Supreme Court, U.S.
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In The
Supreme Court of the United States

WARDEN TERRY CARLSON,

Petitioner,

v.

ORLANDO MANUEL BOBADILLA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), this Court held that "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." The Court pointed to various formulations of what constitutes "testimonial" statements, but did not define the concept. Since that time, lower courts have been divided on how to define "testimonial" and how to apply *Crawford* to other factual scenarios. In this case, in an opinion issued shortly after *Crawford* was decided, the Minnesota Supreme Court held that a statement by a three-year-old child to a child-protection worker was not testimonial because the primary purpose of the interview was to protect the child's health and welfare. The Eighth Circuit granted habeas relief. The questions presented are:

1. Whether the Eighth Circuit exceeded its authority under 28 U.S.C. § 2254(d)(1) (AEDPA), when it held that the Minnesota Supreme Court's ruling that the statement by an abused child to a child-protection worker was not testimonial was "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."

2. Whether the Eighth Circuit exceeded its authority under AEDPA when it made factual determinations contrary to those made by the Minnesota Supreme Court, failed to review the actual interview of the child, and rejected the state supreme court's interpretation of the state statute under which the interview was conducted.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
INTRODUCTION	3
STATEMENT OF THE CASE	4
A. Factual Background	4
B. Minnesota State Court Proceedings	8
1. Minnesota District Court Proceedings	8
2. Decision of the Minnesota Court of Appeals	9
3. Decision of the Minnesota Supreme Court	10
4. Bobadilla's Petition for a Writ of Certiorari	13
C. Federal Habeas Corpus Proceedings	13
1. Decision of the District Court	13
2. Decision of the Eighth Circuit	14
REASONS FOR GRANTING THE PETITION	17

TABLE OF CONTENTS – Continued

Page

I. The Eighth Circuit Exceeded The Limits Of AEDPA When It Held That *Crawford* Clearly Established The Law With Respect To When Statements By Children To Social Workers Are Testimonial And When It Held The State Court Unreasonably Applied *Crawford* 18

A. In Concluding That *Crawford* Clearly Established The Law With Respect To A Young Child's Statement To A Child Protection Worker During A Dual-Purpose Interview, The Eighth Circuit's Decision Conflicts With AEDPA And This Court's Recent Decisions Interpreting AEDPA 19

B. Even If The Federal Law Was Clearly Established, The Writ Should Not Have Been Granted Because The Minnesota Supreme Court Did Not Unreasonably Apply *Crawford* 26

II. The Eighth Circuit Exceeded Its Authority Under AEDPA By Making Factual Determinations Contrary To Those Made By The Minnesota Court, By Failing To Consider The Same Record As The One Before The State Court, And By Construing A State Statute Differently Than The State Court Interpreted It 29

CONCLUSION 37

TABLE OF CONTENTS – Continued

Page

APPENDIX INDEX

Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009) .... App. 1

Bobadilla v. Carlson, 570 F. Supp. 2d 1098 (D. Minn. 2008) .... App. 19

Report and Recommendation (March 25, 2008) ..... App. 55

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) .... App. 92

Bobadilla v. Minnesota, 549 U.S. 953 (2006) ..... App. 130

Minnesota Statute § 626.556 (select provisions) ... App. 131

TABLE OF AUTHORITIES

Page

CASES CITED

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007)....................19

Bradshaw v. Richey, 546 U.S. 74 (2006)....................33

Carey v. Musladin, 549 U.S. 70 (2006)....................*passim*

Crawford v. Washington, 541 U.S. 36 (2004).....*passim*

Davis v. Washington, 547 U.S. 813 (2006)...........20, 21

Hill v. Wilson, 519 F.3d 366 (7th Cir.), *cert. denied*, 129 S. Ct. 200 (2008)....................23

Holland v. Jackson, 542 U.S. 649 (2004)....................32

House v. Hatch, 527 F.3d 1010 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1345 (2009)....................23

Knowles v. Mirzayance, 129 S. Ct. 1411 (2009).........27

Locke v. Cattell, 476 F.3d 46 (1st Cir.), *cert. denied*, 128 S. Ct. 177 (2007)....................25

Lockyer v. Andrade, 538 U.S. 63 (2003)....................19

Mayle v. Felix, 545 U.S. 644 (2005)....................18

Mills v. Maryland, 486 U.S. 367 (1988)....................24

Mitchell v. Esparza, 540 U.S. 12 (2003)....................27

Mullaney v. Wilbur, 421 U.S. 684 (1975) 34

Panetti v. Quarterman, 551 U.S. 930 (2007) 18

Rice v. Collins, 546 U.S. 333 (2006)....................30, 32

TABLE OF AUTHORITIES – Continued

Page

Richardson v. Quarterman, 537 F.3d 466 (5th Cir. 2008), *cert. denied,* 129 S. Ct. 1355 (2009) 25

Rodriguez v. Miller, 537 F.3d 102 (2d Cir. 2008) 24

Smith v. Curry, 580 F.3d 1071 (9th Cir. 2009).....24, 25

Snowden v. State, 846 A.2d 36 (Md. Ct. Spec. App. 2004), *aff'd by,* 851 A.2d 596 (Md. 2004) 22

Spisak v. Hudson, 512 F.3d 852 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak,* 129 S. Ct. 1319 (2009) 24

State v. Krasky, 736 N.W.2d 636 (Minn. 2007), *cert. denied,* 128 S. Ct. 1223 (2008) 36

Thompson v. Battaglia, 458 F.3d 614 (7th Cir. 2006), *cert. denied,* 549 U.S. 1229 (2007) 22

United States v. Saget, 377 F.3d 223 (2d Cir. 2004), *cert. denied,* 543 U.S. 1079 (2005) 22

