No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Warden Terry Carlson,

Petitioner,

v.

Orlando Manuel Bobadilla,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD AFFIRM THE EIGHTH CIRCUIT COURT OF APPEALS AND FEDERAL DISTRICT COURT DECISIONS GRANTING BOBADILLA'S WRIT OF HABEAS CORPUS ON THE GROUNDS THAT HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WAS VIOLATED BY THE ADMISSION OF THE VIDEOTAPE AND THE DECISION OF THE MINNESOTA SUPREME COURT OTHERWISE WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES?

II. WHETHER THIS COURT SHOULD AFFIRM THE DECISION OF THE FEDERAL DISTRICT COURT THAT BOBADILLA'S WRIT OF HABEAS CORPUS SHOULD BE GRANTED ON THE GROUNDS THAT HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS VIOLATED BY ADMISSION OF THE VIDEOTAPE AND THAT THE DECISION OF THE MINNESOTA SUPREME COURT WAS BASED ON AN UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF THE EVIDENCE PRESENT IN THE STATE COURT PROCEEDING?

III. WHETHER BOBADILLA'S WRIT OF HABEAS CORPUS SHOULD BE GRANTED ON THE GROUNDS THAT HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION WAS VIOLATED BY ADMISSION OF THE VIDEOTAPE AND THE MINNESOTA SUPREME COURT'S DECISION WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES?

IV. WHETHER THE MINNESOTA SUPREME COURT'S ERROR WAS NOT HARMLESS ERROR?

V. WHETHER CERTIORARI IS NOT WARRANTED BECAUSE THE STATE HAS FAILED TO ESTABLISH UNDER RULE 10 OF THE SUPREME COURT RULES THAT IT SHOULD BE?

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The published unanimous decision of the Minnesota Court of Appeals, applying Crawford, is officially reported as State v. Bobadilla, 690 N.W.2d 345 (Minn. Ct. App. 2004).

The published decision of the Minnesota Supreme Court, including the dissent, is located at 709 N.W.2d 342 (Minn. 2006).

This Court denied Bobadilla's petition for a writ of certiorari on direct appeal at Bobadilla v. Minnesota, 549 U.S. 953 (2006).

The published decision of the United States District Court, District of Minnesota, reversing the Minnesota Supreme Court, is officially reported at 570 F. Supp. 2d 1098 (D. Minn. 2008).

The published unanimous decision of the Eighth Circuit Court of Appeals, affirming the federal district court, appears in the Federal Reporter as Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009).

The State of Minnesota now seeks review of the Eighth Circuit Court of Appeals decision in this Court.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

U.S. Const. Amend. VI.

Our United States Constitution provides with respect to the privilege of habeas corpus in pertinent part the following:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. Const. Art. I, §9.

In 1867, Congress enacted the statute providing that federal courts "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. Williams v. Taylor, 529 U.S. 362, ___, (2000)(quoting Act of Feb. 5, 1867, ch. 28, 1, 14 Stat. 385)).

Currently, section 2241 of Title 28 provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitutions or laws or treaties of the United States . . . ."

The federal habeas statutes prohibit a federal court from granting a writ of habeas corpus to a person in custody pursuant to a state court judgment with respect to a claim that was adjudicated on the merits in state court unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d).

STATEMENT OF THE CASE

I. Procedural History

In 2003, respondent Orlando Bobadilla was charged with committed 1st and 2nd degree criminal sexual conduct against his nephew "TB." After a trial, a jury returned a verdict of guilty. Mr. Bobadilla took a direct appeal to the Minnesota Court of Appeals, raising a violation of his Sixth Amendment right of confrontation. The Minnesota Court of Appeals, in a unanimous decision, applying Crawford, reversed his conviction and remanded the case for a new trial. The State of Minnesota sought review at the Minnesota Supreme Court, which was granted. The Minnesota Supreme Court, which included a dissent, reversed the Minnesota Court of Appeals. Mr. Bobadilla petitioned the United States Supreme Court for a writ of certiorari, however that was denied. Mr. Bobadilla then brought a petition for a writ of habeas corpus in the federal district court, which was granted. The State of Minnesota then took a direct appeal to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed the district court, granting Mr. Bobadilla's petition for a writ of habeas corpus. The State has now filed a petition for a writ of certiorari with the United States Supreme Court. Mr. Bobadilla herein opposes the State's petition.

II. Facts Relevant to the Petition

Herein, Bobadilla was charged with 1st and 2nd degree criminal sexual conduct against his three (3) year old nephew. During the course of the proceedings, Mr. Bobadilla was not

allowed to confront, face-to-face, the prosecution's one vital witness at all. He was not allowed to cross-examine the prosecution's one vital witness at all. Mr. Bobadilla was essentially convicted entirely upon unsworn, out-of-court hearsay statements of an absent witness. In fact, no one from the defense has ever had the opportunity to question the nephew at all.

