No. 16-___

In the
Supreme Court of the United States

Camille Solomon-Eaton,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment guarantees the accused the right "not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present." *Maine v. Moulton*, 474 U.S. 159, 178 n.14 (1985). Any statement a government agent deliberately elicits from the accused in derogation of this right is inadmissible at her criminal trial. *Id.* at 180.

In this case, after petitioner's right to counsel attached but without counsel present, a government investigator with New York City's child protection services agency—which had been coordinating with federal law enforcement officials both before and after they arrested petitioner—elicited incriminating statements from petitioner. The court of appeals held that those statements were nevertheless admissible at petitioner's trial because the investigator was not a "government agent" for Sixth Amendment purposes.

The question presented divides the federal courts of appeals and the state courts of last resort: When is a child protection services investigator a government agent for purposes of the right to counsel guaranteed by the Sixth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AT ISSUE 1

STATEMENT OF THE CASE 1

A. Introduction and Summary of Grounds for Certiorari 1

B. Facts 6

1. Petitioner's Arrest and Uncounseled Interrogation By a Government Investigator 6

2. The Second Circuit's Decision 10

REASONS FOR GRANTING THE WRIT 12

I. Courts are deeply divided over when a child protection agency investigator is a government agent for purposes of the Sixth Amendment's right-to-counsel guarantee 12

A. Legal and Factual Background 12

B. The Conflict Among Federal and State Courts.....16

1. The majority approach: A child protection investigator is a government agent only if she has agreed, expressly or implicitly, to act on behalf of criminal law enforcement to further a criminal prosecution..... 17

2. The minority approach: A child protection investigator is a government agent if her duties and actions make her the functional equivalent of criminal law enforcement 22

II. The question presented is extremely important 27

III. This case presents a suitable vehicle for resolving the question presented.....28

IV. The Second Circuit applied an incorrect legal standard in holding that the child protection services investigator was not acting as a government agent when she deliberately elicited petitioner's incriminating statements in the absence of counsel. 31

CONCLUSION 35

APPENDIX ..... APP 01

Summary Order of the United States Court of Appeals for the Second Circuit, *United States v. Solomon-Eaton*, No. 14-4573-cr..... APP01

Transcript of Proceedings and Oral Ruling, *United States v. Solomon-Eaton,* No. 12 Cr. 352-KAM, United States District Court for the Eastern District of New York APP06

Judgment in a Criminal Case, *United States v. Solomon-Eaton,* No. 12 Cr. 352-KAM, United States District Court for the Eastern of New York APP17

TABLE OF AUTHORITIES

Federal Cases

Bey v. Morton,
124 F.3d 524 (3d Cir. 1997) 26

Chapman v. California,
386 U.S. 18 (1967) 29

Depree v. Thomas,
946 F.2d 784 (11th Cir. 1991) 21

Dye v. Hofbauer,
546 U.S. 1 (2005) 30

Estelle v. Smith,
451 U.S. 454 (1981) ..... *passim*

Finkel v. David Liepper & Sons,
No. 07-1366-civ, 2009 WL 578380 (E.D.N.Y. Mar. 4, 2009) 30

Florida. v. White,
526 U.S. 559 (1999) 21

Gideon v. Wainwright,
372 U.S. 335 (1963) 16, 27

Illinois v. Fisher,
540 U.S. 544 (2004) 30

Johnson v. California,
545 U.S. 162 (2005) 21

Kane v. Garcia Espitia,
546 U.S. 9 (2005) 30

Kansas v. Ventris,
556 U.S. 586 (2009) 1, 13

Lakeside v. Oregon,
435 U.S. 333 (1978) 27

Maine v. Moulton,
474 U.S. 159 (1985) ..... *passim*

Massiah v. United States,
377 U.S. 201 (1964) 2, 3, 24

Mathis v. United States,
391 U.S. 1 (1968) ..... *passim*

McClendon v. Singh,
No. C 09-0647 MMC (PR), 2013 U.S. Dist. LEXIS 25581
(N.D. Cal. Feb. 25, 2013) 21

Nicholson v. Scoppetta,
344 F.3d 154 (2d Cir. 2003) 15

Powell v. Alabama,
287 U.S. 45 (1932) 27, 28

Saranchak v. Beard,
616 F.3d 292 (3d Cir. 2010) 13, 22, 25

Smith v. United States,
502 U.S. 1017 (1991) 29

United States v. Flores-Montano,
541 U.S. 149 (2004) 30

United States v. Henry,
447 U.S. 264 (1980) 2, 3, 4, 33

United States v. Korbe,
No. 2:09-cr-05, 2010 U.S. Dist. LEXIS 57266 (W.D. Pa. June 9, 2010) 21

United States v. Jackson,
886 F.2d 838 (7th Cir. 1989) 26

United States v. Melgar,
139 F.3d 1005 (4th Cir. 1998) 26

United States v. Moreno,
36 M.J. 107 (C.A.A.F. 1992) 13, 17, 21

United States v. Payne,
591 F.3d 46 (2d Cir. 2010) 30

United States v. Solomon-Eaton,
627 F. App'x 47 (2d Cir. 2016) 1

United States v. Tejeda,
824 F. Supp. 2d 473 (S.D.N.Y. 2010) 30

Whitmore v. Heath,
No. 9:06-cv-00602-JKS, 2010 U.S. Dist. LEXIS 11910
(N.D.N.Y. Feb. 10, 2010) 21

State Cases

Blanton v. State,
172 P.3d 207 (Okla. Crim. App. 2007) ..... *passim*

Commonwealth v. Allen,
480 N.E.2d 630 (Mass. 1985) 26

Commonwealth v. Howard,
845 N.E.2d 368 (Mass. 2006) ..... *passim*

Commonwealth v. Hilton,
823 N.E.2d 383 (Mass. 2005) 26

Commonwealth v. Ramos,
532 A.2d 465 (Pa. Super. Ct. 1987) 3

Commonwealth v. Saranchak,
866 A.2d 292 (Pa. 2005) 22, 24

People v. Curtis,
579 N.E.2d 428 (Ill. App. Ct. 1991) 13, 25

People v. Greene,
760 N.Y.S.2d 769 (N.Y. App. Div. 2003) 11

People v. Ray,
480 N.E.2d 1065 (N.Y. 1985) 10, 11

People v. Wilhelm,
822 N.Y.S.2d 786 (N.Y. App. Div. 2006) 11, 13, 25

State v. Bernard,
31 So. 3d 1025 (La. 2010) 13, 17, 20

State v. Dixon,
916 S.W.2d 834 (Mo. Ct. App. 1995) 25

State v. Everybodytalksabout,
166 P.3d 693 (Wash. 2007) 26

State v. Nason,
981 P.2d 866 (Wash. Ct. App. 1999) 25

State v. Nations,
354 S.E.2d 510 (N.C. 1987) 13, 17, 20

State v. Oliveira,
961 A.2d 299 (R.I. 2008) ..... *passim*

State v. Pearson,
804 N.W.2d 260 (Iowa 2011) 17, 21

State v. Stahlnecker,
690 S.E.2d 565 (S.C. 2010) 13, 17, 20

Wilkerson v. State,
173 S.W.3d 521 (Tex. Crim. App. 2005) ..... *passim*

Federal Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. V 13-14

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. XIV 12, 16

18 U.S.C. § 17(a) 6

18 U.S.C. § 2251 8

18 U.S.C. § 2252 6

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

Fed. R. App. P. 32.1 30

State Statutes

Mass. Ann. Laws ch. 119, § 51A 22, 23

N.Y. Comp. Codes R. & Regs. tit. 18, § 432.2(b)(3)(ii)(a), ... 18

N.Y. Fam. Ct. Act § 1011 8

N.Y. Fam. Ct. Act § 1031 8

N.Y. Fam. Ct. Act §§ 1051-1058 8

N.Y. Soc. Serv. Law § 423(6) 19

N.Y. Soc. Serv. Law § 424(5-a) 9, 19

N.Y. Soc. Serv. Law § 432.2(b)(3)(ii)(a) 19

Other Authorities

Am. Prosecutors Research Inst., *Investigation and Prosecution of Child Abuse* (3d ed. 2004) 27

Anna Richey-Allen, Note, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 Minn. L. Rev. 1090 (2009) 14

Children's Bureau, *Making and Screening Reports of Child Abuse and Neglect* 3 (2013), *available at* http://tinyurl.com/gos86vc. 27

E. Gressman et al., *Supreme Court Practice* (9th ed. 2007) 16

Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006) 17

Laura E. Ruzzo, *The Testimonial Nature of Multidisciplinary Team Interviews in Massachusetts: Applying Crawford to the Child Declarant*, 16 Suffolk J. Trial & App. Advoc. 227 (2011) 27

Lindsay E. Cronch et al., *Forensic Interviewing in Child Sex Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behav. 195 (2006). 14

Mark Ells, U.S. Dep't of Justice, *Forming a Multidisciplinary Team to Investigate Child Abuse* (2d prtg. 2000), *available at* http://tinyurl.com/jycj37x (last visited April 14, 2016) 14

Timothy Ross et al., *Improving Responses to Allegations of Severe Child Abuse: Results from the Instant Response Team Program* I (2004), *available at* http://tinyurl.com/jpwmb4c. 16

OPINIONS AND ORDERS BELOW

The Second Circuit's decision is unpublished (Pet. App. 1–5) but available at 627 F. App'x 47. The transcript of the district court's oral ruling denying petitioner's motion to suppress is reproduced at Pet. App. 6–16. The district court's final judgment appears at Pet. App. 17–22.

JURISDICTION

The court of appeals had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and entered judgment on January 15, 2016. The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on October 31, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Introduction and Summary of Grounds for Certiorari

This case presents a pressing constitutional issue concerning the administration of criminal justice that divides courts across the country. This Court has long held that post-charge interrogation by a government agent is a "critical stage" of the prosecution at which the accused is entitled to counsel under the Sixth Amendment. *See Kansas v. Ventris*, 556 U.S. 586, 590 (2009); *Maine v. Moulton*, 474 U.S. 159, 169–70 (1985); *United States v.*

Henry, 447 U.S. 264, 270–71 (1980); *Massiah v. United States*, 377 U.S. 201, 206 (1964); *see also Estelle v. Smith*, 451 U.S. 454, 469–70 (1981). The accused has the right "not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present." *Moulton,* 474 U.S. at 178 n.14. Any statement that a government agent deliberately elicits from the defendant in derogation of this right is inadmissible at her criminal trial. *Id.* at 180.

