No. _____ 07-886 DEC 26 2007

In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

vs.

JAMES HOWARD BENTLEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a child's report of sexual abuse to a hospital counselor is "testimonial" for purposes of the Confrontation Clause if the statements are made during an interview which serves both therapeutic and investigatory purposes.

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The Iowa Supreme Court's opinion is reported as *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) and is attached at Appendix pages 1-16. The two trial court rulings are unpublished and attached at Appendix pages 17-61.

JURISDICTION

The Iowa Supreme Court issued its decision on September 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI

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

STATEMENT OF THE CASE

This case exemplifies the quandary faced by state courts trying to apply *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266 (2006) to statements made by child victims in settings which mix therapeutic and investigative purposes.

1. In January of 2004, a child psychiatrist diagnosed the victim, J.G., with depression, oppositional defiance disorder, and attention deficit hyperactivity disorder. During 2004, she was hospitalized three times, once following a suicide attempt. On November 16, 2004, J.G. was an in-patient in the juvenile psychiatric ward at St. Luke's Hospital in Cedar Rapids, Iowa when she participated in a videotaped interview at the hospital's Child Protection Center. Hearing Tr. (5-31-06) at 68.

St. Luke's Child Protection Center is affiliated with a network of more than 600 centers advocating for abused children located in all 50 states. The purpose of the center is to provide suspected victims of child abuse with centralized access to services, including medical examinations and psychosocial assessments. The center features a multi-disciplinary team, which includes a physician, the hospital counselor, a Department of Human Services assessment worker and a police officer.

J.G. was 10 years old at the time of the interview, but an expert placed her developmental age at seven or a bit younger. Hearing Tr. (5-31-06) at 77, 81-82. During the interview, J.G. alleged that the respondent molested her starting when she was eight years old and continuing over the course of two years.

Hospital counselor Roseanne Matuszek conducted the interview in a room designed to put children at ease. Cedar Rapids police officer Ann Deutmeyer and state Department of Human Services

worker Pam Holtz, who arranged for the interview, observed through a two-way mirror. Neither ever spoke with J.G. Hearing Tr. (5-31-06) at 14-15. Ms. Matuszek told J.G. that "Pam" from DHS and "Ann" from the police department were watching, but said they were "just going to listen to us talk and are not going to come in here and bother us." J.G. did not appear fazed by learning of their presence, indeed, she casually picked her nose as the interviewer explained the arrangement. The counselor also made J.G. aware that the interview was being recorded.

As the counselor started to tell J.G. that the room was a "safe place for boys and girls to come talk to me" and that "you can say anything in this room and you're not going to get into trouble," J.G. volunteered: "the reason why I'm acting this way is because I've been molested." Hearing Tr. (5-31-06) at 65. When Ms. Matuszek asked how J.G. had been acting, the girl explained: "throwing the fits." The counselor also advised J.G. that it was important to tell the truth and not "make up stories." J.G. interrupted to say she was "not lying." State's Exhibit 2 (Videotape).

During the 40-minute videotaping, J.G. revealed that James Bentley, her mother's former boyfriend, had rubbed his penis against her buttocks while bathing with her, had photographed her posed naked with her legs spread apart, had "licked" her vagina, and "played sex" with her by climbing on top of her and sliding his penis between her closed legs, using "spit" for lubrication. J.G. said Bentley would go "up

and down, up and down" on top of her. State's Exhibit 1 (Patient Interview Report).

When Ms. Matuszek asked near the end of the session whether J.G. was worried about anything, J.G. responded: "I'm worried about me throwing fits." State's Exhibit 2. At no point during the interview did the counselor or J.G. mention anything about J.G.'s statements being used for prosecutorial purposes or any possibility that Bentley could be punished for what he did to her. Hearing Tr. (5-31-06) at 56.

After her interview, J.G. went for a medical examination. Then the child protection team – composed of the counselor, the physician, the child protection worker and the police officer – met to develop recommendations. The team recommended that the girl undergo sexual abuse counseling and have no contact with James Bentley. State's Exhibit 1 (Patient Interview Report). They left any further action to the department of human services and the police.

2. As a result of J.G.'s allegations, the State filed trial informations charging Bentley with two counts of sexual abuse in the second degree for engaging in sex acts with a child under the age of 12. A few months after the charges were filed and before J.G. could testify, Bentley's brother kidnaped, raped and killed her. The record does not reveal direct involvement by respondent in the victim's murder.