Uttecht v. Brown, 551 U.S. 1 (2007) 18, 30

Williams v. Taylor, 529 U.S. 362 (2000) 19, 26

Williams v. Taylor, 529 U.S. 420 (2000) 18

Wilson v. Sirmons, 536 F.3d 1064 (2008), *reinstated in part and remanded in part on other grounds by Wilson v. Workman,* 577 F.3d 1284 (10th Cir. 2009) 25

Wright v. Van Patten, 552 U.S. 120, 128 S. Ct. 743 (2008) 19, 22, 23

Yarborough v. Alvarado, 541 U.S. 652 (2004)......26, 27

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION CITED

U.S. Const. Amend. VI 2, 9

STATUTES AND RULES CITED

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2246 14

28 U.S.C. § 2254 ....2, 13

28 U.S.C. § 2254(d)(1) 26

28 U.S.C. § 2254(e)(1) 14, 30

28 U.S.C. § 2254(e)(2) 14

Minn. Stat. § 626.556 (2002) ....*passim*

Minn. R. Crim. P. 28.02, subd. 8 32

Minn. R. Crim. P. 29.04, subd. 11 32

OTHER AUTHORITY CITED

Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Pol'y 553 (2007)..........20, 21

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PETITION FOR WRIT OF CERTIORARI

Petitioner Warden Terry Carlson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The published decision of the Eighth Circuit (App. 1-18) appears in the Federal Reporter as *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009). The published decision of the district court (App. 19-54) is officially reported at 570 F. Supp. 2d 1098 (D. Minn. 2008). The magistrate's decision (App. 55-91) is unreported. The Minnesota Court of Appeals' decision is officially reported as *State v. Bobadilla*, 690 N.W.2d 345 (Minn. Ct. App. 2004). The Minnesota Supreme Court's published decision (App. 92-129) is located at 709 N.W.2d 243 (Minn. 2006). This Court denied Bobadilla's petition for a writ of certiorari on direct appeal (App. 130) at *Bobadilla v. Minnesota*, 549 U.S. 953 (2006).

JURISDICTION

The Eighth Circuit entered its judgment on August 6, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 28 U.S.C. § 2254, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall

> have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Relevant provisions of Minnesota's statute regarding reporting of maltreatment of minors, Minn. Stat. § 626.556 (2002), are included in the appendix at App. 131-44.

INTRODUCTION

In *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004), this Court acknowledged that its refusal to articulate a comprehensive definition of "testimonial" would cause interim uncertainty. Indeed, since *Crawford*, lower courts have struggled with how to define "testimonial" and how to apply *Crawford* in cases involving factual scenarios that differ from the scenario present in *Crawford*. Notwithstanding the uncertainty surrounding this issue, and the absence of any decision by this Court involving a child's statement to a social worker, the Eighth Circuit held that the law governing whether a child's statement is testimonial is "clearly established" and that the Minnesota Supreme Court "unreasonably appl[ied]" that clearly established law. In reaching that conclusion, the Eighth Circuit failed to abide by the restrictions on habeas relief imposed by Congress in AEDPA. The Eighth Circuit also failed to abide by AEDPA's requirement that federal habeas courts presume that state court factual findings and constructions of state law are correct.

The Eighth Circuit's decision is contrary to the principles of comity, finality and federalism, which AEDPA was designed to promote. This case, therefore, is about ensuring that federal courts of appeal remain faithful to the limits Congress imposed on their authority in AEDPA. Whereas some circuits have heeded this Court's admonitions regarding the limits on habeas relief, the Eighth Circuit and several other circuits persist in granting habeas relief even absent "clearly established" law.

STATEMENT OF THE CASE

A. Factual Background.

In the spring of 2003, three-year-old TB lived with his mother, Melissa, but saw his father, Miguel, every other weekend (JA404-05, 435-36).[1] Miguel lived in the home of his mother and step father (JA434-35). Bobadilla, Miguel's brother, also lived there (*Id.*).

On May 2, 2003, Melissa took TB to spend the weekend with his father (JA404-05). TB and his father spent a lot of the weekend there, either in the living room or in Miguel's upstairs bedroom (JA437). There were times during the weekend when Miguel left TB alone in a room (JA440-54). Miguel saw

[1] "JA" refers to the Joint Appendix filed in the Eighth Circuit.

Bobadilla walking in the hallway while Miguel was washing up in the bathroom (JA453-54). By Sunday, May 4, TB was acting strangely and wet himself three times that day (JA442).

That night, after Melissa picked TB up and while preparing him for bed, she noticed that the area around his anus was very red and irritated (JA405-09, 441). When she mentioned it to TB, he appeared nervous and began playing with his hair (JA405). Melissa reassured TB that he could tell her anything and again asked him what happened (*Id.*). TB then told his mother that "his Uncle Orlando [Bobadilla] had put his finger in his booty," TB's term for his anus (JA387, 405-06). TB told his mother that he had asked Bobadilla to stop and that Bobadilla had said he was sorry (JA406).

TB's parents and grandmother then took him to the hospital, where he was examined in the emergency room (JA406-07, 413, 442-43). The doctor saw an abnormal erythema or redness around TB's rectum, which was consistent with the assault TB disclosed to his mother (JA414-17). The erythema was not a diaper rash, and the doctor did not see any ulcerations or lesions that would lead her to believe that TB had a chronic problem in that area of his body instead of suggesting that he was a possible assault victim (JA416-19).

A police officer, who was dispatched to the hospital on an assault report, initially met with the emergency room nurse and TB's parents (App. 95). The

officer forwarded his report to the investigations unit of the police department and to Kandiyohi County Family Service Department (App. 95). Several days later, on May 9, 2003, social worker Cherlynn Molden interviewed TB in the presence of police investigator Matthew Akerson at the law enforcement center (JA378-79, 390). This interview rests at the heart of the current dispute.

When police investigator Akerson was asked at trial how he became involved in the investigation in this case, he said: "We received a report from the Kandiyohi County Family Service Department of this alleged abuse. Cherlynn Molden had called me. We set up a time to interview the child, the victim in this case" (JA428). Molden testified that she became involved in TB's interview when Detective Akerson asked her to assist him in the interview (JA378). She said, "I wasn't involved in that part of the investigation, but he asked me to assist him" (*Id.*).