The Court has also made clear that, for Sixth Amendment purposes, a "government agent" or "agent of the State" includes more than police officers and prosecutors. A "government agent" also includes, for example, a private citizen who agrees to act at the behest of, or in cooperation with, criminal law enforcement. *See, e.g.*, *Moulton*, 474 U.S. at 163 (co-defendant who "agreed to cooperate" with prosecution); *Massiah*, 377 U.S. at 202 (co-defendant who "decided to cooperate with the government agents"); *Henry*, 447 U.S. at 270 (inmate who "act[ed] under instructions as a paid informant for the Government"). And a public official who is not acting on behalf of criminal law enforcement can also be considered a "government agent" in some circumstances—if, for example, her interview of the defendant is likely to be used in a criminal prosecution or "prove[s] to be a 'critical stage' of the aggregate [criminal] proceedings." *Estelle*, 451 U.S. at 470 (court-appointed psychiatrist who interviewed defendant as part of neutral competency examination "became essentially like … an agent of the State" when he testified for prosecution about defendant's uncounseled statements at penalty phase of capital murder trial); *see also Mathis v. United States*, 391 U.S. 1, 4 (1968) (IRS official

was acting as "government agent" when he questioned defendant without counsel during "routine tax investigation" because (1) "tax investigations frequently lead to criminal prosecutions," and (2) the official acknowledged that "there was always the possibility during his investigation that his work would end up in a criminal prosecution").

This Court's precedents thus can be read to suggest different legal tests for "government agency" depending on whether the individual involved is a public or private actor. When a private individual, such as an informant or cellmate, questions a defendant, the Court has demanded proof that the person acted on behalf of, or in cooperation with, law enforcement before finding that the person was a "government agent." *E.g.*, *Henry*, 447 U.S. at 270. But when the individual is a public official with special investigative powers and duties, such as the IRS agent in *Mathis*, the Court has required less: the investigation need only be of a kind that "frequently lead[s] to criminal prosecutions." 391 U.S. at 4.

Which test governs whether a child protection investigator—a government official but not a criminal law enforcement officer in the traditional sense—is a "government agent" for Sixth Amendment purposes? This Court's precedents provide conflicting answers. On the one hand, *Mathis* and *Estelle* suggest that a child protection investigator is a government agent because her relationship with criminal law enforcement makes the evidence she gathers likely to "end up in a criminal prosecution," *Mathis*, 391 U.S. at 4, so that her role is "like that of an agent of the State." *Estelle*, 451 U.S. at 467. On the other hand, *Henry*, *Massiah,* and similar cases involving private informants could suggest that a

child protection investigator is not a government agent unless she was specifically working for law enforcement to gather evidence in a criminal case.

As a consequence of this schism in this Court's precedents, the lower courts have applied divergent tests and have reached conflicting conclusions in factually similar cases. *Compare, e.g.*, *Commonwealth v. Howard*, 845 N.E.2d 368, 372–73 (Mass. 2006) (uncounseled interview by child protection investigator violated Sixth Amendment because she was "a government official" and her interview of the defendant, "even though conducted in furtherance of her responsibilities for the care and protection of children, was prohibited governmental interrogation and constituted the equivalent of direct police interrogation"; right to counsel would be "seriously 'dilute[d]' ... if [government officials] could, on their own initiative, question defendants about their pending cases and then turn a defendant's incriminating responses over to the police and prosecutor") (citations omitted); *State v. Oliveira*, 961 A.2d 299, 310–11 (R.I. 2008) (under *Estelle* and *Moulton*, child protection investigator was government agent under Sixth Amendment because, though her role was "not primarily prosecutorial" but "to protect children," she knew she would have to turn defendant's incriminating statements over to police, "especially considering her awareness that a criminal prosecution had begun"), *with* Pet. App. 2–3 (court below) (child protection investigator was not "government agent" absent "clear connection between the police" and investigator's actions, such as police "instigation," "close supervision" by the police, and acts "undertaken on behalf of the police to further a police objective"); *Wilkerson v. State*, 173 S.W.3d 521, 523 (Tex. Crim. App. 2005) (child protection investigator was not

"government agent" unless she was "acting in tandem with police to investigate and gather evidence for a criminal prosecution").

This case presents an opportunity for the Court to end this confusion. The court below held that the Sixth Amendment permitted the government to introduce at petitioner's criminal trial self-incriminating admissions she made under questioning by a child protection investigator in the absence of counsel. Though it was undisputed that 1) the investigator knew that federal officials had already arrested petitioner (with the assistance of the investigator's own child protection colleagues), 2) the court had already assigned counsel to represent her in this federal prosecution, 3) the investigator was not acting as a private individual but rather in her official capacity, and 4) her child protection agency was coordinating with federal law enforcement in this very case, the court held she was not a "government agent" when she interviewed petitioner.

This Court should grant certiorari because the Second Circuit's decision is wrong and exacerbates a conflict among the federal circuits and numerous state courts of last resort. And the lower court's ruling, if allowed to stand, seriously "dilutes the protection afforded by the right to counsel," *Moulton*, 474 U.S. at 171, by allowing government officials to question the accused without a lawyer after criminal proceedings have begun, and to use the defendant's uncounseled words to convict her.

B. Facts

1. Petitioner's Arrest and Uncounseled Interrogation By a Government Investigator

Petitioner is a 28-year-old woman who suffers from serious and longstanding emotional and mental health problems, including auditory hallucinations, suicidal ideation, and severe depression. She was also the victim of violent sexual crimes as a youth. At 16, she was raped twice. The first time, a 20-year-old man took her to a vacant housing project and forced her to engage in anal intercourse. The second time, two men locked her inside a room and forced her at gunpoint to perform oral sex on them.

In 2012, federal officials arrested petitioner and charged her in the United States District Court for the Eastern District of New York with 1) sexually exploiting her minor child by taking and transmitting illicit photographs of her (18 U.S.C. § 2251(a), (b)) and 2) distributing and receiving child pornography (18 U.S.C. § 2252(a)(2), (b)(1)). Her sole defense, presented at trial through the testimony of a forensic psychiatrist, was that she was not guilty by reason of insanity because her severe mental illness rendered her "unable to appreciate ... the wrongfulness of [her] acts." 18 U.S.C. § 17(a).

The charges arose following an investigation by the Alabama office of the United States Department of Homeland Security ("DHS") into a Georgia man named Caleb Wade who had been exchanging text messages and photographs with petitioner in the fall of 2011. After officials arrested Wade in December 2011, they discovered numerous images of child pornography on his cell phone, eight of which petitioner had sent to Wade from her

telephone. These eight images included petitioner's then two-year-old daughter with her buttocks and vagina exposed, and with a sex toy in her mouth.

On March 26, 2012, DHS officials in Alabama contacted DHS officials with the Child Exploitation Group in New York City and discussed petitioner's communications with Wade. DHS officials also alerted the Administration for Children's Services ("ACS")—New York City's Child Protective Services ("CPS") agency. Later that day, New York DHS agents met ACS officials at a "briefing location" near petitioner's home to discuss their "objective." The ACS officials then accompanied the federal agents to petitioner's home in Brooklyn. One of the DHS agents asked the ACS officials to enter the home first because DHS did not have a warrant.

The arrest team, accompanied by the ACS officials, entered petitioner's home with permission, obtained her cellular telephone and other evidence, and confirmed with petitioner that she had exchanged various text messages and pornographic images with Wade, including the aforementioned photographs of her daughter. Petitioner was then arrested, and ACS officials and a DHS agent took petitioner's daughter to a hospital for examination. The examination revealed no injuries or other evidence of physical abuse.

Petitioner was arraigned on a federal complaint the next day, March 27, 2012, and the court appointed counsel. That same day, ACS and law enforcement formed an "Instant Response Team" ("IRT"), as mandated by New York State law. *See* N.Y. Soc. Serv. Law § 424(5-a) (child sex abuse investigations "shall be conducted" by multidisciplinary team including child protective services and law enforcement). ACS also assigned Kerlyne

Deriscar-Hinds ("Hinds"), one of its CPS investigators, to investigate the allegations of sexual abuse concerning petitioner's daughter—the same allegations at issue in this prosecution—and to decide whether to commence a civil "Article 10" proceeding against petitioner in New York's family court, which she later did.[1] Hinds noted in the ACS case file (on March 27) that petitioner had "already [been] arrested before CPS had the opportunity to interview her." ACS file, at CS 155.[2] The next day, Hinds spoke with the DHS arresting officer, who showed her the pornographic evidence at issue in this criminal case. ACS file, at CS 157–58. On April 2, 2012, Hinds's supervisor at ACS directed her to "[c]ontact homeland security to see if arrangements can be made" to interview petitioner. ACS file, at CS 159. ACS explicitly noted that "Homeland Security is involved" and that "CPS coordinated [the] case with Homeland Security[.]" ACS file, at CS 150, 167.

Petitioner was released on bail on April 3, 2012. On April 10, 2012—barely a week after Hinds's supervisor directed her to contact DHS and arrange to interview petitioner, and two weeks after petitioner had been assigned counsel—Hinds approached petitioner sitting alone outside a courtroom in the Brooklyn family court building. Though counsel

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[1] An Article 10 petition, similar to a criminal complaint, alleges that a child has been abused or neglected. N.Y. Fam. Ct. Act § 1031. The filing of an Article 10 petition commences an adversarial proceeding to determine "when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met." *Id.* § 1011. If abuse or neglect is proven, the family court may order any of several remedies ranging from supervision of the child to termination of parental rights. *Id.* §§ 1051–58.

[2] Because the ACS file is confidential, it was submitted under seal to the court of appeals.

was neither present nor notified, Hinds confronted petitioner and asked her to explain why the police had come to her home. Petitioner responded that "she had sent naked pictures of her daughter to an acquaintance over state lines, [and] that police invaded her home" and arrested her. Petitioner also admitted to Hinds that "at the time of her sending the pictures … she knew it was wrong, but … sent [them] anyway." Hinds took notes of this interview, which the United States Attorney's Office later subpoenaed for use at petitioner's trial.