In April of 2005, the respondent sought a preliminary determination of whether J.G.'s videotaped

interview would be admissible under the Confrontation Clause. On May 20, 2005, the district court ruled the victim's videotaped statements would be admissible in the sexual abuse trials. The trial judge found J.G.'s statements were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004) because the government's involvement in the interview was "peripheral" and "the circumstances surrounding the interview suggest that a child of J.G.'s age would not reasonably believe that her disclosures to Ms. Matuszek would be available to use at a later trial." Appendix pages 39-54.

After unsuccessfully seeking interlocutory review to the Iowa Supreme Court, the respondent, represented by new counsel, asked the district court to reconsider the Confrontation Clause issue. A different judge excluded J.G.'s statements, finding they were "testimonial" because the counselor was acting as a "surrogate" for the police during the hospital interview. Appendix pages 17-38. The State sought discretionary review, asserting that without J.G.'s videotaped statements the prosecution could not realistically go forward. The Iowa Supreme Court granted review.

3. The Iowa Supreme Court affirmed the district court's determination that admission of J.G.'s statements would violate the Confrontation Clause. In doing so, the Iowa court found it "unnecessary" to analyze the purpose of the statements from the child declarant's perspective.

The state court chronicled the "close, ongoing relationship" between the center and local law enforcement. Appendix pages 7-10. The court noted the child protection worker and police officer arranged J.G.'s interview and watched through an observation window. Appendix pages 7-8. The court pointed out the hospital counselor took a break toward the end of the interview to ask the observers whether she "forgot" to ask any questions. Appendix page 9. However, nothing the counselor asked after the break elicited any further information from J.G.

The Iowa Supreme Court praised the St. Luke's center for performing "very important and laudable services in furtherance of the protection of children." Appendix page 14. The Iowa court described the comfortable setting of the interview room and acknowledged: "It is beyond dispute that information gathered from J.G. in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions. The work of the CPC and the team of professionals who took J.G.'s statement is not impugned by our characterization of J.G.'s statements as 'testimonial.'" Appendix page 14.

The state supreme court recognized that "one of the significant purposes of the interrogation was surely to protect and advance the treatment of J.G.," but the court did not venture to determine the "primary purpose" of the interview. The state court instead held that "the extensive involvement of police in the interview rendered J.G.'s statements

testimonial." Appendix pages 14-15. Petitioner now seeks review of the state supreme court's decision.

REASONS FOR GRANTING THE WRIT

When the Court adopted the new "testimonial" framework for analyzing the admissibility of statements under the Sixth Amendment's Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), it declined to provide a comprehensive definition of "testimonial" statements. *Crawford's* narrow approach engendered a pressing need for more guidance as to what was covered by the new rule.

Questions abounded concerning the impact of the new framework on two specialized fields of criminal prosecution: domestic violence and child abuse. In both fields, circumstances often prevent victims from testifying at trial, leaving prosecutors to prove their cases largely through out-of-court statements. In *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266 (2006), the Court defined the parameters of the Confrontation Clause for two common domestic violence scenarios: 911 calls and on-the-scene questioning by law enforcement. *Davis,* however, purposely did little to clarify issues surrounding child abuse prosecutions.

During the nearly four years since the Court decided *Crawford,* the question of when a child's report of abuse should be considered testimonial has percolated among the lower courts. "Courts around

the nation have struggled with the application of *Crawford* to child witnesses. . . . " *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. – Austin 2005) (describing its task of deciding whether a child's statement was testimonial as "attempting to hit a 'moving target.'"). The struggle of the lower courts to apply *Crawford* and *Davis* to reports of abuse by children has produced divergent results based on varying rationales. The confusion will only be dispelled when the Supreme Court clarifies the legal test to apply to children's statements.

A. Lower courts are divided on the question whether a child's report of abuse to someone other than a police officer is "testimonial."

In the wake of *Crawford* and *Davis,* state courts have reached conflicting decisions concerning the "testimonial" nature of children's statements. The decisions especially diverge when the children are speaking to adults who are not police, but who intend both to assess the child's health and welfare and to share the information with investigators. Interviewers working for multi-disciplinary Children's Advocacy Centers epitomize this dual role.