Molden had a difficult time getting in touch with TB's mother by telephone (JA399). When Molden finally connected with TB's mother, TB's mother brought him in that day for an interview (*Id.*). Detective Akerson and child-protection worker Molden walked TB and his parents to the "child friendly" interview room, explaining to TB that his parents would be waiting for him in the room next door (JA380). Detective Akerson was not in uniform (App. 95).

Molden sat across from TB with an easel between them; Detective Akerson sat opposite from the easel (JA378-79). The room contained a video camera, which was not visible to TB due to a two-sided mirror (JA378). Molden, a social worker who does "child-protection investigations," has been involved in approximately 250 investigations regarding sexual abuse of children (JA374-75). Molden was trained in the CornerHouse method, which is a style of interviewing specifically geared toward children who have been victims of sexual abuse (JA375-76). The Corner-House method requires the interviewer to use non-leading questions in an attempt to elicit the child's own words (JA376). There are challenges in interviewing a three-year-old, such as a short attention span and an inability of a child to understand complex terms or questions (JA379).

During the course of the interview, Molden asked TB whether anyone had hurt his body, and TB replied, "Orlando [Bobadilla] did" (JA385). Molden asked him how Bobadilla had hurt his body, and TB replied, "he does stuff to my booty" (*Id.*). When Molden asked what Bobadilla had done to his booty, TB said that Bobadilla "put his finger in my booty" (*Id.*). Molden asked TB to point out his "booty" on the diagram, and he initially pointed in the general direction of the buttocks (JA387). Molden then had TB stand up and approach the diagram more closely and point more specifically (*Id.*). When TB did so, he pointed to the area of the anus and referred to that as "the booty" (*Id.*).

Molden asked TB where the incident occurred, and TB said that it happened in his father's room (*Id.*). Molden asked TB where his father was at the time, and TB said that his father had gone downstairs to get the "kitty" (JA388). TB also said "yeah" when asked if his father had seen the abuse happen (App. 97). Molden asked TB how many times it happened, and TB said "one time" while he was lying down (JA387-88). TB said Bobadilla touched him on the skin and said he was sorry (JA388). Molden closed the interview with TB with a safety message, discussing with him who he could tell if something like this happened again (JA389).

Although Detective Akerson was present during the interview with TB, the detective did not participate in it (App. 95).

B. Minnesota State Court Proceedings.

1. Minnesota District Court Proceedings.

Bobadilla was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Prior to trial, the state sought rulings concerning TB's competency to testify and the admissibility of several of TB's out-of-court statements, including TB's videotaped statement to Molden. The district court judge ruled that TB was not competent to testify, but that his

statement to child-protection worker Molden was admissible (JA97-308, 328-33).[2]

Molden testified at trial, and her videotaped interview of TB was played for the jury (JA374-400). Bobadilla testified that he never inserted his finger in TB's anal opening (JA473). He testified that he had been in TB's bedroom at Melissa's apartment sometime earlier and accidentally bit TB's ear while playing a game (JA473-74).

The jury found Bobadilla guilty of first-degree and second-degree criminal sexual conduct.

2. Decision of the Minnesota Court of Appeals.

While Bobadilla's appeal was pending, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). The Minnesota Court of Appeals held that under *Crawford*, the admission of TB's videotaped statement to the child-protection worker violated Bobadilla's Sixth Amendment confrontation rights. *Bobadilla*, 690 N.W.2d at 345.

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[2] The judge's decision was based on the reliability of the statement (JA328-33). *Crawford* had not been decided yet.

3. Decision of the Minnesota Supreme Court.

The Minnesota Supreme Court reversed (App. 92-129). The court recognized that *Crawford* bars "testimonial" out-of-court statements when the accused has not been afforded the opportunity for cross examination (App. 100). The issue was thus "whether TB's statements in the interview with the child-protection worker were 'testimonial' under *Crawford*" (App. 100). The Minnesota Supreme Court found that this Court "'refused to articulate a comprehensive definition' of testimonial statements," declined to choose among three formulations, and stated that the three formulations "'share a common nucleus,'" which includes, at a minimum, police interrogations (App. 101-02 (quoting *Crawford*, 541 U.S. at 51-53, 68 n.10)).

Given the absence of a definition of "testimonial" from this Court, the Minnesota Supreme Court looked to the concerns animating *Crawford* and concluded that the central considerations were the purpose of the statement from the perspective of both the declarant and the government questioner; if either is acting to a substantial degree to produce a statement for trial, the statement is testimonial (App. 102-03, 109-10). The court observed that this approach was consistent with that taken by numerous other courts (App. 104-06 (citing cases from 10 jurisdictions and noting that those jurisdictions have considered whether the declarant or questioner were giving or taking a statement with an eye toward trial)).

Recognizing that courts in several jurisdictions have held that statements of children in interviews conducted by social workers or police investigators are testimonial, the court found those cases distinguishable on their facts (App. 111-12 (citations omitted)). The court further noted that government questioners and declarants often have multiple purposes, and that "where preservation for trial is merely incidental to other purposes, . . . a statement will not be deemed testimonial" (App. 107).

Applying its test here, the Minnesota Supreme Court determined that neither TB nor Molden "were acting, to a substantial degree, in order to produce a statement for trial" (App. 112-13). The court found that the interview "was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child" (App. 115). Even if part of the purpose was to produce a statement for trial, that purpose was at best incidental to the main purpose of assessing and responding to any imminent risks to TB's health and welfare (App. 116). The court also determined that given TB's young age, it was doubtful that he understood his statements would be used at a trial (App. 116).

