* note 33, at 94 (explaining courts admit child witness hearsay statements because statements considered reliable). Ceci and Friedman reasoned two factors are particularly influential for courts in deciding to admit statements made by very young children: (1) “the apparent absence of a motive for the child to lie,” and (2) “the apparent unlikelihood in some settings that the child could develop a plan to deceive or to concoct her account if it did not in fact reflect abuse she had actually suffered.” Ceci & Friedman, *supra* note 33 at 94.

³⁹ *Allshouse III*, 36 A.3d 163, 173 (Pa. 2012) (applying *Bryant* analysis in deciding whether four-year-old’s statements were testimonial); *see also supra* note 23 and accompanying text (explaining significance of *Bryant* decision).

⁴⁰ *Allshouse III*, 36 A.3d at 174 (quoting *Bryant*, 131 S. Ct. at 1155); *see supra* note 23 and accompanying text (explaining significance of *Bryant* decision).

mine the existence of an ongoing emergency.⁴¹ The *Bryant* decision then instructed an inquiring court to look to the “statements and actions of both the declarant and interrogators [as potential sources of] objective evidence of the primary purpose.”⁴²

The Supreme Court of Pennsylvania reasoned that while Geist’s interview with A.A. occurred one week after the assault on J.A. and after J.A. had been removed from the family home, once the Appellant accused A.A. it was “incumbent upon Geist to immediately investigate the matter . . . because, at that time, A.A. and J.A. were together in their grandparents’ home”⁴³ Geist perceived this situation as an emergency because J.A. and A.A. were together at their grandparents’ house, meaning that J.A. could still be in danger if A.A. was the perpetrator.⁴⁴ *Bryant* clarified that an ongoing emergency is not dispositive as to the primary purpose of the interview prong.⁴⁵ Next, the court analyzed Geist’s actions, including the content of the questions asked and his report after the interview, but concluded the primary purpose of the interview with A.A. was to allow Geist “to assess and address what he believed to be an ongoing emergency.”⁴⁶ Looking to A.A.’s conduct, the court opined that it was unlikely that a four-year-old could understand that her statements were evidence of past conduct that might be used in the course of criminal proceedings against the Appellant.⁴⁷ Lastly, the surrounding circumstances of the interview lacked any type of formality that would alert the victim to the possibility that her statements could be used in court.⁴⁸ The court concluded A.A.’s statement to Dr. Ryen was inconsequential because it was simply a summation of A.A.’s statements to Geist, which the court previously concluded were properly admitted.⁴⁹

Despite *Bryant*’s holding and SCOTUS’s call to the Supreme Court

⁴¹ *Bryant*, 131 S. Ct. at 1157 n.8 (defining ongoing emergency through individual’s perception of the interrogation at that time); *Allshouse III*, 36 A.3d at 174 (applying “perspective of the parties at the time of the interrogation” to define ongoing emergency).

⁴² *Bryant*, 131 S. Ct. at 1160 (explaining how to identify primary purpose of an interrogation); *Allshouse III*, 36 A.3d at 175 (same).

⁴³ *Allshouse III*, 36 A.3d at 178 (reasoning why Geist perceived situation as ongoing emergency).

⁴⁴ *See id.* (explaining Geist immediately investigated the matter due to fear of J.A.’s safety).

⁴⁵ *Bryant*, 131 S. Ct. at 1160 (stating existence of ongoing emergency is only one factor in determining purpose of interrogation); *Allshouse III*, 36 A.3d at 178 (same).

⁴⁶ *Allshouse III*, 36 A.3d at 179 (explaining Geist’s actions before and after interview were not for purpose of trial preparation).

⁴⁷ *Allshouse III*, 36 A.3d at 180-81 (holding age is relevant in applying reasonable person standard).

⁴⁸ *Id.* at 181 (characterizing circumstances surrounding interview with A.A. as informal).

⁴⁹ *Id.* at 182 (refusing to consider Dr. Ryen’s interview in analysis).

of Pennsylvania to reverse its decision, the Pennsylvania Supreme Court's decision to admit A.A.'s statements was consistent with a more logical view: to examine the situation from the child-declarant's perspective.⁵⁰ SCOTUS's failure to take into consideration the declarant's intent in *Bryant* was a misinterpretation of the meaning of "testimonial;" in the context of a child declarant this mistake could cost the victim the opportunity to see his or her abuser punished.⁵¹ The importance of the child victim's cognitive awareness of the consequences of his or her statements goes to the core of testimonial evidence, upon which the Pennsylvania Supreme Court should have placed greater emphasis.⁵² Without this cognitive awareness, there is no "solemn declaration" that statements are meant to be used in a criminal proceeding, but rather an off-hand narrative.⁵³