The sharpness of the conflict is best illustrated by the opposite positions taken on this question by the supreme courts in the neighboring states of Iowa and Minnesota. In both *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) and *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007), the child declarants were assessed at a

hospital rather than a police station; both children were referred to the assessment center by social services and law enforcement; both children were interviewed by an employee of the hospital and not a government actor (though in *Bentley* an officer watched the interview through an observation window while in *Krasky* police were not present); both interviews were videotaped; both interviewers recommended sexual abuse counseling after hearing the children's reports of abuse; and both children were unavailable at the time of trial. Despite these many similarities, the two courts reached contrary conclusions concerning the testimonial nature of the children's statements. In Minnesota, the child's statements may be used at trial without violating the defendant's Confrontation Clause rights. But across Minnesota's southern border in Iowa, the offender charged with raping the child may avoid prosecution because the child's voice cannot be heard at trial. It is very difficult to reconcile these results. The conflict cannot be resolved without a decision of this Court.

The split is not limited to Iowa and Minnesota. In deciding *Bentley*, the Iowa Supreme Court joined one federal circuit court of appeals and four other state courts of last resort, which have read *Crawford* to exclude the statements of an unavailable child witness as "testimonial" under the Confrontation Clause when they were made to a private interviewer at a children's advocacy center. *See United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007); *State v. Snowden*, 867 A.2d

314 (Md. 2005); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); *State v. Blue*, 717 N.W.2d 558 (N.D. 2006). Eight intermediate state appellate courts also have found that statements made to a member of a multi-disciplinary team were "testimonial." *See L.J.K. v. State*, 942 So.2d 854 (Ala. Crim. App. 2005); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004); *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006); *Hernandez v. State*, 946 So.2d 1270 (Fla. App. 2007); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233 (Idaho App. 2006); *State v. Pitt*, 147 P.3d 940 (Or. App. 2006); *In re S.R.*, 920 A.2d 1262 (Pa. Super. 2007); *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006).

On the other side of the split are two state courts of last resort which have decided that a child's statements to a private actor who was a member of a child abuse assessment team were nontestimonial. *See People v. Vigil*, 127 P.3d 916 (Colo. 2006); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006). The Eighth Circuit Court of Appeals also decided that a child's statements to a physician who worked with a children's advocacy center were nontestimonial when no "forensic interview" preceded the meeting with the physician. *United States v. Peneaux*, 432 F.3d 882, 895-96 (8th Cir. 2005). Three other intermediate state appellate courts have decided that children's statements to private actors who worked within the child assessment team were nontestimonial. *See People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004); *State v.*

D.H., 2007 WL 3293361 (Ohio Ct. App. 2007); *State v. Edinger*, 2006 WL 827412 (Ohio Ct. App. 2006); *State v. Foreman*, 157 P.3d 228 (Or. App. 2007).

Even outside the context of child assessment centers, state courts of last resort differ on the question whether children's statements to government-employed child protection workers must be viewed as testimonial. *Compare State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (holding neither government questioner nor three-year-old declarant were acting to produce statement for trial) *with State v. Mack*, 101 P.3d 349 (Or. 2004) (three-year-old victim's statements to Department of Human Services worker were testimonial because worker was "proxy" for police).

Because *Crawford* and *Davis* provide insufficient guidance on how to determine if children's reports of abuse are testimonial, the division among the lower courts does not promise to correct itself.

B. A pressing need exists for the Supreme Court to dispel the lower courts' confusion over what legal tests may be derived from *Crawford* and *Davis* to determine the testimonial nature of children's statements.

The inconsistency among the analyses applied by lower courts to determine whether children's statements are testimonial is even greater than the split in outcomes. *Crawford* and *Davis* were purposely incremental in defining "testimonial." Lower courts have filled the doctrinal void with idiosyncratic tests

to gauge which statements by children are the equivalent of in-court testimony. The variation in those legal tests trains on two questions: (1) can the "primary purpose" language in *Davis* be transported to the context of child abuse reports? and (2) how does the language in *Crawford* concerning the reasonable expectations of the declarant apply to statements made by young children? The divergent treatment of these two inquiries further demonstrates why it is necessary for the Court to resolve the question presented here.

1. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which try to apply or adapt the "primary purpose" test articulated in *Davis*.

