No. 09-560

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Eighth Circuit granted habeas relief to Bobadilla on the ground that the statement three-year-old TB gave to a social worker constituted a "testimonial" statement for purposes of the Confrontation Clause under *Crawford v. Washington,* 541 U.S. 36 (2004). Yet this Court in *Crawford* expressly acknowledged that it was not providing a definition of "testimonial," and lower courts around the nation have struggled in determining whether children's statements to social workers are "testimonial." In nonetheless granting habeas relief, the Eighth Circuit flouted the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA), most notably its requirement that state court merits determinations be rejected only when they conflict with "clearly established Federal law" as determined by this Court. 28 U.S.C. § 2254(d)(1). The Eighth Circuit also failed to defer to state court factual findings and constructions of state law, as AEDPA and longstanding federalism principles require.

Bobadilla's principle response is that the state is asking for mere error correction. Br. in Opp. 18. This Court, however, has repeatedly granted certiorari when federal courts of appeals declined to abide by AEDPA's limits. *See, e.g., Waddington v. Sarausad,* 129 S. Ct. 823 (2009); *Wright v. Van Patten,* 552 U.S. 120 (2008) (*per curiam*); *Carey v. Musladin,* 549 U.S. 70 (2006); *Rice v. Collins,* 546 U.S. 333 (2006); *Bradshaw v. Richey*, 546 U.S. 74 (2006) (*per curiam*); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*);

Middleton v. McNeil, 541 U.S. 433 (2004) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Bell v. Cone*, 535 U.S. 685 (2002). When federal courts of appeal fail to comply with AEDPA, they thwart Congress's will and undermine the principles of comity, finality, and federalism that AEDPA was designed to promote. As this Court has recognized by granting certiorari in the cases cited above, review is necessary to ensure that federal courts give state court decisions the deference that AEDPA requires.

The Eighth Circuit's decision also has implications that go well beyond this specific case. In the end, the Eighth Circuit held that *any* interview between a child and a social worker under Minn. Stat. § 626.556 – the state law governing the reporting and investigation of threats to children's health and welfare – produces a testimonial statement. Pet. App. 15. That far-reaching holding conflicts with the Minnesota Supreme Court's decisions in other child abuse cases, *see* Pet. for Cert. 36, and contravenes the settled rule "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." *Richey*, 546 U.S. at 76.

Bobadilla's other response to the petition, set out in his Statement of the Case, is to defend the federal courts' disregard of the state courts' fact findings in this case on the ground that "the *federal district court findings of fact are actually presumed correct herein*,

not those of the state trial or appellate court." Br. in Opp. 7 (emphasis in original). That, of course, is incorrect. 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 can be rebutted only "by clear and convincing evidence." *See also* 28 U.S.C. § 2254(d)(2) (authorizing habeas relief when a state court merits adjudication "resulted in a decision that was based on an *unreasonable* determination of the facts") (emphasis added). Bobadilla essentially concedes that the Eighth Circuit declined to give the required deference to the Minnesota courts' findings that a child protection worker initiated the interview of TB for the primary purpose of assessing whether abuse occurred and whether further action was needed to protect the child. These multiple failures by the Eighth Circuit to respect state courts' findings merit this Court's review.

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 That The State Court Unreasonably Applied *Crawford*.

In order for a federal court to grant habeas relief, the state court must have unreasonably applied clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Bobadilla fails to explain how *Crawford* "clearly established" that a young child's

statements to a social worker are testimonial. This Court in *Crawford* did not comprehensively define "testimonial." *Crawford*, 541 U.S. at 51-52, 68. Rather, the Court gave three alternative formulations of testimonial statements but did not adopt any particular one, acknowledging that its refusal to comprehensively define "testimonial" would cause interim uncertainty. *Id.* at 51-52, 68 n.10.