As further support for its conclusion, the court noted that the interview here was conducted pursuant to Minn. Stat. § 626.556, Minnesota's statutory scheme for reporting, investigating, and responding

to threats to children's health and welfare (App. 113). The statute requires "the local welfare agency," following a report of abuse, to "conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible" (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a) at App. 137-38)). And although the statute requires the welfare agency and law enforcement to "coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews," (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a) at App. 138)), the statute is not "designed with the express purpose of facilitating the creation of out-of-court statements for a future trial" (App. 114).

Finally, the Minnesota Supreme Court explained that some assessment interviews may produce testimonial statements, citing as an example an older child who understands the law-enforcement consequences of the statement "or an interview with more significant law-enforcement involvement [which] might both exhibit a greater purpose on the part of a declarant or government questioner to produce statements for use at a future trial" (App. 116). The court recognized that in a situation "tantamount to a 'police interrogation' under *Crawford*," the government questioner would be acting to a substantial degree to

produce a statement for trial (App. 112). The court found, however, that this was not such a case.

Justice Alan Page dissented and filed a separate opinion (App. 120-24).

4. Bobadilla's Petition for a Writ of Certiorari.

In his petition for certiorari in this Court on direct appeal, Bobadilla argued, "[t]his case necessitates a definitive ruling on the following *issue of first impression*: how this Court's decision in *Crawford* applies to a child victim's accusatory statement elicited during a child abuse forensic interview, where the child was too young to testify." (Pet. for Cert., No. 05-11698, at 2; emphasis added). He also argued that lower courts were "irreconcilably split" in considering the purpose of a forensic child abuse interview where the interview serves a dual purpose (*Id.* at 8). Bobadilla said *Crawford* left unresolved how to define whether a child's statement during a forensic interview was testimonial and that this issue was "unsettled" (*Id.* at 8, 12).

This Court denied Bobadilla's petition for certiorari on October 10, 2006 (App. 130).

C. Federal Habeas Corpus Proceedings.

1. Decision of the District Court.

Bobadilla filed a counseled petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United

States District Court for the District of Minnesota. He argued that the introduction of TB's videotaped statement at trial violated his right of confrontation and was contrary to *Crawford*, and that the Minnesota Supreme Court unreasonably applied *Crawford* (JA46-60, 97-105). Bobadilla further argued that under 28 U.S.C. § 2254(e)(1), there was "no factual finding, no presumption, and nothing to rebut." (JA105-09). He moved the court for an evidentiary hearing under 28 U.S.C. §§ 2246 & 2254(e)(2) (JA114-21).

Declining to adopt the Magistrate's Report and Recommendation to deny Bobadilla's petition, the district court granted habeas relief (App. 19-54). The district court conceded that the record before the federal court did not contain a transcript of the full interview of TB (App. 44 n.7). The state filed a motion to expand the record to include a copy of the videotape and/or a transcript of it (JA241-53), and simultaneously filed a motion to alter or amend judgment based upon review of the videotape (*Id.*). The district court denied both of the state's motions (JA254-59).

2. Decision of the Eighth Circuit.

The Eighth Circuit affirmed the grant of habeas relief, holding that it was "unreasonable" for the Minnesota Supreme Court not to conclude that the interview of TB was a form of "police interrogation" that, under *Crawford*, created a testimonial statement (App. 13). In the Eighth Circuit's view, every

interview conducted by a social worker under Minn. Stat. § 626.556 amounts to a police interrogation that produces a testimonial statement because the statute "mandates social workers and police officers [to] coordinate the planning and execution of their investigation. . . ." (App. 15). According to the Eighth Circuit, "even if a social worker is acting for a different purpose, the statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation" (App. 15). "Far from making such interviews unlike the police interrogation in *Crawford*, the statute mandates them to be the functional equivalent of such interrogations" (App. 15). The court therefore rejected the Minnesota Supreme Court's determination that the interview was conducted under Minn. Stat. § 626.556 "'for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child'" (App. 13-14 (quoting App. 115)).

On the facts of this case, the Eighth Circuit found that Molden's trial testimony revealed that "the interview was initiated by a police officer" and that Molden participated in the interview "for the purpose of the criminal investigation" (App. 11-12). In quoting Molden's testimony, the court of appeals inserted its own language: "'Detective Akerson from the Police Department asked me to assist him in interviewing [TB]. I wasn't involved in that part of the investigation [*that is, the criminal investigation*], but he

asked me to assist him'" (App. 3 (brackets added by Eighth Circuit; emphasis added)). The court did not explain why Molden's testimony could not be read as saying that she had not personally been interviewing witnesses to determine what steps were needed to protect TB's health and welfare (*i.e.*, the civil investigation).

The Eighth Circuit emphasized that "the interview was not conducted until five days after the abuse was first alleged, which indicates the purpose of the interview was to confirm a past allegation of abuse rather than to assess immediate threats to TB's health and welfare" (App. 12). The court did not explain why a civil investigation done for the purposes of protecting a child's health and welfare could not take place five days after abuse is alleged. The Eighth Circuit also determined that the federal district court did not "clearly err" in finding that Molden did not ask the type of questions expected if the purpose of the interview was to assess risks to TB's welfare (App. 14). In reaching that conclusion, the court did not address the state's argument that the federal district court could not make such a finding without having the videotaped interview or a transcript of it in its record.

In the end, the Eighth Circuit concluded that "[t]he only significant difference between the interview involved in the present case and the one held to be testimonial in *Crawford* is instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the

same" (App. 12). It was therefore "unreasonable for the Minnesota Supreme Court to conclude, even though the questioning was undertaken by a social worker, the statements made by TB during his interrogation were in any way different than the statements found to be testimonial in *Crawford*" (App. 13). Finally, the court found that the error in admitting TB's videotaped statement at trial was not harmless (App. 16-17).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit decided this case as if it were on direct appeal. In doing so, the court failed to properly apply the limitations imposed by Congress through AEDPA and the decisions of this Court interpreting AEDPA. Specifically, the Eighth Circuit's decision conflicts with AEDPA and this Court's precedents by treating *Crawford* as though it had "clearly established" the law with respect to whether and when statements made by young children to social workers are testimonial, and by concluding that the state court "unreasonably appl[ied]" *Crawford*. The Eighth Circuit also exceeded its authority under AEDPA by rejecting the state court's factual findings without a complete record and by adopting a different interpretation of a Minnesota statute than that adopted by the Minnesota Supreme Court.