The defense moved to suppress petitioner's admissions, arguing that they had been elicited in violation of the Sixth Amendment right to counsel. Counsel contended that the statements were "very close" to statements to federal law enforcement officials because ACS agents had "accompanied the federal agents at the time of the arrest so they also could be viewed as agents." Pet. App. 12. Counsel added that Hinds and her ACS colleagues could be viewed "as acting on behalf of federal authorities getting the statement they couldn't get after [the] right to counsel is attached under Sixth Amendment," Pet. App. 12, and that Hinds had been "inquiring about the exact same conduct, the same allegations that are the subject of the federal charge, and she's part of an agency that literally was recruited" by DHS officials to assist in this case. Pet. App. 13–14.

The district court declined to suppress. The court focused on Hinds's purpose, stating that "it doesn't seem to me that the conversation regarding the background of what led to the child being separated from the mom was focused on the prosecution of Ms. Solomon-Eaton but rather focusing on whether the child … was being protected" and on determining petitioner's parental rights. Pet. App. 14–15. The court found that Hinds was

"not having this conversation with Ms. Solomon-Eaton for purposes of the federal prosecution for the child pornography related charges, but rather in the context of the family court proceeding." Pet. App. 16.

Because the court found no Sixth Amendment violation, it allowed the prosecution at trial to call Hinds as its final rebuttal witness and to elicit petitioner's uncounseled admissions. The government emphasized these admissions for the jury in its main summation, arguing that they doomed petitioner's insanity defense because "the defendant's own actions and the defendant's own words" showed "that she is guilty and responsible." The prosecutor further argued:

> Not only do you have the defendant's actions, you have her own words. After she got caught, the rouse [*sic*] was up. And when she was being interviewed by a child protective services worker, Ms. Deriscar-Hinds, she told you that at the time that she was doing these things, she knew what she was doing was wrong.

The prosecutor highlighted these uncounseled admissions again in rebuttal summation, arguing that the defense had "no answer" to the evidence that petitioner "told a child services worker that she knew what she did was wrong."

The jury convicted petitioner on all counts. Though she had no prior criminal record, she was sentenced principally to 17 years in prison.

2. The Second Circuit's Decision

The court of appeals affirmed, holding that investigator Hinds was not a "government agent" for Sixth Amendment purposes. The court relied on the criteria for "government agency" set forth by the New York Court of Appeals in *People v. Ray*, 480

N.E.2d 1065 (N.Y. 1985)—a case involving a private actor, not a public official like Hinds. Pet. App. 3. The Circuit held that, under *Ray* and its progeny, a child protection investigator is "an agent of law enforcement for Sixth Amendment purposes" only if certain "indicia of State involvement" are present, including "a clear connection between the police and the private investigation," "completion of the private act at the instigation of the police," "close supervision of the private conduct by the police," and "a private act undertaken on behalf of the police to further a police objective." Pet. App. 3 (quoting *People v. Greene*, 760 N.Y.S.2d 769, 772 (N.Y. App. Div. 2003) (quoting, in turn, *Ray*, 480 N.E.2d at 1067)). The Circuit added: "While a social worker is generally not an agent of the police, ... when a child protective services caseworker has extensive interaction with law enforcement before and after interrogating the defendant, particularly when part of a formal multidisciplinary team or joint venture, New York courts tend to find that the caseworker is a law enforcement agent." Pet. App. 3 (citing *Greene*, 760 N.Y.S.2d at 772; *People v. Wilhelm*, 822 N.Y.S.2d 786, 793–94 (N.Y. App. Div. 2006)).

Applying the *Ray* criteria, the Second Circuit held that Hinds was not a government agent. First, the court stated, "Hinds was not part of a multidisciplinary team or joint venture with the government" and "did not even learn of this case until after Solomon-Eaton was arrested." Pet. App. 3. The court added that "[o]nly weeks later, on her own initiative, did Hinds seek to interview Solomon-Eaton for the purposes of her child abuse and neglect investigation." *Id.* Finally, "Hinds did not receive instructions from law enforcement regarding her interview beforehand, or conduct the interview with law

enforcement present, or volunteer the results of her interview to the government." Pet. App. 3. Thus, the court ruled, no Sixth Amendment violation occurred.

REASONS FOR GRANTING THE WRIT

I. Courts are deeply divided over when a child protection agency investigator is a government agent for purposes of the Sixth Amendment's right-to-counsel guarantee.

A. Legal Background

The Court has long held that "[t]he right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice." *Moulton*, 474 U.S. at 168 (footnote omitted). While the right is principally a trial right, the Court has also recognized that the assistance of counsel "cannot be limited to participation in a trial." *Id.* at 170. Indeed, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Id.* Accordingly, the right to counsel attaches upon the initiation of adversarial criminal proceedings and guarantees the defendant "the right to rely on counsel as a 'medium' between him and the State." *Id.* at 176.

Once the right to counsel attaches, the accused has the right "not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present." *Id.* at 178 n.14. Any statement that a government agent

deliberately elicits from the accused in derogation of the right to counsel is inadmissible. *Id.* at 180.[3]

In the wake of *Massiah*, *Moulton*, and this Court's other pertinent precedents, numerous lower courts, including several state courts of last resort, have reached conflicting decisions over when specialized government officials (usually called "child protection services investigators" or something similar) are government agents for Sixth Amendment purposes. *See, e.g.*, Pet. App. 2–3 (court below); *State v. Stahlnecker*, 690 S.E.2d 565 (S.C. 2010); *State v. Oliveira*, 961 A.2d 299 (R.I. 2007); *Commonwealth v. Howard*, 845 N.E.2d 368 (Mass. 2006); *People v. Wilhelm*, 822 N.Y.S.2d 786 (N.Y. App. Div. 2006); *United States v. Moreno*, 36 M.J. 107 (C.A.A.F. 1992); *People v. Curtis*, 579 N.E.2d 428 (Ill. App. Ct. 1991); *State v. Nations*, 354 S.E.2d 510 (N.C. 1987).[4] These

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[3] Though such uncounseled statements may be used to impeach a defendant's "inconsistent testimony at trial," *Ventris*, 556 U.S. at 594, that exception to the exclusionary rule does not apply here because petitioner did not testify at her trial.

[4] The same issue—whether CPS investigators were acting as government agents—also arises frequently in the closely related context of the Fifth Amendment's *Miranda* rule. *See, e.g.*, *Saranchek v. Beard*, 616 F.3d 292 (3d Cir. 2010); *State v. Bernard*, 31 So.3d 1025 (La. 2010); *Blanton v. State*, 172 P.3d 207 (Okla. Crim. App. 2007); *Wilkerson v. State*, 173 S.W.3d 521 (Tex. Crim. App. 2005); *Commonwealth v. Ramos*, 532 A.2d 465 (Pa. Super. Ct. 1987). Because this Court has applied the same test for "government agency" under both the Fifth and Sixth Amendments, *see Estelle,* 451 U.S. at 465–69, 469–71 (psychiatrist was "agent of the State" for both Fifth and Sixth Amendment purposes, without setting forth separate tests), *Oliveira*, 961 A.2d at 310 n.15 (noting that *Estelle*'s agency analysis for Fifth Amendment purposes "applied likewise to its finding of a Sixth Amendment violation"); *Curtis*, 579 N.E.2d at 431 (analysis of whether a child services investigator is a "prosecutorial agent" for Fifth Amendment purposes is "equally applicable

government officials are not members of criminal "law enforcement" as traditionally understood; they are not FBI agents, police officers, or criminal prosecutors. But like these traditional law enforcement actors, they are public officials responsible for investigating and gathering evidence of alleged child abuse, interviewing alleged victims and perpetrators, coordinating their investigations with law enforcement, and, when appropriate, initiating legal proceedings against an abuser. These investigators also often receive special training in interviewing parents, children, and other family members. Some localities use child protection agency caseworkers, while other jurisdictions use trained interviewers at "child advocacy centers" to conduct such interviews. *See* Lindsay E. Cronch et al., *Forensic Interviewing in Child Sex Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behav. 195, 196, 204 (2006). But regardless of the interviewers' exact titles or the location of their interviews, many state and local governments deploy specially trained individuals to question alleged victims and perpetrators of child abuse to determine whether abuse has occurred, to protect children from further abuse, and to coordinate with police and prosecutors.[5] As a consequence,

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in the Sixth Amendment setting"), these Fifth Amendment cases are fairly included in the split.

[5] *See* Mark Ells, U.S. Dep't of Justice, *Forming a Multidisciplinary Team to Investigate Child Abuse* 4-6 (2d prtg. 2000), *available at* http://tinyurl.com/jycj37x (last visited April 14, 2016); Anna Richey-Allen, Note, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 Minn. L. Rev. 1090, 1092 (2009) (citing Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline J. Pub. L. & Pol'y 315, 329–31 (2006)).

prosecutors frequently take advantage of these child protection investigations by using the evidence they produce to convict defendants in criminal court.

New York City's child protection services system is typical. The City's Administration for Children's Services (ACS) is the investigating arm in charge of conducting initial inquiries into child abuse allegations. *See Nicholson v. Scoppetta*, 344 F.3d 154, 158–61 (2d Cir. 2003) (describing ACS's statutory framework). Its Division of Child Protection "conducts more than 55,000 investigations of suspected child abuse or neglect each year." *See* "About ACS," *available at* http://tinyurl.com/zwezdn7 (last visited April 13, 2016). And when, as here, allegations of sexual abuse of a child are involved, New York law mandates that investigations be conducted by "an approved multidisciplinary team" that includes, among others, representatives from "child protective services, law enforcement, [and] district attorney's office." N.Y. Soc. Serv. Law §§ 423(6), 424(5-a). Moreover, every CPS organization must "give telephone notice and forward immediately a copy of reports … which involve suspected … sexual abuse of a child … to the appropriate law enforcement [officials]." N.Y. Soc. Serv. Law § 424(5-a). Further, CPS investigators must conduct "face to face interviews" with alleged perpetrators of child sexual abuse, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 432.2(b)(3)(ii)(a), and cooperate with prosecutors and other criminal law enforcement officials. N.Y. Soc. Serv. Law § 424(5-a). New York City's ACS office implemented these statutory obligations through the "Instant Response Team" program, a close partnership between law enforcement, prosecutors, and ACS investigators that includes "joint interview[s]," "coordinated

investigations," and "information sharing." Timothy Ross et al., *Improving Responses to Allegations of Severe Child Abuse: Results from the Instant Response Team Program* I (2004), *available at* http://tinyurl.com/jpwmb4c.