A major dividing point for lower courts is whether and how to apply the "primary purpose" test articulated in *Davis*. The *Davis* Court eschewed producing an "exhaustive classification of all conceivable statements" as either testimonial or nontestimonial, but instead held that the following dichotomy sufficed to settle the precise scenarios before the Court. Statements were "nontestimonial" when made during a police interrogation under circumstances objectively showing that the interrogation's "primary purpose" was to enable police to meet an ongoing emergency. By contrast, statements were "testimonial" when there was no ongoing emergency and the "primary purpose" of the interrogation was to prove

past events potentially relevant to a later prosecution. *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. at 2273-2274.

Inevitably, the "primary purpose" component of *Davis* has found its way into the testimonial analysis concerning statements made by child victims. Some lower courts have viewed the "primary purpose" test as a flexible one and not limited to situations involving an emergency/non-emergency dichotomy. For example, in *State v. Krasky*, 736 N.W.2d at 643, the Minnesota Supreme Court declined to "read the *Davis* opinion to hold that only those statements made in response to an immediate danger are nontestimonial." The *Krasky* Court reasoned:

> The facts of *Davis* required the court "to determine more precisely which police interrogations produce testimony" and the precise question was whether emergency calls to police are treated differently than statements made in the regular course of a police investigation. *Id.* at 2273-74. The court specifically noted that its holding was limited to its facts. *Id.* at 2278 n. 5. . . . We conclude that the *Davis* decision leaves undisturbed our conclusions in *Bobadilla* and *Scacchetti* that statements elicited by a medical professional for the primary purpose of protecting a child sexual assault victim's health and welfare are nontestimonial.

State v. Krasky, 736 N.W.2d at 643.

Several intermediate state appellate courts examining children's reports of abuse likewise have determined that "the absence of an emergency does not, alone, make the statements testimonial." *Lollis v. State,* 232 S.W.3d 803, 807 (Tex. Ct. App. – Texarkana 2007) (applying "various factors" in determining "whether primary purpose of a statement was to get or give testimony or to accomplish some other purpose"); *see also Commonwealth v. Allshouse,* 924 A.2d 1215, 1223 (Pa. Super. 2007) ("we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in *Davis*.").

Further examples of the flexible application of the primary purpose test are lower court decisions which have concluded that children's complaints addressed to health care providers were nontestimonial because they are made for the purpose of medical diagnosis or treatment, even though they are a report of past events. *See, e.g., United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("statements made to physician seeking to give medical aid . . . are presumptively nontestimonial"); *Foley v. State*, 914 So.2d 677, 685 (Miss. 2005) (child's statements were part of "neutral medical evaluation"); *State v. Vaught*, 682 N.W.2d 284, 291-92 (Neb. 2004) (victim taken by family to hospital to be examined).

The Iowa Supreme Court's analysis in *Bentley* conflicts with the above decisions which exported the

"primary purpose" test to a child assessment and treatment context. The Iowa court recognized that "one of the significant purposes of the interrogation was surely to protect and advance the treatment of J.G." but nevertheless the court ignored the framework of *Davis* by failing to undertake a "primary purpose" analysis. Appendix pages 14-15. The Iowa court does not explain why the circumstances which objectively show the purpose of the hospital interview was to promote the child's health and welfare could not create a situation where her statements were nontestimonial akin to the emergency purpose of Michelle McCottry's 911 call in *Davis*. Just as Ms. McCottry's 911 call was not testimony but "plainly a call for help," (*Davis*, 126 S. Ct. at 2276), J.G.'s self-assessment that she was acting out because she had been molested was the child declarant's cry for protection and treatment, not prosecution. Just as "no 'witness' goes into court to proclaim an emergency and seek help," (*Davis*, 126 S. Ct. at 2276), no "witness" goes into court to seek a remedy for her mental disorders.