The Eighth Circuit's decision undermines the finality of state court convictions that AEDPA sought

to protect. This Court has reversed numerous federal court of appeals decisions on that basis, but several circuits, including the Eighth Circuit, have not adhered to the AEDPA standards. In addition, the Eighth Circuit's decision directly conflicts with the Minnesota Supreme Court's decision, resulting in confusion in Minnesota on how child abuse cases should be handled and prosecuted. This Court should grant certiorari to ensure that federal habeas courts follow the limits imposed by Congress in AEDPA.

I. The Eighth Circuit Exceeded The Limits Of AEDPA When It Held That *Crawford* Clearly Established The Law With Respect To When Statements By Children To Social Workers Are Testimonial And When It Held The State Court Unreasonably Applied *Crawford*.

Congress enacted AEDPA "to advance the finality of criminal convictions," *Mayle v. Felix,* 545 U.S. 644, 662 (2005), and "to further the principles of comity, finality, and federalism." *Panetti v. Quarterman,* 551 U.S. 930, 945 (2007). Accordingly, this Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor,* 529 U.S. 420, 436 (2000). AEDPA provides "binding directions" to accord deference to state-court decisions, and creates a "high standard to be met" before a federal court may issue a writ of habeas corpus. *Uttecht v. Brown,*

551 U.S. 1, 10 (2007). The Eighth Circuit's decision in this case is contrary to the principles that Congress sought to further with the enactment of AEDPA.

A. In Concluding That *Crawford* Clearly Established The Law With Respect To A Young Child's Statement To A Child Protection Worker During A Dual-Purpose Interview, The Eighth Circuit's Decision Conflicts With AEDPA And This Court's Recent Decisions Interpreting AEDPA.

The "threshold question" under AEDPA is whether there is a rule of law that was "clearly established" at the time the state-court conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). "Clearly established" refers to the holdings, as opposed to the dicta, of this Court at the time of the relevant state-court decision. *Lockyer v. Andrade,* 538 U.S. 63, 72 (2003) (citing *Williams*, 529 U.S. at 412). When there is no holding by this Court on a particular issue, it cannot be said that the state supreme court unreasonably applied clearly established federal law. *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006); *Wright v. Van Patten*, 552 U.S. 120, ___, 128 S. Ct. 743, 746-47 (2008). "AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 277-78 (2007) (Roberts, C.J., dissenting).

Crawford does not "squarely address" the issue in this case and does not provide a "categorical answer" or "clear answer" to the issue presented to the Minnesota Supreme Court. *Crawford* expressly left open the question of whether statements are testimonial when given in contexts other than that of a *Mirandized* adult suspect during a police interrogation. This Court gave three alternative formulations of testimonial statements but did not adopt any particular formulation, *Crawford*, 541 U.S. at 51-52, refused to define "interrogation," *id.* at 53 n.4, and specifically stated that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Anticipating the situation that faced the Minnesota Supreme Court in this case, the Court explicitly acknowledged that its "refusal to articulate a comprehensive definition in this case will cause interim uncertainty." *Id.* at 68 n.10

Indeed, when the Minnesota Supreme Court decided this case, this Court had not yet issued its decision in *Davis v. Washington,* 547 U.S. 813, 822 (2006), which refined the concept of "testimonial" by holding that statements made in response to police interrogation "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." And, even after *Davis,* many questions about the scope of *Crawford* remain. *See* Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Pol'y

553, 573-74 (2007) (discussing the "wide range" of issues that need to be resolved, including the extent to which statements to government agents who are not law enforcement can be characterized as testimonial and the extent to which the age of the declarant can be considered). As Professor Friedman notes, "[w]ith respect to extremely young children, . . . there is a plausible argument that they may be incapable of being witnesses within the meaning of the Confrontation Clause." *Id.* at 574. With so many questions about what constitutes a testimonial statement still unanswered – even after further refinement in *Davis* – the Eighth Circuit's conclusion that *Crawford* clearly established the law with respect to the statements at issue is untenable.

For precisely these reasons, in his petition for certiorari on direct appeal, Bobadilla argued that the question presented was one of "first impression" and "unsettled" (Pet. for Cert., No. 05-11698, at 8, 12). He stated that *Crawford* left unresolved how to define whether a child's statement during a forensic interview was testimonial (*Id.*). Bobadilla's own argument in his petition verifies that there is no clearly established law regarding whether a child's statement to a child protection worker is testimonial.

Bobadilla also asserted in his petition for certiorari that lower courts were "irreconcilably split" in considering the purpose of a forensic child abuse interview where the interview serves a dual purpose. (*Id.* at 8). The Minnesota Supreme Court recognized that courts considering *Crawford* have utilized

different formulations of "testimonial" and have reached varying results (App. 106 n.3, 11-12 (citing, for example, *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004), *cert. denied*, 543 U.S. 1079 (2005), as a case concluding that the declarant's perspective is the dispositive factor in the testimonial analysis)). The state court also recognized that other jurisdictions had concluded that a child's statement to a social worker was testimonial (*see* App. 111 (citing, for example, *Snowden v. State*, 846 A.2d 36 (Md. Ct. Spec. App. 2004), *aff'd by,* 851 A.2d 596 (Md. 2004))). As this Court recognized in *Musladin*, 549 U.S. at 76-77, the different results of the lower courts further establish the lack of clearly established Supreme Court precedent. *See also Thompson v. Battaglia,* 458 F.3d 614, 619 (7th Cir. 2006) (holding that a lack of clearly established law is evident when there is a variety of practice among state and federal courts), *cert. denied,* 549 U.S. 1229 (2007).