Bobadilla suggests that, because this Court in *Crawford* stated that testimonial statements include "police interrogations," it is clearly established that the statements made by the young child in this case to a social worker in the presence of a detective were testimonial. Br. in Opp. 8-11. Bobadilla fails to acknowledge, however, that this Court recognized the existence of various definitions of "interrogation," and that further refinement in *Crawford* was unnecessary since the adult *Mirandized* suspect's statement during a police interrogation "qualifies under any conceivable definition" of "interrogation." *Crawford*, 541 U.S. at 53 n.4. Thus, *Crawford* expressly left open the question of whether statements taken in other contexts are the product of a "police interrogation."

As this Court predicted, the absence of a comprehensive definition of "testimonial" has caused uncertainty in lower courts regarding what types of statements are testimonial. The Minnesota Supreme Court in this case described some of the various definitions of "testimonial" used in other jurisdictions, Pet. App. 106 n.3, 111-12, and commentators have noted that a number of questions regarding the scope

of *Crawford* remain. *See, e.g.*, Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Pol'y 553, 573-74 (2007) (discussing the "wide range" of issues needing resolution and questioning whether extremely young children are capable of being witnesses within the meaning of the Confrontation Clause); 2 Kenneth S. Broun et al., McCormick on Evidence § 252 (6th ed. 2006) (describing the three potential definitions of "testimonial" and saying, "[b]ecause the Court did not pick among these contenders, let alone adopt a comprehensive definition of 'testimonial,' and because it departs from existing precedent, many questions about the scope of coverage of *Crawford* simply cannot be answered"). The Eighth Circuit flouted AEDPA when it granted Bobadilla habeas relief in the absence of clearly established precedent on this point.

Even if *Crawford* is viewed as having clearly established some of the contours of what constitutes a testimonial statement, habeas relief should not have been granted because the Minnesota Supreme Court did not unreasonably apply *Crawford*. *See* Pet. for Cert. 26-29. Because the rule of *Crawford* is so general, the Eighth Circuit should have given more leeway to the Minnesota Supreme Court's application of *Crawford*. *See Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (holding that "[t]he more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations"). The Eighth Circuit's "readiness to attribute error" is inconsistent with AEDPA's "highly deferential standard for

evaluating state court rulings." *Visciotti,* 537 U.S. at 24 (citation omitted). The Eighth Circuit's blatant disregard for AEDPA's strictures merits this Court's review.

II. The Eighth Circuit Also Exceeded Its Authority Under AEDPA By Failing To Defer To The Minnesota Supreme Court's Findings Of Fact And Construction Of State Law.

The Eighth Circuit compounded its failure to abide by 28 U.S.C. § 2254(d)(1) by failing to abide by other limitations imposed by AEDPA and basic principles of federalism. First, the Eighth Circuit did not defer to the state court's factual determinations as required by 28 U.S.C. § 2254(e)(1) (stating that a state court's factual determinations are presumed correct, and the habeas petitioner bears the burden of rebutting this presumption by clear and convincing evidence). In particular, the court rejected 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. Pet. App. 13-14, 115. As noted, Bobadilla erroneously states that the federal district court's findings of fact, rather than those of the state court, should be presumed correct. Br. in Opp. 7. He cites no authority for this proposition, nor could he for it is flatly contrary to AEDPA.

In rejecting the state court's findings, the Eighth Circuit failed to heed this Court's admonition that federal habeas courts not use a set of debatable inferences to set aside the state court's findings. *See Collins*, 546 U.S. at 342. Bobadilla also uses a set of debatable inferences in his defense of the Eighth Circuit's handling of the facts. For example, noting that the CornerHouse method for interviewing children involves a "forensic" technique, Bobadilla implies that the purpose of the interview in this case was for law enforcement purposes. Br. in Opp. 4. As the Minnesota Supreme Court explained, however, even if part of the purpose of the interview 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. Pet. App. 116.[1]

Bobadilla further suggests that the Minnesota Supreme Court ignored the presence of the detective during the interview. Br. in Opp. 16, n.5. To the contrary, the Minnesota Supreme Court acknowledged