Regarding the Supreme Court of Pennsylvania's treatment of the interviewer Geist, the court used the same over-emphasis on the interviewer's point of view as SCOTUS did in *Bryant*.⁵⁴ Prosecutors do not always evaluate the status of the interviewer by considering his or her employment position, the primary purpose of the interview, or the interviewer's independence from supervision or protocol during the interview.⁵⁵ While determining the status of the interviewer helps establish the primary purpose of conducting the interview by contextualizing the child witness's statements, it did not speak to the basic objective of the Confrontation Clause: "to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial."⁵⁶ Reliability is at the core of both the hearsay doctrine and the Confrontation Clause,

⁵⁰ *Id.* at 180-81 (explaining declarant's age should be included as factor in "all of the relevant circumstances"); Sawicki, *supra* note 29, at 3 (explaining importance of traumatized child's mental state); *see supra* notes 18, 33, and 47 and accompanying text (stating importance of witness's age in testimonial determination).

⁵¹ *See supra* note 33 and accompanying text (explaining how high suggestibility and lack of cognitive awareness make children unaware of statements' consequences).

⁵² *See supra* note 29 (requiring reasonable person standard in determining admissibility of statements made by child witnesses). "[A] 'reasonable person' standard for children takes into account the abilities of children by acknowledging that infancy is a 'legal disability' requiring a different standard of assessment." Phillips, *supra* note 32, at 39.

⁵³ *Bryant*, 131 S. Ct. at 1168-69 (Scalia, J., dissenting) (requiring cognitive awareness in order for statements to fit testimonial definition).

⁵⁴ *Bryant*, 131 S. Ct. at 1160 (explaining statements and actions of both declarant and interrogators provide evidence of primary purpose); *Allshouse III*, 36 A.3d at 178-79 (explaining Geist's actions before and during interview prove existence of ongoing emergency).

⁵⁵ *See* Sawicki, *supra* note 29, at 3 (explaining distinction between government agents and non-police interviewers as factor in establishing purpose of interview).

⁵⁶ *Bryant*, 131 S. Ct. at 1155 (explaining basic objective of Confrontation Clause); Ceci & Friedman, *supra* note 33, at 94 ("[C]onfrontation right is 'primarily a functional right that promotes reliability in criminal trials.'"); *see supra* note 27 and accompanying text (explaining hearsay rules and Confrontation Clause protect similar values).

and a statement's reliability is dependent upon the circumstances in which the statement was said, which should be defined in light of the declarant's characteristics.⁵⁷ The declarant should be the focus of the testimonial statement analysis because both the intent behind the words as well as the spoken words themselves define the statement as either a solemn declaration or a narrative.⁵⁸ This focus on the declarant is especially important in that it supports the conclusion that the "reasonable person" standard is not an adult standard per se, but a standard that should take into account the cognitive abilities of the declarant.⁵⁹

From a prosecutor's perspective, the child-declarant should be the focus of the testimonial hearsay analysis because the prosecution has the burden to present its witness, and without the use of the child witness's statement it is almost impossible for a prosecutor to succeed in any child abuse case.⁶⁰ It is in the best interest of both the prosecutor and child witness for the child to not testify because it is a risky litigation tactic.⁶¹ No

⁵⁷ Ceci & Friedman, *supra* note 33, at 96 (defining reliability of statement depends on circumstances of interview). Ceci thoughtfully suggests that possibly the confrontation right should not apply to a statement made by a very young child "because the child lacks sufficient maturity and understanding at the time of her statement for the statement to be considered testimonial." *Id.* at n.268. While this may diminish the probative value of the statement, it should not preclude the statement's admissibility:

"If a dog's bark has sufficient probative value, we do not exclude it because the accused has not had a chance to cross-examine the dog. It may be that the cry for help of a young child, even if verbalized, bears a closer material resemblance to the dog's bark than to an adult's accusatory declaration."

Id. at n.268 (quoting Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 3 ISR. L. REV. 506, 532 n.55 (1997)).

⁵⁸ *Allshouse III*, 36 A.3d at 121-22 (Scalia, J., dissenting).

⁵⁹ See Phillips, *supra* note 32, at 31 ("When courts begin to recognize that the objective reasonable person standard is not an adult standard, and that the court can take into account the cognitive and mental abilities of the child, that will result in turning the tide of inaccurate decisions from the bench that is harming child victims and witnesses."); see also *supra* note 33 and accompanying text (discussing cognitive abilities of children in litigation contexts).