The Eighth Circuit's grant of habeas relief, notwithstanding the absence of "clearly established Federal law, as determined by" this Court, runs afoul of this Court's recent decisions in *Musladin* and *Van Patten*. Those decisions stand for the proposition that a general principle derived from this Court's precedent does not constitute "clearly established" law under AEDPA when applied in a different factual context. *See Musladin,* 549 U.S. at 75-77 (holding that the general principle from prior decisions regarding the effect of state-sponsored courtroom practices was not clearly established with respect to spectators'

conduct); *Van Patten,* 128 S. Ct. at 746-47 (holding that prior precedents "do not clearly hold that counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence"). In *Van Patten,* this Court noted that its prior decisions did not "squarely address" the issue and did not provide a "categorical answer" or "clear answer" to the question presented. *Id.* at 746-47. The same is true here.

In this case, the general principle of *Crawford* regarding the Confrontation Clause's concern with testimonial statements does not amount to a declaration that a young child's statement to a child-protection worker during a dual-purpose interview produces a testimonial statement on par with the *Mirandized* interrogation at issue in *Crawford*. Like the general principles at issue in *Musladin* and *Van Patten*, the general principle of *Crawford* is not sufficient to meet the clearly-established-federal-law standard in this case. *Cf. House v. Hatch*, 527 F.3d 1010, 1017 n.5, 1022 (10th Cir. 2008) (holding that post-*Musladin*, "federal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts" and that the habeas petitioner must do more than identify a generalized legal principle to demonstrate the law is clearly established), *cert. denied*, 129 S. Ct. 1345 (2009); *Hill v. Wilson*, 519 F.3d 366, 368 (7th Cir.) (citing *Musladin* and *Van Patten* and stating, "[t]he Supreme Court has held that a right becomes 'clearly established' only when a course of decisions has

established how the Constitution's grand generalities apply to a class of situations"), *cert. denied*, 129 S. Ct. 200 (2008); *Rodriguez v. Miller*, 537 F.3d 102, 107 (2d Cir. 2008) (recognizing that *Musladin* requires courts to read Supreme Court holdings narrowly).

The Eighth Circuit is not alone in failing to heed this Court's pronouncements regarding AEDPA's meaning and application. For example, in *Spisak v. Hudson*, 512 F.3d 852, 854 (6th Cir. 2008), *cert. granted sub nom. Smith v. Spisak*, 129 S. Ct. 1319 (2009), the Sixth Circuit held that *Musladin* did not affect its decision to grant habeas relief based on, *inter alia*, a purported violation of *Mills v. Maryland*, 486 U.S. 367 (1988). The court reached that conclusion even though *Mills* did not clearly establish that jury instructions in capital cases must expressly advise the jury that it can consider all mitigating circumstances, including mitigating circumstances not unanimously found by the jury to exist. Similarly, the Ninth Circuit in *Smith v. Curry*, 580 F.3d 1071, 1082 (9th Cir. 2009), granted habeas relief based on petitioner's claim that the trial judge's supplemental jury instruction coerced a verdict because the judge knew the identity of the holdout juror and suggested that the jury concentrate on certain evidence. The dissent recognized that this Court had clearly established that a defendant was entitled to an uncoerced jury verdict, "[b]ut I can find no clearly established federal law indicating that a trial judge may not comment on the evidence when he knows the numerical division of the jury, and no Supreme Court

holding requires a state court judge (when commenting on the evidence) to recite any and all evidence. . . . *Id.* at 1086-87 (Smith, J., dissenting).

By contrast, several circuits have faithfully applied *Musladin's* teaching. The Tenth Circuit recently rejected a habeas claim because no clearly established law dictated that the Confrontation Clause applies at capital sentencing proceedings. *Wilson v. Sirmons*, 536 F.3d 1064, 1111-12 (2008), *reinstated in part and remanded in part on other grounds by Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). Similarly, the First Circuit denied habeas relief where the petitioner argued that his confession during an interview transformed it into a custodial interrogation requiring a *Miranda* warning. *Locke v. Cattell*, 476 F.3d 46, 53-54 (1st Cir.), *cert. denied*, 128 S. Ct. 177 (2007). The court acknowledged that several state courts had concluded that an admission transforms an interview into a custodial interrogation, but found no clearly established law because this Court has not ruled on the issue. *Id.* And in *Richardson v. Quarterman*, 537 F.3d 466, 475-76 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1355 (2009), the Fifth Circuit held that this Court's decisions did not clearly establish that unconstitutional judicial bias existed where the judge's wife knew the deceased because that situation did not fall within any of the three categories of situations (*e.g.*, having a direct pecuniary interest in the case) where this Court has found recusal to be required.

This Court's intervention is needed to ensure that the federal courts of appeal uniformly adhere to AEDPA's requirement that habeas relief may be granted under 28 U.S.C. § 2254(d)(1) only when the state court misapplied a "clearly established" holding by this Court. *Crawford* did not specify how its general principle was to be applied outside the context of a *Mirandized* statement given by an adult suspect to the police. This Court, therefore, did not clearly establish what constitutes a testimonial statement in other contexts. AEDPA foreclosed a grant of habeas relief in this case.

B. Even If The Federal Law Was Clearly Established, The Writ Should Not Have Been Granted Because The Minnesota Supreme Court Did Not Unreasonably Apply *Crawford*.