The question thus frequently arises in both state and federal courts: May the prosecution introduce uncounseled statements deliberately elicited from the defendant by a child protection investigator who was pursuing the same allegations of abuse at issue in the criminal case and who, by law, must cooperate and coordinate with criminal law enforcement? Is the worker a government agent for purposes of the Sixth Amendment? As we now show, courts have applied different legal tests to answer this recurring question and, as a consequence, have reached dramatically different conclusions despite similar facts. Accordingly, this Court's intervention is needed.

B. The Conflict Among Federal and State Courts

The federal courts of appeals and state courts of last resort[6] are sharply divided over when a child protection investigator is a government agent for Sixth Amendment purposes. This Court should grant review to resolve this entrenched conflict. *See* E. Gressman et al., *Supreme Court Practice* 258–59 (9th ed. 2007) ("Another established reason for the grant of certiorari is the presence of a direct conflict between the decision

[6] The Sixth Amendment right to counsel, of course, applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963).

of a court of appeals and that of the highest court of a state, where that conflict concerns a federal question.") (collecting cases); S. Ct. R. 10(a).

1. The majority approach: A child protection investigator is a government agent only if she has agreed, expressly or implicitly, to act on behalf of criminal law enforcement to further a criminal prosecution.

The majority of federal appellate courts and state courts of last resort to address the issue apply common-law agency principles. *See Restatement (Third) of Agency* § 1.01 (Am. Law Inst. 2006) (defining "agency" as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act"). In particular, these courts—at least six state courts of last resort and two federal appellate courts, including the Second Circuit below—look to whether the child protection investigator *agreed* with criminal law enforcement, implicitly or explicitly, to act on its behalf and under its direction. *See* Pet. App. 2–3 (court below); *United States v. Moreno*, 36 M.J. 107 (C.A.A.F. 1992); *Wilkerson v. State*, 173 S.W.3d 521 (Tex. Crim. App. 2005); *State v. Nations*, 354 S.E.2d 510 (N.C. 1987); *State v. Stahlnecker*, 690 S.E.2d 565 (S.C. 2010); *State v. Bernard*, 31 So.3d 1025 (La. 2010); *Blanton v. State*, 172 P.3d 207 (Okla. Crim. App. 2007);[7] *State v. Pearson*, 804 N.W.2d 260 (Iowa 2011).

[7] The Texas and Oklahoma Courts of Criminal Appeals are the highest courts for criminal cases in those states.

The *Wilkerson* decision, which has influenced other state courts, illustrates the majority approach. In *Wilkerson*, a CPS investigator interviewed the defendant about the removal of his children after he was arrested for injuring a child. 173 S.W.3d at 524. The defendant moved to suppress the uncounseled admissions he made during the interview because the CPS investigator, a government official, never advised him of his right to remain silent and to have a lawyer present during questioning. Noting "the important legal question" at stake, *id.* at 526, *Wilkerson* held that *Estelle* and *Mathis* were distinguishable, *id.* at 527 n.17, and that suppression was not required because "only those [public employees] who are working for or on behalf of police are law-enforcement 'state agents.'" *Id.* at 528. The court stated that "[t]he term 'agency' denotes a consensual relationship which exists between two persons or parties where one of them is acting for or on behalf of the other." *Id.* at 529. *Wilkerson* declared that CPS caseworkers, who investigate family placement and safety matters, and police officers, who investigate criminal matters, normally "run on separate parallel paths." *Id.* Only when these parallel paths "converge"—and "the police and [CPS] agent are investigating a criminal offense in tandem"—may the agent "be viewed as an agent of the police." *Id.*

The court announced three sets of factors relevant to the agency inquiry. First, "Did the police know the interviewer was going to speak with the defendant? Did the police arrange the meeting? Were the police present during the interview? Did they provide the interviewer with the questions to ask? Did they give the interviewer implicit or explicit instructions to get certain information from the defendant? Was there a 'calculated

practice' between the police and the interviewer that was likely to evoke an incriminating response from defendant during the interview? And finally, does the record show that the police were using the agent's interview to accomplish what they could not lawfully accomplish themselves? In sum, was law enforcement attempting to use the interviewer as its anointed agent?" *Id.* at 530.

Second, "courts should examine the record concerning the interviewer's actions and perceptions: What was the interviewer's primary reason for questioning the person? Were the questions aimed at gaining information and evidence for a criminal prosecution, or were they related to some other goal? How did the interviewer become involved in the case? Did the interviewer help 'build a case' that led to the person's arrest, or was the interviewer pursuing some other goal or performing some other duty? At whose request did the interviewer question the arrestee? In sum, did the interviewer believe that he was acting as an agent of law enforcement?" *Id.*

Third, held *Wilkerson*, "courts should examine the record for evidence of the defendant's perceptions of the encounter. When the defendant was interviewed, did he believe that he was speaking with a law-enforcement agent, someone cloaked with the actual or apparent authority of the police? What gave him this impression? Alternatively, would a reasonable person in defendant's position believe that the interviewer was an agent of law enforcement?" *Id.* at 530–31.

The *Wilkerson* court summed up its three-part test for "government agency" as follows: "At bottom, the inquiry is: Was this custodial interview conducted (explicitly or

implicitly) on behalf of the police for the primary purpose of gathering evidence or statements to be used in a later criminal proceeding against the interviewee? Put another way, is the interviewer acting as an 'instrumentality' or 'conduit' for the police or prosecution? Most simply: is the interviewer 'in cahoots' with the police?" *Id.* at 531 (footnotes omitted).

The highest courts in at least five other states—Iowa, Louisiana, North Carolina, Oklahoma, and South Carolina—apply the *Wilkerson* "in cahoots" approach or a similar analysis. *See Nations*, 354 S.E.2d at 325 (no Sixth Amendment violation because social services caseworker "was not a sworn law enforcement officer," "did not have any type of arrest power or jurisdiction," "was not affiliated in any way with any law enforcement agency," interviewed defendant only "to protect and safeguard the welfare of children," and did not act "at the direction of any law enforcement agency" or for the purpose of initiating criminal proceedings); *Stahlnecker*, 690 S.E.2d at 572 (no Sixth Amendment violation absent, "[a]t a minimum," "some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation takes place") (internal citation omitted); *Bernard*, 31 So.3d at 1035 ("The most important factors are … whether the investigator discussed the case with police prior to the interview, whether the interview was conducted at the police's request, and whether the primary purpose of the investigator's visit was to elicit a confession while in cahoots with law enforcement."); *Blanton,* 172 P.3d at 211 (caseworker was government agent because she "was initially called to assist the police in their investigation of the child sexual abuse

before Blanton was arrested," "became part of the investigative team," and "[h]er investigation was instrumental" in the filing of criminal charges); *Pearson*, 804 N.W.2d at 271 (Iowa 2011) (caseworker not government agent because the "'state-agency employee [was] working on a path parallel to, yet separate from, the police'") (quoting *Wilkerson*, 173 S.W.3d at 529).

At least one federal appellate court, in addition to the Second Circuit below, also follows this approach. In *United States v. Moreno*, the Court of Appeals for the Armed Forces, citing *Moulton* and *Henry*, held: "If a child abuse investigator-social worker or other non-law enforcement official is not serving the 'prosecution team,' it logically follows that such person is not a member of the 'prosecutorial forces of organized society' and thus is not barred from contacting an accused . . . ." 36 M.J. at 120; *see also Depree v. Thomas*, 946 F.2d 784, 794 (11th Cir. 1991) ("At a minimum, ... there must be some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation takes place.") (citation omitted).[8]

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[8] Many federal district courts have also followed the *Wilkerson* model. *See, e.g.*, *Whitmore v. Heath*, 2010 U.S. Dist. LEXIS 11910, at *10-11 (N.D.N.Y. Feb. 10, 2010) (denying Sixth Amendment claim because defendant could not show that "the child protection caseworker was induced by law enforcement to contact him for the purpose of obtaining information"); *United States v. Korbe*, 2010 U.S. Dist. LEXIS 57266, at *26 (W.D. Pa. June 9, 2010) ("[Caseworker] was not acting under any instructions from law enforcement to obtain information from Defendant."); *McClendon v. Singh*, 2013 U.S. Dist. LEXIS 25581, at *62 (N.D. Cal. Feb. 25, 2015) (denying Sixth Amendment claim because the defendant offered "no evidence [the caseworker] was working as an agent on behalf of the prosecution for purposes of Petitioner's criminal trial").

2. The minority approach: A child protection investigator is a government agent if her duties and actions make her the functional equivalent of criminal law enforcement.

In sharp contrast, the Third Circuit and at least three state courts of last resort do not require a principal-agent relationship of agreement and control between criminal law enforcement and a child protection investigator. Rather, in accordance with this *Mathis* and *Estelle*, these courts focus instead on the investigator's objective role: i.e., her functions and duties, her working relationship with law enforcement, and the likelihood that her investigation will assist a criminal prosecution. *See Saranchak v. Beard*, 616 F.3d 292 (3d Cir. 2010); *Commonwealth v. Saranchak*, 866 A.2d 292 (Pa. 2005); *Commonwealth v. Howard*, 845 N.E.2d 368 (Mass. 2006); *State v. Oliveira*, 961 A.2d 299 (R.I. 2007).

The Massachusetts Supreme Judicial Court's decision in *Howard* exemplifies the minority position. There, the court held that, because a Department of Social Services ("DSS") investigator was a government official, her interview of the defendant without counsel was inadmissible under the Sixth Amendment. 845 N.E.2d at 369, 372–73. In *Howard*, DSS and the Massachusetts State Police received a report from a local police department about an alleged sexual offense. The DSS investigator and a state trooper met to discuss the case as part of a Sexual Abuse Intervention Network team.[9] After the meeting, the trooper directed the investigator to avoid contact with the defendant.