⁶⁰ Ceci & Friedman, *supra* note 33, at 72 (explaining child's allegation in sexual abuse cases is often crucial to prosecution). Because the prosecution must satisfy a high standard of persuasion, even small probabilities that a child will make a false allegation of sexual abuse or minor misjudgments in assessing these probabilities may be highly significant for the prosecutor. *Id.* at 76; see also *Melendez-Diaz*, 557 U.S. at 324 (imposing burden on prosecution to present witness); Sawicki, *supra* note 29, at 6 (quoting *Melendez-Diaz* concerning placement of burdens on the prosecution); see also *supra* note 31 and accompanying text (explaining *Melendez-Diaz* definition of nontestimonial statements); see also National Center for Prosecution Of Child Abuse, *supra* note 29 (showing few states enact legislation helping prosecutors use comforting tactics on children during trial proceedings).

⁶¹ Ceci & Friedman, *supra* note 33, at 53-54 (arguing children are easily influenced by "suggestive interviewing techniques"); Phillips, *supra* note 32, at 36-37 (showing children do not understand legal terminology until age ten). Several studies affirm that "children under the age of ten do not comprehend legal terms, the nature or process of court proceedings, or the individuals

prosecutor wants a child to testify without having the capacity to do so, to become confused, and to provide inaccurate testimony.⁶² Social workers and doctors are the prosecution's most reliable source for child-declarant testimony because these individuals are acting according to the best interest of the child, such as her safety and medical wellbeing, not to gather evidence in anticipation of litigation.⁶³ As a result, a heightened level of reliability exists and the statements should be admitted.⁶⁴

In *Commonwealth v. Allshouse*, the Supreme Court of Pennsylvania considered whether a child witness's statements in an interview with a caseworker were testimonial evidence subject to the Confrontation Clause. Although the majority of states contend that statements to child protective services employees are testimonial in nature, the Supreme Court of Pennsylvania chose not to reverse its decision even in light of the *Bryant* decision. Strictly construing *Bryant*'s reasoning and its emphasis on the fact-specific nature of the surrounding circumstances, the Supreme Court of Pennsylvania's decision is consistent with scientific evidence that a child below the age of ten does not have the cognitive ability to understand that his or her statements made in an interview, such as the interview between A.A. and Geist, will be later used to prove past events in a criminal prosecution. This reasoning is consistent with the Framers' goals because when an accuser lacks the intent to create an out-of-court substitute for trial testimony, there is no violation of the rights of the accused to cross-examine the declarant about statements taken for use at trial. Hopefully SCOTUS' refusal to grant certiorari for *Allshouse III* is a signal for courts to account

involved in court proceedings"; therefore, a child cannot independently understand the weight of their statements before or during court proceedings. Phillips, *supra* note 32, at 37.

⁶² Ceci & Friedman, *supra* note 33, at 54-57 (providing studies showing increasing rates of false claims resulting from suggestive interviewing techniques); see Walker *supra* note 29, at 2-3 (arguing use of comprehensive and systemic court preparation for child witnesses would decrease inaccurate testimony); *supra* notes 3 and 33 and accompanying text (arguing children cannot conceptualize legal system and are highly susceptible to certain interviewing techniques).

⁶³ See Sawicki, *supra* note 29, at 4 (explaining statements elicited for medical diagnosis and treatment not made for purpose of criminal prosecution); see also Ceci & Friedman, *supra* note 33, at 85-86 (recommending that investigators should avoid suggestive questions). In addition, interviewers should limit closed question that yield "yes" or "no" answers and should avoid multiple interviews. See Ceci & Friedman, *supra* note 33 at 86. Further, interviewers should avoid suggestive question until they are confident that the child has all that she or he is willing to say. *Id.* at 85-86.

⁶⁴ Sawicki, *supra* note 29, at 7 (arguing only reasonable expectation of child-declarant is at issue); see also Phillips, *supra* note 32, at 23 (suggesting admissibility issues stem from judges' lack of training on cases involving child victims). "A recent survey of 2,240 judges found that barely 50% of them had received any child welfare training before hearing child dependency and neglect proceedings." *Id.* at 23 n.83 (quoting Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years* (revised and expanded), 25 HAMLINE J. PUB. L. & POL'Y (2007)).

for children-declarants' cognitive immaturity and enact a reasonable child standard. Until state courts, such as Massachusetts, apply this standard consistently the interpretation of "testimonial" will remain too vague, further perpetuating the re-victimization of the court system's most vulnerable victims.

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