A petitioner may receive habeas relief when the law is clearly established if the state court unreasonably applied the law. 28 U.S.C. § 2254(d)(1). Even if the federal court concludes that the state court decision erroneously applied clearly established federal law, the writ may only be issued if the application was objectively unreasonable. *Williams*, 529 U.S. at 411. "[T]he range of reasonable judgment can depend in part on the nature of the relevant rule." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The range may be narrow if the legal rule is specific, but when rules are more general, the meaning of such rules must emerge over time. *Id.* "The more general

the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.*; *see also Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009). Consistent with this principle, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

The Eighth Circuit did not give the leeway it was required to give to the Minnesota Supreme Court, given the many questions this Court left unanswered in *Crawford*. Instead, the Eighth Circuit "overruled" the Minnesota Supreme Court for holding a view different from its own on an issue where this Court's precedent is ambiguous. The Eighth Circuit appears to have rejected the substantial purpose test applied by the Minnesota Supreme Court to this dual-purpose interview. Examining Minn. Stat. § 626.556, the Eighth Circuit held that "even if a social worker is acting for a different purpose, the statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation" (App. 15). The court then concluded that the statute mandates child-protection interviews to be the "functional equivalent" of police interrogation (App. 15). This holding suggests that dual-purpose interviews always produce testimonial statements if *any* purpose is for law enforcement.

The Minnesota Supreme Court's substantial purpose test, however, was not an unreasonable application of *Crawford*. The Minnesota Supreme Court carefully and thoroughly analyzed *Crawford*. The court recognized that (1) under *Crawford*, at a minimum, testimonial statements include prior testimony and police interrogations; (2) this Court in *Crawford* declined to define "interrogation" because a more precise definition was not necessary in that case; and (3) as explained by *Crawford*, the Confrontation Clause protects abuse by both declarants and government questioners (App. 102-03). Applying these principles, the Minnesota Supreme Court determined that consideration of the substantial purpose of the statement from the perspectives of both the declarant and the government questioner was critical (App. 102-03, 107-10). That holding was not objectively unreasonable.

The Minnesota Supreme Court found that "neither the child-protection worker nor the child declarant, TB, were acting, to a substantial degree, in order to produce a statement for trial" (App. 112-13). Based on those findings, it was not objectively unreasonable for the Minnesota Supreme Court to conclude that Molden's questioning of TB was not the "functional equivalent" of a prototypical police interrogation conducted by police officers. Moreover, the Minnesota Supreme Court also concluded that "given TB's very young age, it is doubtful that he was even capable of understanding that his statements would be used at trial" (App. 116). It was not

(and is not) objectively unreasonable to conclude, as Professor Friedman suggests, that "young children . . . may be incapable of being witnesses within the meaning of the Confrontation Clause." For that reason as well, the Minnesota Supreme Court's judgment was not objectively unreasonable.

Giving the Minnesota Supreme Court's decision the leeway it was required to be given under AEDPA, the state court's application of *Crawford* was not unreasonable.

II. The Eighth Circuit Exceeded Its Authority Under AEDPA By Making Factual Determinations Contrary To Those Made By The Minnesota Court, By Failing To Consider The Same Record As The One Before The State Court, And By Construing A State Statute Differently Than The State Court Interpreted It.

The Eighth Circuit could only conclude that Molden acted as a "surrogate" for the police when she interviewed TB, and that the interview was the "functional equivalent" of a police interrogation, by rejecting the Minnesota Supreme Court's contrary factual findings and construction of state law. AEDPA, however, requires that federal courts presume the correctness of state courts' factual findings, and longstanding law requires that federal courts accept state courts' construction of state law. The Eighth Circuit's violation of those principles compounds the need for this Court's intervention.

First, under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Accordingly, a federal court's "use [of] a set of debatable inferences to set aside the [factual] conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice v. Collins*, 546 U.S. 333, 342 (2006). When a federal court fails to accord the required deference to the state court, it "fail[s] to respect the limited role of federal habeas relief" prescribed by Congress and Supreme Court precedent. *Brown,* 551 U.S. at 10. The Eighth Circuit disregarded these constraints.

Most notably, the Eighth Circuit found that the interview of TB was initiated by a police officer and was conducted for the purpose of the criminal investigation (App. 11-12). This is contrary to the Minnesota Supreme Court's finding that the interview was initiated by the child protection worker for the overriding purpose of assessing whether abuse occurred and whether action was needed to protect the child's health and welfare (App. 115). Yet the Eighth Circuit did not even mention § 2254(e)(1) and the presumption of correctness. Instead, it "use[d] a set of debatable inferences" to reach the opposite factual conclusion.

The record, however, provides ample support for the Minnesota Supreme Court's finding. At trial, Detective Akerson explained how he became involved

in the investigation in this case, saying, "[w]e received a report from the Kandiyohi County Family Service Department of this alleged abuse. Cherlynn Molden had called me. We set up a time to interview the child, the victim in this case." (JA428). Ignoring that statement altogether, the Eighth Circuit latched onto the following testimony from Molden: "Detective Akerson from the Police Department asked me to assist him in interviewing [TB]. I wasn't involved in that part of the investigation, but he asked me to assist him" (App. 3; JA378). The Eighth Circuit construed that statement as follows: "Molden stated Detective Akerson asked her to 'assist him' in questioning TB and that she was not involved in the *criminal investigation* until Detective Akerson 'asked [her] to assist him'" (App. 12 (emphasis in original)). The Eighth Circuit's assumption that Molden was referring to the "criminal" investigation when she said she was not involved in "that part of the investigation" is not supported by the record.

Under Minn. Stat. § 626.556, social services and law enforcement work together upon receiving a child abuse report. Under that statute, the child protection agency is responsible for "assessing or investigating" the report of abuse (*see, e.g.*, Minn. Stat. § 626.556, subd. 3, at App. 134-35). Therefore, when she was testifying, Molden could have been explaining that she was not previously involved in the *child protection investigation*. This is a fair inference from the record, especially since Detective Akerson said he became involved in the case upon receiving a report

from social services. Given the testimony, it was proper for the Minnesota Supreme Court to conclude that that the interview was initiated by the child protection worker. Only by "us[ing] a set of debatable inferences" could the Eighth Circuit "set aside the [factual] conclusion" of the Minnesota Supreme Court; but as this Court held in *Rice v. Collins*, 546 U.S. at 342, AEDPA bars federal courts from granting habeas relief on that basis.