[9] Like New York and other states, Massachusetts requires the creation of a multidisciplinary team to investigate alleged child sexual abuse. *See* Mass. Ann. Laws ch. 119 § 51A.

Nevertheless, six days after the trooper arrested the defendant, the investigator interviewed him without notifying defense counsel or the state police. *Id.* at 370–71.

Howard held that the interview had to be suppressed because the investigator was a government agent for purposes of the Sixth Amendment. Unlike the Second Circuit and other courts on the long side of the split, the *Howard* court rejected the notion that no constitutional problem existed because 1) DSS was "not a law enforcement agency," 2) the investigator's interview was only "conducted in furtherance of her responsibilities for the care and protection of children," and 3) the trooper did not supervise the investigator or instruct her to conduct the interview. *Id.* at 371, 372–73. Instead, the court relied on the investigator's functions, asking whether "official duties direct [the investigator] to interact with a defendant," and whether the investigator "may be required to turn any incriminating responses over to the police and prosecutor." *Id.* at 372. Thus, consistent with this Court's decision in *Mathis*, the Massachusetts high court focused on the statutory obligations of the DSS—and the likelihood that the results of the interview would be used in a criminal case—not on whether the investigator agreed or subjectively intended to act "in cahoots" with criminal law enforcement. *Id.* at 372–73.

In *Oliveira*, the Rhode Island Supreme Court took a similar functional approach. There, a Department of Children, Youth and Families ("DCYF") investigator was assigned, under a Rhode Island statute, to a child sex abuse case after the defendant's arrest. 961 A.2d at 307. After meeting with the detective and prosecutor, as DCYF procedure and policy encouraged, the investigator interviewed the defendant without notifying counsel.

Id. The defendant gave a full confession, which he later sought to suppress. *Id.* Recognizing that the investigator's role "was not primarily prosecutorial" but rather focused on civil proceedings, the *Oliveira* court nevertheless held that the interview violated the Sixth Amendment in light of the investigator's *function,* not her subjective purpose. *Id.* at 310. Relying on *Estelle* and *Moulton*, the court held that the investigator's "awareness that a criminal prosecution had begun" and her statutory duty to turn over incriminating evidence to the police were sufficient to trigger Sixth Amendment protection. *Id.* at 311.[10]

The Third Circuit and the Pennsylvania Supreme Court hew closely to these Massachusetts and Rhode Island decisions. The Pennsylvania Supreme Court's test asks whether the child protection official was investigating sexual abuse charges for which the defendant was already "awaiting trial" and whether the interview "was very much analogous to a police officer investigating a crime." *Commonwealth v. Saranchak*, 866 A.2d 292, 302 (Pa. 2005). The Third Circuit, adopting this functional approach, analyzes whether the investigator's interview was "of the kind ... that has a high probability of

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[10] The Rhode Island Supreme Court and other courts have noted that holding child protection investigators to be government agents for right-to-counsel purposes will not "stifle or limit the[ir] important work ... in protecting the safety of children." *Oliveira*, 961 A.2d at 311. The holding does not prohibit a child protection investigator, for example, from interviewing the accused. *Id.* at 312. It simply means that the results of any interview conducted in violation of the right to counsel will not be admissible at the defendant's criminal trial. *Id.*; *see also Blanton*, 172 P.3d at 211; *Massiah*, 377 U.S. at 207 ("All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.").

leading to informant testimony at a criminal trial," such as where the interview was "of a person [already] *charged with offenses involving children.*" *Saranchak v. Beard*, 616 F.3d 292, 304 (3d Cir. 2010) (emphasis in original).

A number of state intermediate appellate courts also follow this functional approach. *See, e.g.*, *State v. Dixon,* 916 S.W.2d 834, 835, 837 (Mo. Ct. App.1995) (social worker was government agent because, "[a]s mandated by [state law], she worked jointly, exchanging reports, with the police in investigating [the defendant]" and "knew that a prosecution had already been initiated and that the information she obtained would be shared with the police"); *People v. Wilhelm,* 822 N.Y.S.2d 786, 791–92, 793 (N.Y. App. Div. 2006) (CPS caseworkers were government agents because they had "cooperative working arrangement" with police and prosecutor, were members of "multidisciplinary team" that included criminal law enforcement officials, and, when requested, provided information to prosecutor's office; court held it "immaterial that the CPS caseworkers considered their investigation separate from that of the police …; defendant's 'right to counsel cannot hinge on the government's characterization of its own investigation.'").[11]

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[11] *See also People v. Curtis*, 579 N.E.2d 428, 431 (Ill. App. Ct. 1991) ("DCFS investigators who inquire into abuse and neglect charges, and who instigate charges where appropriate, are prosecutorial agents of the State."); *State v. Nason*, 981 P.2d 866, 870 (Wash. Ct. App. 1999) ("Here, although [the caseworker] was investigating Mr. Nason for the purpose of a dependency action, [the caseworker] was required to disclose incriminating evidence to law enforcement officials. As in *Mathis*, a criminal prosecution could, and did, arise shortly after the interview[,] and the prosecution relied in part on evidence gathered by [the caseworker]. [He] was not caring for the interests of Mr. Nason or acting as his agent or representative, rather [the caseworker] owed his allegiance to the State.").

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In sum, federal and state courts are split over when a child protection investigator is a government agent for Sixth Amendment purposes.[12] The Second Circuit and other courts focus narrowly on whether the investigator agreed to work at law enforcement's behest and under its supervision—asking, for example, whether the worker had "extensive interaction with law enforcement before and after interrogating the defendant," acted "at the instigation of the police" or under its "supervision," and participated in "a formal multidisciplinary team or joint venture." Pet. App. 2–3. Other courts, relying on this Court's decisions in *Mathis* and *Estelle*, adopt a functional approach that examines the official's role, duties, and the likelihood that her investigation will be used to further a criminal prosecution. As the final arbiter of what the Sixth Amendment requires, this Court should resolve this widespread and entrenched split.

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[12] This split is even more pronounced if one includes cases addressing other kinds of public officials outside the mold of traditional criminal law enforcement. *See, e.g.*, *United States v. Jackson*, 886 F.2d 838 (7th Cir. 1989) (probation officer "did not act on behalf of the government"); *State v. Everybodytalksabout*, 166 P.3d 693 (Wash. 2007) (en banc) (probation officer was "government agent"); *Bey v. Morton*, 124 F.3d 524 (3d Cir. 1997) (corrections officer was not state agent); *Commonwealth v. Hilton*, 823 N.E.2d 383 (Mass. 2005) (court officer was agent of the police); *Commonwealth v. Allen*, 480 N.E.2d 630 (Mass. 1985) (hospital nurse was not agent of the police); *United States v. Melgar*, 139 F.3d 1005 (4th Cir. 1998) (Immigration and Naturalization Services agent was state agent), *overruled on other grounds by Texas v. Cobb*, 532 U.S. 162 (2001).

II. The question presented is extremely important.

The question presented recurs frequently, as the extent of the split illustrates, and is sufficiently important to warrant this Court's intervention now, without the need for further percolation.

The right to the assistance of counsel at all critical post-charge interactions with the State is one of the most fundamental rights of the accused in a criminal case. *See Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."); *Gideon*, 372 U.S. at 340 (representation by counsel in a criminal case is "fundamental and essential to a fair trial"). And the pretrial period is "perhaps the most critical period of the proceedings" during which a defendant "requires the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45, 47 (1932).

The question presented is especially significant because it arises so frequently. Every state has a child protection agency. *See* Children's Bureau, *Making and Screening Reports of Child Abuse and Neglect* 3 (2013), *available at* http://tinyurl.com/gos86vc. Every state has also enacted legislation "addressing or promoting the use of multidisciplinary or multi-agency teams in child abuse cases." Laura E. Ruzzo, *The Testimonial Nature of Multidisciplinary Team Interviews in Massachusetts: Applying Crawford to the Child Declarant*, 16 Suffolk J. Trial & App. Advoc. 227, 229 (2011) (footnote omitted). And states nationwide have adopted the child-protection-worker-as-interviewer model of investigating child abuse. *See* Am. Prosecutors Research Inst.,

Investigation and Prosecution of Child Abuse xxiii, xxx, 37 (3d ed. 2004). Prosecutors thus realize that they can obtain the results of child abuse investigations to use in related criminal cases, either voluntarily or by subpoena, making it unnecessary for criminal law enforcement officials to commission or direct those investigations themselves. If prosecutors can so easily take advantage of ostensibly "civil" child protection investigations to convict defendants criminally—despite the investigators' failure to comply with requirements of the Sixth Amendment—that vital constitutional protection becomes hollow.

Nor is there any need for additional percolation. Many courts, including the highest courts of at least nine states, have thoughtfully weighed in on the issue presented. And because the division among the lower courts ultimately stems from confusion over which line of this Court's precedents to follow, only this Court can resolve the dispute definitively.

III. This case presents a suitable vehicle for resolving the question presented.

This case also provides an appropriate certiorari vehicle. Petitioner raised the question presented below, *see* Petitioner's Corrected Second Circuit Brief 1–2, 25–26, 29–37 (May 22, 2015), and specifically urged the court of appeals to follow the approach of the Rhode Island Supreme Court and other courts in the minority camp. *Id.* at 35–36. And the Second Circuit cleanly decided the question on the merits. Pet. App. 3.

Further, the question is outcome determinative. If the court below had applied the functional tests espoused by the highest courts of Rhode Island or Massachusetts, it would

have determined that Hinds was a government agent for Sixth Amendment purposes in light of her statutory duties and her agency's coordination with federal criminal law enforcement officials in this case. That determination, in turn, would likely have resulted in a new trial because petitioner's improperly admitted inculpatory statements, which were tantamount to a confession, and which the prosecution emphasized to great effect in its two summations, decimated her otherwise strong insanity defense. The erroneous admission of the confession on the key issue in dispute—whether petitioner was able to appreciate the wrongfulness of her acts—must have influenced the jury, and cannot be considered "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Moreover, the essential facts bearing on the question presented are undisputed. The government has never contested, for example, that Hinds knew about this already-pending prosecution when she interviewed petitioner, that petitioner's right to counsel had attached two weeks before the interview, and that ACS officials had coordinated with DHS officials both before and after petitioner's arrest. Indeed, the ACS file explicitly acknowledged that "CPS coordinated [the] case with Homeland Security[.]" ACS file, at CS 150, 167.