Other lower courts have followed the *Davis* framework, but have confined its "primary purpose" test to the emergency/non-emergency duality. State courts of last resort from Kansas, Missouri and North Dakota have emphasized the timing of the children's statements in determining they were testimonial. *See State v. Henderson*, 160 P.3d 776, 790 (Kan. 2007) ("There was no emergency; F.J.I. was speaking of past events and Henderson was not in her home; her

demeanor was calm."); *State v. Justus*, 205 S.W.3d 872, 880 (Mo. 2006) ("S.J.'s statements were not produced in the midst of an 'ongoing emergency.' Rather, the evidence shows that S.J. was not in any immediate danger. S.J. was speaking about past events, about what Justus *had* done."); *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006) ("Because there was no 'ongoing emergency' and the primary purpose of the videotaped interview in this case was 'to establish or prove past events potentially relevant to a later criminal prosecution,' we hold the videotape recording constituted a testimonial statement."); *see also Hernandez v. State*, 946 So.2d 1270, 1282 (Fla. App. 2 Dist. 2007) (questioning did not enable police to meet ongoing emergency when sex abuse occurred a week earlier); *State v. Buda*, 912 A.2d 735, 745 (N.J. Super. A.D. 2006) (statement was taken "when N.M. was no longer in danger and there was no 'ongoing emergency'"); *Rangel v. State*, 199 S.W.3d 523, 534 (Tex. App. – Fort Worth 2006) (child "was not facing ongoing emergency").

It is understandable that lower courts, in the absence of an overarching test for determining which statements are testimonial, would try to shoehorn child abuse scenarios into the emergency language from *Davis*. Nevertheless, it is evident that *Davis* did not intend for its holding to be a one-size-fits-all solution to the problem of deciding which out-of-court statements are the equivalent of in-court testimony. Lower courts and practitioners who serve abused children require a better tailored legal test.

2. The decision of the Iowa Supreme Court conflicts with the decisions of other state supreme courts which take into account the reasonable expectations of the child declarant.

Many lower courts read *Crawford v. Washington,* 541 U.S. at 51-52, as creating an "objective witness" test when it set forth three formulations of the "core" class of testimonial statements, two of which mentioned the thought process of the declarant, *i.e.* pretrial statements the witness would reasonably expect to be used prosecutorially and those statements made under circumstances which would lead an objective witness to believe would be available for use at a later trial. *See, e.g., United States v. Saget,* 377 F.3d 223, 228 (2nd Cir. 2004) (noting that "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at trial"); *United States v. Hendricks,* 395 F.3d 173, 181 (3rd Cir. 2005) (determining that intercepted statements between defendants and other third parties were not testimonial as the declarants did not make the statements in the belief that they might be used at a later trial); *United States v. Cromer,* 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry . . . is whether the declarant intends to bear testimony against the accused."); *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) ("We conclude that the 'common nucleus' present in the formulations which the

Court considered centers on the reasonable expectations of the declarant"); *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) ("we believe an objective test focusing on the reasonable expectations of a person in the declarant's position under the circumstances of the case most adequately safeguards the accused's Confrontation Clause right and most closely reflects the concerns underpinning the Sixth Amendment.").

The "objective witness" test has drawn skepticism after *Davis*. Some lower courts believe this Court switched from gauging the reasonable expectations of the declarant in *Crawford* to assessing only the intent of the questioner in *Davis*. *See State v. Siler*, 876 N.E.2d 534, 541 (Ohio 2007) ("The court's analysis in *Davis* does not focus on the expectations of the declarant . . . the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation"); *State v. Mason*, 162 P.3d 396, 401 (Wash. 2007) ("the objective test seemed to shift from the declarant in *Crawford* to the interrogator in *Davis*"); *see also State v. Alvarez,* 143 P.3d 668, 672 (Ariz. App. 2006) ("Although not entirely clear, the Court in *Davis* apparently shifted the focus from the motivations or reasonable expectations of the declarant to the primary purpose of the interrogation."); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *5 (Idaho Ct. App. 2006) (finding objective witness test "discredited by *Davis,* which focuses not at all on the expectations of the declarant but on the content of the statement, the

circumstances under which it was made, and the interrogator's purpose in asking the questions").

Other courts and commentators are not convinced that the Court abandoned all concern about the declarant's perspective when deciding if a statement is testimonial. *See, e.g., People v. Stechly*, 870 N.E.2d 333, 359 (Ill. 2007) (finding that "outside the context of statements produced in response to government interrogation, it is the declarant's perspective which is paramount in a testimonial analysis"); *State v. Jensen*, 727 N.W.2d 518, 525 (Wis. 2007) (viewing *Davis* as "slightly expand[ing]" previous discussion of what constitutes testimonial statements and looking to subjective purpose of declarant in making statement); Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & Policy 553, 560 (2007) (maintaining that the perspective of the witness "should be the crucial" consideration even after *Davis*). Professor Friedman highlighted the statement from *Davis*: "And of course even when interrogation exists . . . it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* (citing *Davis v. Washington*, 547 U.S. at ___ n.1, 126 S. Ct. at 2274 n.1).