Second, the Eighth Circuit compounded that error by failing to consider the same record as the Minnesota Supreme Court considered. "[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Holland v. Jackson*, 542 U.S. 649, 652 (2004). The Eighth Circuit, however, did not consider the actual interview of TB, even though the videotape was considered by the Minnesota Supreme Court. The videotape of the interview was played at trial and introduced as Exhibit One (JA397). The Minnesota Supreme Court had the videotape of the interview as part of its record. *See* Minn. R. Crim. P. 28.02, subd. 8, and 29.04, subd. 11 (stating that the record on appeal in the Minnesota Supreme Court includes the exhibits offered at trial). And the Minnesota Supreme Court's decision quoted portions of the interview, discussed what occurred "[i]n the interview," and noted TB's responses to Molden's questions regarding the location of TB's father during the abuse (App. 96-97, 115-16). Thus, what was said during the interview was relevant to the Minnesota Supreme Court's

decision that Molden's primary purpose was to protect the health and well-being of TB.

The federal district court acknowledged that it did not have the video or a transcript of it (App. 44 n.7), but nonetheless denied the state's motion to expand the record to include the videotape (JA254-59). The Eighth Circuit did not address the state's appeal of the district court's denial of the motion to expand the record, and therefore issued its decision without access to the video or transcript. That evidence, however, bears directly on the Eighth Circuit's factual findings. The Eighth Circuit held that "the district court did not clearly err in finding Molden did not ask the type of questions one would reasonably expect if the purpose of the interview was to assess 'imminent' risks to TB's health and welfare. . . ." (App. 14). The court further explained that, "[i]t is the circumstances of the interview at issue which must control, not just the purpose of the statute itself" (App. 14). But if the circumstances of the interview control, then the actual interview is relevant to the determination of whether the statements are testimonial. In failing to consider the videotape or a transcript of it, the Eighth Circuit violated AEDPA.

Third, the Eighth Circuit also exceeded its authority by failing to give deference to the Minnesota Supreme Court's interpretation of the state statute under which the interview was conducted. It is well established that a federal court must follow a state court's interpretation of state laws. *See Bradshaw v. Richey*, 546 U.S. 74, 75-76 (2006) ("We have

repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); *Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975).

In considering whether TB's statement was testimonial, the Minnesota Supreme Court examined Minn. Stat. § 626.556, the statutory scheme for reporting, investigating, and responding to threats to a child's health and welfare (App. 113-15). The Minnesota Supreme Court observed that the statute requires "the local welfare agency," following a report of abuse, to "'conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible'" (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a), at App. 138)). The court concluded that, although the statute requires the welfare agency and law enforcement to "'coordinate the planning and execution of their respective investigation and assessment efforts to avoid duplication of fact-finding efforts and multiple interviews,'" (App. 113 (quoting Minn. Stat. § 626.556, subd. 10(a), at App. 138)), it is not "designed with the express purpose of facilitating the creation of out-of-court statements for a future trial" (App. 114).

The Eighth Circuit rejected the Minnesota Supreme Court's interpretation of the statute as authorizing social workers to interview minors for the purpose of assessing if abuse occurred and whether steps were needed to protect minors' health and welfare. The Eighth Circuit instead concluded that the statute, "rather than dispelling the hallmarks of traditional police interrogations, requires them" (App. 15). Indeed, the Eighth Circuit concluded – directly contrary to the Minnesota Supreme Court – that, "[f]ar from making such interviews unlike the police interrogation in *Crawford*, the statute mandates them to be the functional equivalent of such interrogations" (App. 15).[3]

In addition, the Eighth Circuit misstated the Minnesota Supreme Court's interpretation of the statute. The Eighth Circuit said:

> As the district court astutely noted, if a prosecutor six months after abuse occurred asked a social worker to help him videotape a statement for an upcoming trial, it would be unreasonable to conclude the purpose of the

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[3] The Eighth Circuit further concluded that the videotape requirement was consistent with a law enforcement purpose (App. 15). The Minnesota Supreme Court concluded that the fact that the interview is videotaped does not necessarily indicate the purpose of the interview is to create a statement for trial (App. 115). The use of a videotaped interview helps to avoid multiple interviews of the child, which are traumatic and increase the likelihood that the child will be confused by unnecessarily suggestive questions (App. 115).

> interview was to protect the child from immediate danger just because the statute says as much.

(App. 15). The Minnesota Supreme Court, however, would likely agree that such a statement is testimonial and would not rely on the statute to conclude otherwise. The Minnesota Supreme Court said, "[c]ertainly, communications in initial-assessment interviews may very well evolve into testimonial statements" (App. 116). The court gave as examples an interview with an older child who understands the law-enforcement consequence, or an interview "with more significant law-enforcement involvement" (App. 116). Thus, the Minnesota Supreme Court was not holding that every dual-purpose interview under the statute creates a nontestimonial statement.

The Eighth Circuit's interpretation of Minn. Stat. § 626.556 essentially compels the conclusion that *any* interview conducted pursuant to the statute creates a testimonial statement. This interpretation is not only contrary to the Minnesota Supreme Court's decision in this case, but it conflicts with the Minnesota Supreme Court's decisions in other child abuse cases. *See, e.g., State v. Krasky*, 736 N.W.2d 636 (Minn. 2007) (holding that child's statements to nurse – after child was referred to nurse by social services and law enforcement – were not testimonial and relying in part on Minn. Stat. § 626.556), *cert. denied*, 128 S. Ct. 1334 (2008).

*   *   *

Given the questions left open by *Crawford*, the Minnesota Supreme Court's decision was not an unreasonable application of clearly established law. In addition, the Minnesota Supreme Court's factual determinations and interpretation of a state statute are entitled to deference. The Eighth Circuit's analysis of this case as if it were on direct appeal violates AEDPA and the presumption of finality afforded to state court convictions.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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