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[1] Furthermore, a "forensic" interview might be useful in civil court, where confrontation concerns are not implicated. Bobadilla also asserts that the record does not support petitioner's assertion that TB pointed to the area of the buttocks, or anus, during the interview. Br. in Opp. 5, n.3. The social worker's testimony established that TB pointed to the buttocks in describing the assault. JA385-87. Other evidence established injury to the area around TB's anus. *See* JA409, 415, 419. In addition, the jury found Bobadilla guilty of sexual penetration, involving any intrusion into an anal opening. *See* Minn. Stat. §§ 609.342, subd. 1(a), and 609.341, subd. 12.

that a plainclothes detective sat in the room during the interview but did not participate in it. Pet. App. 95. The Minnesota Supreme Court further recognized that an interview "with more significant law-enforcement involvement" might produce a testimonial statement. Pet. App. 116. The Eighth Circuit, without even citing § 2254(e)(1) or (d)(2), rejected the Minnesota Supreme Court's version of what transpired. Congress did not intend state court factual findings to be so casually tossed aside by federal courts.

Second, the Eighth Circuit compounded that failing by its refusal to consider the same record as the one before the Minnesota Supreme Court. In determining whether a state court's decision was unreasonable, a federal habeas court must assess the decision in light of the record the state court had before it. *Jackson*, 542 U.S. at 652. Neither the district court nor the Eighth Circuit, however, had the videotape of TB's interview or a transcript of it, even though the Minnesota Supreme Court did. Pet. for Cert. 32. Bobadilla erroneously suggests that the state was at fault because it did not make the videotape or transcript a part of the record and did not move to expand the record until after the federal district court issued its decision. Br. in Opp. 11-12. The videotape only became necessary, however, *after* the district court failed to adhere to AEDPA, that is, when the court failed to apply the presumption of correctness to the state supreme court's factual findings. The state should not have been expected to

anticipate that the federal district court would not properly apply AEDPA, especially after the magistrate judge recommended that habeas relief be denied. Pet. App. 55-91.

Finally, the Eighth Circuit exceeded its authority when it failed to give deference to the state court's interpretation of Minn. Stat. § 626.556, the statutory scheme for reporting, investigating, and responding to threats to a child's health and welfare. *See* Pet. App. 131-44. Bobadilla claims that "[i]nterpretation of state law has no bearing in this case." Br. in Opp. 8. Yet, he admits that the state court, "based on this statute [Minn. Stat. § 626.556], concluded that neither the child protection worker nor the nephew were acting, to a substantial degree, for the purpose of producing a statement for introduction at a trial, when the videotaped statement of the nephew was taken and made." Br. in Opp. 15. Bobadilla then discusses the Eighth Circuit's interpretation of the statute. Br. in Opp. 15-16. This statute was a core part of this case, both on direct appeal and on habeas review.

The Minnesota Supreme Court concluded that the statute was not designed for the express purpose of creating out-of-court statements for a future trial. Pet. App. 114. In contrast, the Eighth Circuit held that the statute mandates that interviews of children are the functional equivalent of the police interrogation in *Crawford*. Pet. App. 15. In interpreting the state statute in the way it did, the Eighth Circuit did not apply the well-established principle that a federal

court must follow a state court's interpretation of state laws. *E.g., Richey*, 546 U.S. at 76. Moreover, the Eighth Circuit's interpretation essentially adopts a blanket rule that interviews in child abuse cases under the statute necessarily create testimonial statements. That holding conflicts with Minnesota Supreme Court decisions in other child abuse cases, *see* Pet. for Cert. 36, and will affect numerous child abuse investigations in the future.

* * *

To be sure, whenever a federal court grants habeas relief, it is rejecting a decision by a state court, sometimes a state's highest court. However, recognizing the serious federalism implications when that occurs, as well as society's interest in finality, Congress placed strict limits on federal courts' authority to override state court legal and factual determinations in criminal cases. The Eighth Circuit's decision disregards those limits. Only this Court can ensure that Congress's will in enacting AEDPA is not thwarted.

CONCLUSION

For all of these reasons, as well as those in the petition, this Court should grant the petition for a writ of certiorari.

Dated: December 15, 2009

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