The unpublished nature of the decision below is no bar to this Court's review. "The fact that [a] Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., joined by O'Connor and Souter, JJ., dissenting from denial of certiorari). Indeed, this Court often

grants certiorari to review unpublished and summary decisions. *See, e.g.*, *Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Illinois v. Fisher*, 540 U.S. 544 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004).

The Second Circuit's ruling is also likely to prove influential. Though summary orders in the Second Circuit are not binding precedent, they carry significant weight—both in the court of appeals and in district courts throughout the Circuit. *See United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) ("'[D]enying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases . . . .'")(citation omitted); *United States v. Tejada*, 824 F. Supp. 2d 473, 475 (S.D.N.Y. 2010) ("The [c]ourt is not persuaded that it is at liberty not only to disregard but contradict a Second Circuit ruling squarely on point because it was rendered in a summary order."); *Finkel v. David Liepper & Sons, Inc.*, No. 07-1366-civ, 2009 WL 578380, at *3 (E.D.N.Y. Mar. 4, 2009) ("Although this ruling is in a Summary Order that cannot be cited as precedential authority by attorneys, this court must recognize and respect the Second Circuit's reasoning."). And the Second Circuit's decision could have pernicious effects in other jurisdictions as well. *See* Fed. R. App. P. 32.1 (providing that no court of appeals may prohibit or discourage a party from citing unpublished federal appellate decisions issued after January 1, 2007).

The Court should be especially willing to review an unpublished decision where, as here, it exacerbates a deep split and weakens a fundamental constitutional limit on the

government's power to interrogate a criminal defendant without her lawyer and to use the fruits of that uncounseled interrogation to convict her.

IV. The Second Circuit applied an incorrect legal standard in holding that the child protection services investigator was not acting as a government agent when she deliberately elicited petitioner's incriminating statements in the absence of counsel.

This Court should also grant review because the Second Circuit applied the wrong test and reached the wrong result. Just as child protection investigators are government actors subject to the Fourth Amendment *see, e.g.*, *Michael C. v. Gresbach*, 526 F.3d 1008, 1014 (7th Cir. 2008); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (Fourth Amendment applies to searches by public school officials), they are subject to the Sixth Amendment as well, at least in the circumstances presented here.

In ruling otherwise, the Second Circuit erroneously applied the criteria set forth by the New York Court of Appeals in *Ray*. Those criteria, by their express terms, address when a purely "*private* act" or "*private* investigation"—*Ray* involved the acts of a "private store detective"—loses its "private" character and becomes "so pervaded by governmental involvement" as to trigger "the full panoply of constitutional protections." 480 N.E.2d at 1067 (emphases added). In that context, the relevant indicia that "may transform private conduct into State action, include: a clear connection between the police and the private investigation, completion of the private act at the instigation of the police; close supervision of the private conduct by the police; and a private act undertaken on behalf of the police to further a police objective." *Id.*

While the *Ray* test makes perfect sense where private actors or informants are involved, *see, e.g.*, *Massiah*, *Henry*, *Moulton*, it makes no sense here. Hinds was not a "private actor" engaged in "private conduct" or a "private investigation." She was a government official required to "work cooperatively with law enforcement personnel" to "add to the evidence" of child sexual abuse underlying this criminal prosecution. *See Oliveira*, 961 A.2d at 310. Hinds knew "she was statutorily required to forward any information" she obtained from petitioner concerning the criminal allegations. *Id.*; *see also Howard*, 845 N.E.2d at 372. And Hinds's employer, ACS, had already been recruited by federal law enforcement officials to assist and coordinate in this very case. The question is thus not whether any "private act" lost its private character but whether Hinds's public role as a government-employed child protection investigator working in coordination with federal agents made her sufficiently like a criminal law enforcement official to trigger Sixth Amendment protection.

Because it applied the wrong legal test, the court of appeals relied upon factors that do not negate Hinds's status as a government agent. The court noted, for example, that Hinds herself "was not part of a multidisciplinary team or joint venture with the government," at least not in a "formal" sense. Pet. App. 3. But it was undisputed that Hinds's employer, ACS, *was* part of a legally mandated multidisciplinary Instant Response Team with law enforcement, and that ACS was "coordinating [the] case with Homeland Security."

The court also found it significant that "Hinds did not even learn of the case until after Solomon-Eaton was arrested." Pet. App. 3. But no case—from this Court or any other—requires a person, whether a private actor or a government official, to be aware of the criminal case from the moment of the defendant's arrest to qualify as a government agent. What matters is that, one day after petitioner's arrest, Hinds learned of this pending criminal prosecution but nevertheless decided, in her official capacity as a government investigator, to confront petitioner and question her about the charges without notifying counsel. Federal prosecutors then knowingly exploited Hinds's conduct by using the results of her uncounseled interview to convict petitioner.[13]

The court also said that Hinds interviewed petitioner "on her own initiative" and "for the purposes of her child abuse and neglect investigation." Pet. App. 3. But Hinds's interview was conducted "on her own initiative" only in the sense that federal law enforcement officials did not directly put her up it. They did not need to: her position, and her statutory duties, *required* her to conduct a face-to-face interview with petitioner and to coordinate with law enforcement. And while her principal purpose may have been to amass evidence of child sexual abuse for use in a civil proceeding, this Court and others recognize

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[13] Of course, "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Moulton*, 474 U.S. at 176 (citing *Henry,* 447 U.S. at 276 (Powell, J., concurring)). But "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." *Id.*

that her subjective purpose is not determinative. *See Estelle*, 451 U.S. at 467; *Mathis*, 391 U.S. at 4; *Oliveira*, 961 A.2d at 310–11; *Howard*, 845 N.E.2d at 372. Rather, the dispositive factors are that 1) child sexual abuse investigations by ACS "frequently lead to criminal prosecutions," *Mathis*, 391 U.S. at 4—indeed, as Hinds knew, this criminal prosecution was already well underway when she interviewed petitioner; 2) ACS and federal law enforcement were coordinating; and 3) Hinds would have known in the context of this coordinated investigation that the incriminating evidence she elicited would be used by prosecutors in the criminal case, as it was. This Court requires nothing more for Hinds to be a "government agent." *See Mathis*, 391 U.S. at 4; *Estelle*, 451 U.S. at 471; *Oliveira*, 961 A.2d at 311; *Howard*, 845 N.E.2d at 372.

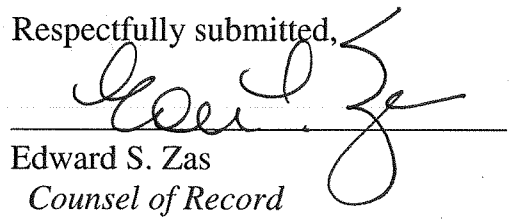
Finally, the court noted that "Hinds did not receive instructions from law enforcement regarding her interview beforehand, or conduct the interview with law enforcement present, or volunteer the results of her interview to the government." Pet. App. 3. Again, under the correct legal test, these observations do not negate Hinds's status as a government agent. *See Oliveira*, 961 A.2d at 310 (dispensing with the argument that the investigator "did not interview defendant at the direct behest of the police or prosecution"). This Court has found a government-agency relationship even where law enforcement officials affirmatively instructed a party *not* to interview the defendant. *See Moulton*, 474 U.S. at 175–76. Nor do criminal law enforcement personnel need to be present at the interview for government agency to exist. *See id.*

In summary, under the correct constitutional analysis, Hinds, like the IRS official in *Mathis*, was not acting as a private citizen but as a government agent when she interviewed petitioner about pending criminal charges without notifying her appointed lawyer. Accordingly, the resulting statements should have been suppressed.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,



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Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of January, two thousand sixteen.

PRESENT: AMALYA L. KEARSE,
DENNIS JACOBS,
CHESTER J. STRAUB,
Circuit Judges.

- -X
UNITED STATES OF AMERICA,
Appellee,

-v.- 14-4573-cr

CAMILLE SOLOMON-EATON,
Defendant-Appellant.
- -X

FOR APPELLANT: EDWARD S. ZAS, Federal Defenders of New York, Inc., Appeals Bureau, New York, NY.

FOR APPELLEE: SARITHA KOMATIREDDY (Peter A. Norling, on the brief), for Robert L. Capers, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Matsumoto, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

Camille Solomon-Eaton appeals from the judgment of the United States District Court for the Eastern District of New York (Matsumoto, J.) convicting her of (i) sexually exploiting her minor child and (ii) distributing or receiving child pornography. Solomon-Eaton was sentenced chiefly to 17 years' imprisonment. Solomon-Eaton seeks a new trial on the grounds that (i) her Sixth Amendment right to counsel was violated when a child protective service caseworker elicited self-incriminating statements from the defendant, and (ii) the government made prejudicial and improper arguments during rebuttal summation. She also contends that her sentence was unconstitutional and substantively unreasonable. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

1. An individual who is not a law enforcement agent can become one for Sixth Amendment purposes if he or she acts as a "government agent" who "deliberately elicit[s]" the incriminating information. United States v. Whitten, 610 F.3d 168, 193 (2d Cir. 2010) (internal quotation marks omitted). Such incriminating information is thereby suppressible only if obtained as a result of intentional effort by the government. United States v. Stevens, 83 F.3d 60, 64 (2d Cir. 1996) (discussing Massiah v. United States, 377 U.S. 201 (1964)). We review the factual findings of a district court's ruling on a suppression motion for clear error, viewing the evidence in the light most favorable to the government, and the legal conclusions de novo. See, e.g., United States v. Rodriguez, 356 F.3d 254, 257 (2d Cir. 2004).