It is evident from this debate that *Davis* raised more questions than it answered concerning how a declarant's intent factors into the analysis of what statements are testimonial. The Court must resolve this major doctrinal dilemma before the legal community can function properly within the new

confrontation framework. Resolution is especially critical for lower courts called upon to examine whether and how an objective witness standard should be applied to a child declarant. *See State v. Henderson*, 160 P.3d 776, 784 (Kan. 2007) ("*Davis* did not address, however, what part, if any, the mindset of the declarant still plays in the testimonial calculus, much less the mindset of a child declarant as in the instant case.").

The age and developmental level of child witnesses have received uneven treatment among lower courts called to determine the admissibility of their statements. It is possible to discern four distinct approaches adopted by jurisdictions which have tackled this aspect of the Confrontation Clause question since *Crawford*.

One approach has been to consider an objectively reasonable person *in the child's position* when determining the statements were nontestimonial. For instance, a Texas appellate court began its Confrontation Clause analysis by considering "the age and sophistication of D.M.," who was four years old at the time she told a police officer that "a bad man had killed her [mommy] and took her away." The appellate court decided "that D.M.'s age and her emotional state are factors strongly suggesting that her statements to Officer Sullivan were non-testimonial." *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. – Austin 2005). Other jurisdictions have given primary consideration to the declarant's age when determining whether statements were testimonial. *See United*

States v. Coulter, 62 M.J. 520, 528 (N.M. Ct. Crim. App. 2005) ("Two-year-old KL could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating."); *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006) ("given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial"); *see also State v. Brigman*, 615 S.E.2d 21, 25 (N.C. App. 2005) ("J.B.'s age raises the question as to whether he was even capable of reasonably believing that these statements would be used at trial."); *In re D.L.*, 2005 WL 1119809 (Ohio App. 2005) (three-year-old victim's statements to a nurse practitioner were nontestimonial, in part because, "a reasonable child of her age" would not have believed her statements were for anything other than medical treatment); *State v. Dezee*, 125 Wash. App. 1009, 2005 WL 246190 (Wash. Ct. App. 2005) (the reasonable belief of the nine-year-old declarant would be relevant to determine if her statements were testimonial).

A second approach has been to factor in the child declarant's age as part of an objective witness test only if the statements are not the product of police interrogation. For example, the Colorado Supreme Court reasoned:

> [A]n assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable

> person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.

People v. Vigil, 127 P.3d 916, 925 (Colo. 2006). The *Vigil* court cautioned, however, "if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial." *Id.* at 926 n.8; *see also People v. Stechly,* 870 N.E.2d 333 (Illinois 2007); *State v. Siler*, 876 N.E.2d 534 (Ohio 2007); *State v. Mack*, 101 P.3d 349 (Or. 2004).

A third approach has been to view the tender age of the declarant as one concern among the totality of circumstances leading to the testimonial determination. Decisions from Kansas and Missouri consider "a young victim's awareness, or lack thereof, that her statement would be used to prosecute" not as dispositive of whether her statement is testimonial, but as one factor to consider in light of *Davis*. *See State v. Henderson*, 160 P.3d at 784-85; *State v. Justus*, 205 S.W.3d at 879.

A fourth approach has been to give no sway to the young age of the declarant. The Iowa Supreme Court's decision in *Bentley* falls into this fourth category. The Iowa court declined to consider the child declarant's age and mental condition in determining the testimonial nature of her statements to a hospital counselor.

> The State asserts that J.G.'s statements are nontestimonial because a reasonable child of J.G.'s chronological age (10) and functional age (7) would not have understood her statements would be used to prosecute the defendant. We conclude, however, an analysis of the purpose of the statements from the declarant's perspective is unnecessary under the circumstances presented here.

Appendix page 10.

The Iowa court's resistance to viewing the purpose of the statements from the child's perspective is in line with decisions of the Maryland Supreme Court and several intermediate state appellate courts. *See State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) (finding "concern for the testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause"); *see also People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. App. 5 Dist. 2004) ("Conceivably, the Supreme Court's reference to an 'objective witness' should be taken to mean an objective witness in the same category of persons as the actual witness – here, an objective four year old. But we do not think so."); *State v. Hooper*, ___ P.3d ___, 2006 WL 2328233, *5 (Idaho Ct. App. 2006) (holding that *Davis* foreclosed State's argument that six-year-old declarant would not have understood her statements would be subject to use later at trial).

The disarray among lower courts on whether to consider the child declarant's perspective calls for

resolution. The doctrinal divide among the lower courts has created intolerable uncertainty concerning the admissibility of children's reports of abuse. If lower courts are mistaken in deeming statements testimonial even when child declarants are oblivious to their future use, then too many child abuse prosecutions are endangered. On the other hand, if lower courts are mistaken in finding statements are nontestimonial unless the child is able to comprehend that they may be used to prosecute the perpetrator, then too many defendants are having their confrontation clause rights violated. This Court should resolve the post-*Davis* debate about the relevance of a child declarant's intent.

Furthermore, state court decisions like *Bentley* which refuse to consider a child's inability to anticipate the prosecutorial use of his or her statements must be reconciled with indications in *Crawford* and *Davis* that a co-defendant's statements made "unwittingly" to an FBI informant in *Bourjaily v. United States,* 483 U.S. 171 (1987), would be considered nontestimonial. *See Davis,* 126 S. Ct. at 2275; *Crawford,* 541 U.S. at 58. Although law enforcement was extensively involved in obtaining Bourjaily's statements, the statements are not considered the equivalent of in-court testimony because the declarant was not aware of their planned use. The Court should clarify why child witnesses who cannot comprehend the prosecutorial purpose of their statements should be subject to a different analysis than adult co-conspirators.

C. This case poses a question of fundamental importance to a nationwide system of Children's Advocacy Centers.

The proliferation of Children's Advocacy Centers has been heralded as one of the most important innovations of this decade in providing services to child abuse victims. Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline Journal of Public Law and Policy 315, 324 (Fall 2006). The first such center opened in 1985 and by 2006 the National Children's Alliance had accredited centers in all 50 states. *Id.* These centers use a multi-disciplinary team approach to reduce the number of interviews abused children must endure and to deliver coordinated intervention services. *Id.* The National Children's Alliance estimated that its more than 600 member centers served 160,000 children in 2005. National Children's Alliance Annual Report p. 2, available at *www.nca-online.org* (last visited 12/2/07). Three-quarters of the children receiving services were under 12 years old. *Id.*

The United States Department of Justice has encouraged this multi-disciplinary approach for the last ten years as a way to encourage appropriate questioning of children. *See* U.S. DOJ, Law Enforcement Response to Child Abuse, http://www.ncjrs.gov/pdffiles/162425.pdf. More than forty states have legislation authorizing multi-disciplinary teams. *See* Myrna Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency,*

Hearsay, and Confrontation, 82 Ind. L. J. 1009, 1023 (2007). Iowa law authorized the creation of child protection assistance teams like that operating from St. Luke's Hospital. *See* Iowa Code § 915.35.

The Iowa Supreme Court's assurance that it was not impugning the work of the St. Luke's program in finding the victim's statements to be "testimonial" does not allay the uncertainty faced by these centers in the wake of *Crawford* and *Davis.* These centers – by design – fulfill both therapeutic and investigative purposes. Lower court decisions which find children's statements to private interviewers to be testimonial overlook the independence of the non-law enforcement members of the team and undermine the effectiveness of the coordinated response to child abuse championed by these centers. The involvement of law enforcement on the child protection team which saves children the trauma of repeated stationhouse interviews is also the factor that some courts point to as rendering the children's statements testimonial. *See, e.g., State v. Snowden*, 867 A.2d 314, 327 (Md. 2005) (finding detective's presence during interview "overwhelms any argument that the statements were not testimonial because they were not in response to *police* questioning"); *In re S.R.*, 920 A.2d 1262, 1267 (Pa. Super. 2007) (finding it significant that police viewed proceeding through one-way glass and conferred with examiner).