New York courts determine whether a child protective services caseworker was an agent of law enforcement for Sixth Amendment purposes by considering "indicia of State involvement," including "a clear connection between the police and the private investigation," "completion of the

private act at the instigation of the police," "close supervision of the private conduct by the police," and "a private act undertaken on behalf of the police to further a police objective." People v. Greene, 760 N.Y.S.2d 769, 772 (App. Div. 3d Dep't 2003) (quoting People v. Ray, 491 N.Y.S.2d 283, 286 (N.Y. 1985)). While a social worker is generally not an agent of the police, id., when a child protective services caseworker has extensive interaction with law enforcement before and after interrogating the defendant, particularly when part of a formal multidisciplinary team or joint venture, New York courts tend to find that the caseworker is a law enforcement agent. See, e.g., id.; People v. Wilhelm, 822 N.Y.S.2d 786, 793-94 (App. Div. 3d Dep't 2006).

The child protective specialist here, Kerlyne Deriscar-Hinds, was not part of a multidisciplinary team or joint venture with the government. Hinds did not even learn of the case until after Solomon-Eaton was arrested. Only weeks later, on her own initiative, did Hinds seek to interview Solomon-Eaton for the purposes of her child abuse and neglect investigation. Hinds did not receive instructions from law enforcement regarding her interview beforehand, or conduct the interview with law enforcement present, or volunteer the results of her interview to the government. Because Hinds was not a government agent when she conducted her interview with Solomon-Eaton, Solomon-Eaton's Sixth Amendment claim fails.

2. To succeed on a claim of prosecutorial misconduct premised on statements made during summation, a defendant must show that the prosecutor's comments caused "substantial prejudice" such that the defendant was deprived of a fair trial. United States v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998); see also United States v. Locascio, 6 F.3d 924, 945-46 (2d Cir. 1993). To assess whether substantial prejudice exists, we weigh "the severity of the misconduct, the measures adopted to cure [it], and the certainty of conviction absent the misconduct." United States v. Elias, 285 F.3d 183, 190 (2d Cir. 2002).

The prosecutor's rebuttal summation was a fair response to the defense summation. After defense counsel urged the jury to show "mercy" in considering Solomon-Eaton's insanity

defense, the prosecutor had "wide latitude," Tocco, 135 F.3d at 130, to characterize defense counsel's closing as a "sympathy pitch." The prosecutor was also permitted to rebut defense counsel's arguments about "justice," provided she did so in a fair, limited way. The rebuttal summation's brief discussion of "justice" did not substantially prejudice Solomon-Eaton.

3. Our review of the substantive reasonableness of a sentence is "particularly deferential": we will set aside sentences as substantively unreasonable "only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions"; that is, if the sentence "shocks the conscience," if it "constitutes a manifest injustice," or if "allowing [it] to stand would damage the administration of justice." United States v. Aldeen, 792 F.3d 247, 255 (2d Cir. 2015) (internal quotation marks omitted).

A sentence violates the Eighth Amendment prohibition against "cruel and unusual punishment" only when it is "grossly disproportionate to the crime;" outside the context of capital punishment, that is "exceedingly rare." United States v. Yousef, 327 F.3d 56, 163 (2d Cir. 2003) (internal quotation marks omitted). To determine whether a sentence is "grossly disproportionate," a court must consider the legitimacy of a legislature's basis for prescribing a certain punishment for a certain offense, and compare the gravity of the particular offense to the severity of the particular sentence. Ewing v. California, 538 U.S. 11, 23-30 (2003).

The statutory range for Solomon-Eaton's offenses (six counts of sexually exploiting her minor child and seven counts of distributing and receiving child pornography) is 15 to 320 years' imprisonment. In imposing a 17-year sentence, the district court explicitly considered (i) Solomon-Eaton's mental history and health, (ii) her lack of diagnosed pedophilia, and (iii) her progress in mental health treatment. Against these factors, the district court weighed (i) the gravity of the offenses, (ii) the likely future psychological and emotional harm the offenses will cause the victims, and (iii) the moral culpability of Solomon-Eaton as the parent of one of the victims. The

district court's sentence of 17 years is well "within the range of permissible decisions." Aldeen, 792 F.3d at 255 (internal quotation marks omitted).

Nor is Solomon-Eaton's sentence "grossly disproportionate to the crime." Yousef, 327 F.3d at 163 (internal quotation marks omitted). The gravity of her offenses (a combined thirteen counts of sexually exploiting a minor child and distributing and receiving child pornography) warrants the severity of her sentence (barely over the statutory mandatory minimum).

Accordingly, and finding no merit in Solomon-Eaton's other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

THE COURT: She will be back in soon?

MS. KOMATIREDDY: Yes, thank you. The midmorning break would be appropriate at this time.

THE COURT: Ladies and Gentlemen, have a midmorning break. Please don't discuss the case. Thank you for your attention.

(Jurors exit the courtroom.)

THE COURT: All right. Let's take a break and hopefully in ten minutes we'll be ready to resume.

(Brief pause.)

MR. SUNDARAM: Your Honor, the government's list of rebuttal witnesses is Kerlyne Deriscar-Hinds. She is a -- I don't know what the right agency is, CPS, like Child Protective Services, or ACS caseworker. That's who she is. And she is, I think, assigned to the ACS component of this case regarding what would happen in terms of reunification with the child, things of that matter after the arrest.

And her progress notes, you know, recount a lot of visits; she does family visits, home visits, she sees the child, she has seen my client, she has seen the home where she is in. And, you know, we think that it may be appropriate for her rebuttal to testify about things that go to the insanity defense relating to observations of our client. However, the government -- she also has elicited -- this agent has elicited from our client some

statements the first time I think on one of the meetings and that statement should not be admissible. If she is going to be here as a fact witness on our client's -- on her trained observations of our client's mental state, that's one thing, but she should not be allowed to bring in a statement of our client. And I think there's one statement that we're concerned about that the government says that they did intend to try to elicit from the letter.

MS. KOMATIREDDY: I can make this clear for the Court, your Honor. Ms. Hinds will come in and say that the defendant told her she knew what she did was wrong. That is our purpose in offering her testimony. That statement was disclosed to defense counsel last December in discovery. It was clearly disallowed. All of the records were turned over. Defense counsel never moved to suppress.

There is no issue in terms -- they are not even articulating an issue yet, but I'm confident that there is no issue in terms of admissibility or constitutionality. I'll leave it to them to raise the burden.

MR. SUNDARAM: This is not like a statement that they included. It's true, it's in one of these reports which we were given in discovery. They did not serve like a Rule 16 notice saying that this is a statement that she made to law enforcement. That's what we regard the statement as.

Additionally, it's not a statement that she -- the

issue in this case is our client's ability to appreciate the wrongfulness of her conduct at the time it occurred and the effect of her mental disease on that. This is basically a statement that doesn't speak to her appreciation at the time. It says that she stated the ACS worker, first of all, asks her about the allegations. This is after her right to counsel's attached here and also we believe in family court where she had a lawyer.

It's not -- the context isn't entirely clear because this is an investigation progress report. It appears that they were in court earlier that day. They gave some sort of letter. They asked the baby mother, as they put it, what happened that caused her to get arrested by Homeland Security. She admits to sending pictures sometime in September, November 2011. The worker asks if she ever met this person or had any relationship with him. She says she never personally met him. They met through a chat line.

Then it says she also states that she does not know what she was thinking. That's probably the only statement that actually talks about what -- even touches upon her mental state at the time of the incident or the conduct. She states she knows, knows now, in April 2012, what she did was wrong and was taken by surprise when a whole lot of police came to her home and explained to her about the pictures she sent over state lines of her daughter

is a crime and they then arrested her.

They then start asking her about diagnosis of any mental health concerns and they talk about, you know, she says she was never diagnosed but has depression, et cetera. Then they have also some statements about the past when she was a teenager and she was raped. Of course, they have other reports where they just talk about their observations when they see her.

But this statement, first of all, it's not -- it doesn't speak to her mental state at the time of the offense. It says now in, you know, April, it says I didn't know what I was doing or something and now I think it's -- now I know that was wrong. The police came and, you know, arrested me.

THE COURT: Is the word "now" in the statement?

MR. SUNDARAM: No. It just says she knows. The other one said -- the first statement said she had -- she does not know what she was thinking. Then it says -- and this isn't like a written statement of our client. This is the narrative of the progress report. Then it states she stated that she knows what she did was wrong and was taken by surprise, as I just read.

You know, this is not -- this doesn't speak to the wrongfulness at the time which is very important here. It's what the jury is going to be instructed about. It's

also -- you know, it's also not like a statement to a psychiatrist. It wasn't the worker's purpose or expertise to assess her state of mind at the time she engaged in the charged conduct.

THE COURT: But it's an admission.

MR. PATTON: It's not an admission, your Honor. She is saying having been arrested, she knows what she did was wrong.

THE COURT: All right. What rule of evidence or authority can you cite to me in support of your argument that this is not admissible, the statement by Ms. Solomon-Eaton?

MR. SUNDARAM: As an evidentiary matter?

THE COURT: Or a case law. Tell me what the legal basis is for your tardy application to exclude or limit this testimony, this evidence. We had, as you know, a schedule for motions in limine. Forget about that, forget about that, because the government produced the statement. You're not denying that they gave it to you in December. You're not denying that this witness was on their witness list. You're not denying that you never made the motion.

But let's just talk about the substance. What is the legal basis for excluding this statement?

MR. SUNDARAM: For the reasons we just stated. It's not relevant to the specific issue in the case of what

her -- her ability to appreciate wrongfulness at the time of the conduct. It's at most -- it's basically an admission of the crime, of the initial acts of sending the pictures. But it's not -- it doesn't speak to her knowledge at the time.

Our other objection is under Rule 403, it should be excluded because it creates a real risk that the jury will improperly reject the insanity defense based on evidence that Ms. Solomon-Eaton had some recognition of that her conduct was wrong after she was arrested and told that what she did was criminal.

THE COURT: Well, whether she knew it was criminal is not an element, knowledge of the law. It's appreciating the wrongfulness of the conduct. Whether the jury interprets that as a statement of knowledge at the time she made the statement or a statement of knowledge at the time she engaged in the conduct is an issue for the jury, I think.

I don't believe it's inadmissible, and I think both sides are free to argue as to what that means and you can certainly cross-examine the witness. She may admit that that statement is not precisely identified as the state of mind that day when she made the statement or at the time of the conduct. But I don't think it's inadmissible, per se.

MR. SUNDARAM: Your Honor, what's a little unusual about this is that I understand that, you know, in a large

pack of discovery this statement is in one of these investigation notes. And I understand that, you know, we can say we should have thought that they were planning to admit it the whole time for that purpose. But this is --

THE COURT: It is so obviously --

MR. SUNDARAM: Like in Rule 16, they serve notice about the post-arrest statements to the actual prosecuting authority in federal court. But this is very close to that because it's a Child Protective Services agency. As the Court heard, they accompanied the federal agents at the time of the arrest so they also could be viewed as agents. I mean, that would have to be determined, but as acting on behalf of the federal authorities getting the statement they couldn't get after right to counsel is attached under the Sixth Amendment of this case.

THE COURT: She had counsel you said at the time she was in family court with a lawyer; is that right?

MR. SUNDARAM: Excuse me?

THE COURT: Did you say that she was with counsel in family court at the time of this statement? Did I understand you to say that?

MR. SUNDARAM: This is something that I believe -- I know that she had a family court lawyer who was appointed and who is mentioned in some of these notes.

THE COURT: All right.

MR. SUNDARAM: To represent her on the child protected issues.

THE COURT: Right. And the context in which she made the statement determined her fitness to regain custody of her daughter; is that it? You don't know?

MR. SUNDARAM: I believe that's the --

MS. KOMATIREDDY: Your Honor, just to get some context, first of all, Rule 16 does not require me to flag every statement for defense counsel. I sent a cover letter, indicated that this was Rule 16 material and indicated in bullet points what it contained in terms of records from the City of New York, Administration for Children's Services. And it's really defense counsel's responsibility to read it.

In terms of the status of a child services worker, she is not a federal law enforcement agent. She is not a government actor in the federal government -- and investigative actor in the federal government eliciting a statement. This is a state administrative worker doing her job in child services protection and there's no issue.

MR. SUNDARAM: She is inquiring about the exact same conduct, the same allegations that are the subject of the federal charge, and she's part of an agency that literally was recruited by -- which we learned during trial was recruited by Homeland Security to --

THE COURT: Not to prosecute or investigate the

defendant, but rather to make sure that this child was identified and put in a safe place, ACS.

MS. KOMATIREDDY: And this worker was not part of the team that went to the home. This worker was not recruited by -- this worker is not connected to the actual moment where they went to the home and knocked on the door and spoke to the defendant. This is a conversation that happened later, and she was just doing it in the course of her ordinary duties as a Child Protective Services worker.

MR. SUNDARAM: It's the same agency. And by that time the child has already been separated from the mother. So what we're talking about is they come back later, same agency that went with the feds before at the time of the arrest and when the statement was obtained from Ms. Solomon-Eaton.

And then after, like weeks after the right to counsel is attached, she's been arraigned here on a criminal complaint, released on bail. Then they go and ask her about the allegations.

THE COURT: But isn't that being done in the context of determining whether the mother and child will be reunited or whether some visiting --

MS. KOMATIREDDY: Yes, your Honor.

THE COURT: I don't know the context, but it doesn't seem to me that the conversation regarding the

background of what led to the child being separated from the mom was focused on the prosecution of Ms. Solomon-Eaton but rather focusing on whether the child would be -- was being protected and whether, you know, Ms. Solomon-Eaton's right as a parent was still being determined. It just doesn't seem to me to be excludable under any rule or principle or case that I can conjure. And again, you're invited to present one.

In terms of your argument that this is not relevant, it could not be more relevant.

MR. SUNDARAM: It couldn't be more relevant if it spoke to her mental state at the time of the incident.

THE COURT: That's a matter of interpretation, and certainly you can cross-examine this witness as to, again, whether this statement was made in the context of Ms. Solomon-Eaton describing what she knew on that day or whether it was what she knew at the time of the charged conduct.

So it's not inadmissible. It may go to weight.

MR. SUNDARAM: Your Honor, it has been recognized that CPS caseworkers in a child abuse case where the person also has, like, a state prosecution based on the same allegations for a child abuse-related crime can be viewed as agents of those authorities.

THE COURT: All right. But in this particular

case, given the factual context, she is not -- this witness, from what you've described, is not having this conversation with Ms. Solomon-Eaton for purposes of the federal prosecution for the child pornography related charges, but rather in the context of the family court proceeding.

I think we're getting to the point where we're starting to repeat.

MS. KOMATIREDDY: We're ready, your Honor.

THE COURT: I don't believe it's inadmissible. Let's get the jury back. Your objection is respectfully overruled on several grounds. One, it's tardy. Two, there's no legal basis for exclusion. And three, I believe that the relevance and probative value is not outweighed by any unfair prejudice to the defendant.

MR. PATTON: Your Honor, could we get some clarification on the scope of the testimony. The government has represented that it was going to be short. I just want to know what that means.

MS. KOMATIREDDY: Five minutes.

MR. PATTON: The subject matter, just generally so that in case we have other objections.

MS. KOMATIREDDY: Do you have the 3500?

THE COURT: This is off the record I take it when lawyers are conversing?

MS. KOMATIREDDY: Sorry.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
Camille Solomon-Eaton

JUDGMENT IN A CRIMINAL CASE

Case Number: 12CR352[KAM]

USM Number: 80077-053
Kannan Sundaram
Federal Defenders
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

✔ was found guilty on count(s) after a plea of not guilty — 1 through 13 of a 13-count second-superseding indictment.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2251(a)	Sexual Exploitation of a Child	3/26/2012	1,3,5
18 U.S.C. § 2251(b)	Sexual Exploitation of a Child by a Parent		2,4,6
18 U.S.C. § 2252(a)(2)	Distribution of Child Pornography		7-9
18 U.S.C. § 2252(a)(2)	Receipt of Child Pornography		10-13

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 22, 2014
Date of Imposition of Judgment

s/KAM
Signature of Judge

Kiyo A. Matsumoto, USDJ
Name and Title of Judge

October 22, 2014
Date

APP17

AO 245B (Rev. 09/11) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Camille Solomon-Eaton
CASE NUMBER: 12CR352[KAM]

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

On Counts 1-6, 17 years. On Counts 7-11 and 13, defendant is sentenced to 7 years. On Count 12, defendant is sentenced to 9 years. All sentences shall be served concurrently.

✔ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that Ms. Solomon-Eaton be designated to FCI Marianna, if available, otherwise FCI Tallahassee, or FCI Aliceville to facilitate family visits, and, if available provide the Sex Offender Treatment Program- Residential (SOTP-R), in which the Court recommends that Ms. Solomon-Eaton be promptly enrolled, as well as providing the defendant with ongoing mental health treatment in the form of individual and group therapy, as well as educational and vocational services.
Ms. Solomon-Eaton is encouraged to participate in the BOP's Financial Responsibility Program that will assist her with making payments towards her $1,300 assessment obligation if it is not paid in full by her surrender date.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

✔ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

✔ before 2 p.m. on December 29, 2014.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Camille Solomon-Eaton
CASE NUMBER: 12CR352[KAM]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Life supervision on each count with special conditions.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

✔ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

✔ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Camille Solomon-Eaton
CASE NUMBER: 12CR352[KAM]

SPECIAL CONDITIONS OF SUPERVISION

A. Ms. Solomon-Eaton shall comply with the sex offender registration requirements mandated by law.

B. The defendant shall participate in a mental health treatment program, which may include participation in a treatment program for sexual disorders, as approved by the Probation Department. She shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree she is able to do so, and shall cooperate in securing any applicable third party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess her ability to pay. As part of the treatment program for sexual disorders, the defendant shall participate in polygraph examinations to obtain information necessary for risk management and correctional treatment.

C. Ms. Solomon-Eaton shall make payments to the victim's health treatment expenses, if any are ever incurred as a result of the offense.

D. Ms. Solomon-Eaton shall not associate with any children under the age of 18, unless a responsible adult is present and she has prior approval from the Probation Department.

E. Unless otherwise indicated in the treatment plan provided by the sex offender treatment program, the defendant is prohibited from viewing, owning or possessing obscene, or sexually stimulating visual or auditory material involving children or adolescents.

F. If the defendant cohabitates with an individual who has minor children, she will inform that other party of her prior criminal history concerning her sex offense. Moreover, she will notify the party of her prohibition of associating with any children under the age of 18, unless a responsible adult is present and she has prior approval from the U.S. Probation Department.

G. The defendant is not to use a computer, Internet capable device, or similar electronic device to access child pornography of any kind. The term "child pornography" shall include images or videos of minors engaged in 'sexually explicit conduct" as that term is defined in Title 18 U.S.C. Section § 2256 (2). Ms. Solomon-Eaton shall also not use a computer, Internet-capable device, or similar electronic device to view images of naked children. Ms. Solomon-Eaton shall not use her computer to view child pornography or images of naked children stored on related computer media, such as CDs or DVDs, and shall not communicate via her computer with any individual or group who promotes child pornography or the sexual abuse of children. The defendant shall also cooperate with the U.S. probation Department's Computer and Internet Monitoring program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/hardware on said devices, at the defendant's expense.

H. Ms. Solomon-Eaton shall submit her person, residence, place of business, vehicle, papers, computers, or other electronic communications or data storage devices or media, or office, to a search on the basis that the probation officer has reasonable belief that evidence of a violation of conditions of release may be found. The search must also be done in a reasonable manner and at a reasonable time. Failure to submit to search may be grounds for revocation, and Ms. Solomon-Eaton shall inform any other residents that the premises may be subject to search pursuant to this condition.

I. Defendant will not purchase or possess photographic or video equipment without prior knowledge and permission by the U.S. Probation Department.

J. Ms. Solomon-Eaton shall not possess a firearm, ammunition, or destructive device.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Camille Solomon-Eaton
CASE NUMBER: 12CR352[KAM]

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 1,300	$ 0	$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Camille Solomon-Eaton
CASE NUMBER: 12CR352[KAM]

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ✔ Lump sum payment of $ 1,300 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ✔ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ✔ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ✔ Special instructions regarding the payment of criminal monetary penalties:

The assessment payment shall be mailed to the Clerk of Court. U.S. district Court. 225 Cadman Plaza East, Brooklyn, New York 11201.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.