The Iowa Supreme Court "leaves for another day the decision whether statements made by children

during interrogations conducted by forensic interviewers without police participation are testimonial." Appendix page 11. Other courts likewise have been reluctant to decide that all child statements made in such a multi-disciplinary setting are testimonial. *See People v. Sisavath*, 13 Cal. Rptr. 3d at 758 ("We have no occasion here to hold, and do not hold, that statements made in every MDIC interview are testimonial under *Crawford*.").

In light of such state court holdings, child advocacy centers face the dilemma of whether and how to adapt their protocols to minimize or eliminate law enforcement involvement to preserve the possibility that children's statements to interviewers would be considered "nontestimonial" and therefore admissible at trial if the child is eventually unavailable to testify. This problem is immediate and concrete because abused children commonly are found incompetent or emotionally unavailable to testify. Experts recognize that a child may not be available to testify "due to emotional or mental health reasons, pressures from family members to recant his allegations, or fear of facing the defendant." Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 Hamline Journal of Public Law and Policy 99, 130 n.160 (2006). If the law were more clear on what factors render a child's statements to be "testimonial," the counselors may be able to take statements about the abuse without setting up a Confrontation Clause challenge. The national importance of the child advocacy center movement

offers a compelling reason for the Court to grant certiorari in this case.

D. This case presents an excellent vehicle for clarifying the definition of "testimonial" as applied to child witnesses.

For several reasons, this case offers a prime opportunity for the Court to illuminate the meaning of "testimonial" as applied to child declarants, especially children reporting abuse to a private interviewer under circumstances which reveal both *investigative and therapeutic purposes.*

First, the case is not burdened by questions concerning the determination of unavailability. "Because the parties agree that J.G. is, tragically, 'unavailable,' and Bentley had no prior opportunity to cross-examine J.G., the admissibility of J.G.'s videotaped statements depends on whether they are 'testimonial' if offered against Bentley in this case." Appendix page 4.

Second, the record does not support a forfeiture argument. The respondent's brother, not the respondent, procured the victim's unavailability by killing her in advance of the sexual abuse trial. Accordingly, the Court faces the clean question of the testimonial nature of the child's statements.

Third, no procedural hurdles impede reaching the question presented. The respondent preserved the issue of his right to confront the deceased witness in

the trial court. The State properly challenged the trial court's exclusion of the evidence on discretionary review to the Iowa Supreme Court. The Iowa court's opinion stands solely on the federal Confrontation Clause; no adequate and independent state-law ground supports the decision. *See Michigan v. Long*, 463 U.S. 1032 (1983). The respondent's trial will not commence before this certiorari action is resolved because the prosecution stands or falls on the admissibility of J.G.'s statements. The State cannot avail itself of a harmless error argument.

Fourth, the realm of child assessment center interviews marks an ideal next step in the Court's jurisprudence defining "testimonial" statements. The work of these centers on behalf of abused children is progressive, widespread and important. Participants in the multi-disciplinary enterprise hunger for guidance on what factors may render a child's statements testimonial.

The hearing transcripts and exhibits in this case feature a detailed description of the origin, aims, protocol and actual operation of the St. Luke's Hospital Child Protection Center. Both the district court and the Iowa Supreme Court laud the work of the center and acknowledge the therapeutic purpose of the interview. These factual findings set in stark relief the legal questions whether a primary purpose test applies in this non-emergency context and whether the intent of the child declarant should be considered.

The certainty of the child's unavailability, the lack of a forfeiture issue and the strength of the record make the instant case a stronger prospect for review than the petition for certiorari in *Krasky v. Minnesota*, Sup. Ct. No. 07-7390, which presents a similar question and was pending before the Court at the time of this writing.

Finally, the facts of this case are typical. Law enforcement was involved with the child assessment interview to a greater extent than some cases and to a lesser extent than others. *Compare People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. App. 5 Dist. 2004) (statements found testimonial where district attorney and investigator attended interview at county facility) *with State v. Edinger*, 2006 WL 827412 (Ohio Ct. App. 2006) (statements found nontestimonial where police permitted to view child through closed circuit TV while she was making statement to social worker, but child was not made aware of police presence). J.G.'s chronological age of 10 and developmental age of seven or younger fall into the age groups most frequently served by child assessment centers. A decision addressing this common child abuse scenario would provide helpful precedent for the lower courts.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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