After the allegation of sexual abuse was made by the nephew, a Detective Akerson began working on the criminal investigation. Detective Akerson asked a Ms. Molden, a county child protection worker, to assist him. Ms. Molden had been specially trained in the "Cornerhouse" method of interviewing children suspected of having been sexually assaulted. It is a forensic technique.[1] Therefore, Ms. Molden contacted the nephew's mother and arranged at interview at the police station.

Five (5) days after the abuse was alleged, the nephew was brought to the police station where he met with Detective Akerson[2] and Ms. Molden. The nephew, Ms. Molden, and Detective Akerson went into an interview room that had a hidden camera. Ms. Molden put the questions to the nephew. Detective Akerson sat across from the nephew during the questioning. The hidden camera secretly recorded the interview. At some point, the nephew talked about Orlando Bobadilla putting his finger in his booty. Trial Transcript (hereinafter "T.") at 123. The nephew's communication during the forensic interview was less than perfect. T. at 125. He identified "chest" as "mama." T. at 125. He called the back side of a male drawing "D." T. at 125. He had no name for "penis." T. a 125. Further, with all due respect, no one ever asked him exactly what he meant by someone putting his finger in

[1]. The term "forensic" is defined as "belonging to courts of justice." Black's Law Dictionary, p. 583 (5th ed. 1979). The course also provides a mock cross examination demonstration.

[2]. The State writes in its petition that the detective was not in uniform. This should be stricken on the grounds that it is not part of the record.

his booty, such as on the buttocks, or in between the cheeks, or actually inside his rectum, etc.[3] He said that what happened, happened one time in his father's room, T. at 126, that he was laying down, that he had on his pokemon shirt, that he was touched on his skin, that Orlando said he was sorry, and that his father was going to get the kitty. T. at 127. He also said that his grandmother did the same thing to him.

The federal district court below also made the following findings of fact:

(1) that the Minnesota Supreme Court ignored the fact that Detective Akerson was present during the forensic interview, throughout its legal analysis; JA223 (JA refers to the Joint Appendix);

(2) that the person who initiated the interview of TB was Detective Akerson; JA229;

(3) that TB's statement was taken by a police officer in the course of an interrogation; JA228;

(4) that Molden was asked by Detective Akerson to assist him in the criminal investigation of Mr. Bobadilla, JA30, and that the Minnesota Supreme Court's assertion that the interview of TB was initiated by a child-protection worker in response to a report of sexual abuse is flatly contradicted by the testimony of Molden herself; JA230;

(5) Molden acted as a surrogate interviewer for the police in questioning the nephew; JA230-31;

(6) Molden, trained in forensic interviewing, subjected TB to a highly structured series of questions, (identified in Crawford as a hallmark of a police interrogation); JA231;

(7) Molden and Akerson did not have a purpose of protecting

[3]. The State writes in its petition that at some point during the interview, the nephew pointed to the area of the buttocks, or anus. This should be stricken on the grounds that that is not in the record.

the nephew from imminent danger in conducting the forensic interview, JA231, and there were no imminent risks to TB's health or welfare at the time of the forensic interview on May 9; JA232;

(8) the questions were not aimed at learning about possible risks to TB, but rather appeared to be aimed toward one goal: getting TB to repeat, on videotape, his statements that Mr. Bobadilla sexually abused him; JA233;

(9) nothing prevents a social worker from collecting evidence for use in a criminal prosecution; JA233;

(10) the state requires law enforcement and the local welfare agent to work together in criminal investigation and assessment efforts, and both purposes are achieved during the same forensic interview; JA234;

(11) the forensic interview fulfills the interrogation by the police, since the police are not permitted to do a separate one their own, JA235, the social worker is a surrogate interviewer for the police, JA235, and the forensic interview is the one and only police interrogation of TB. JA236.

In an appeal from a judgment on a §2254 petition, a reviewing court "review[s] the [federal] district court's findings of fact for clear error." Perry v. Kemna, 356 F.3d 880, 882 (8th Cir. 2003), rehearing and rehearing en banc denied, Mar. 16, 2004)(quoting Taylor v. Bowersox, 329 F.3d 963, 968 (8th Cir. 2003)). Conclusions of law are reviewed de novo. Id. (quoting Taylor v. Bowersox, at 968).

The State herein has incorrectly asserted that the state appellate court's findings of fact should be presumed correct. Appellant has cited Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) for this proposition.

First, Sumner was decided in 1981, 27 years ago, when a

substantially different version of section 2254 was in effect, and hence, is no longer very persuasive authority. More importantly however, in Sumner, it was pointed out that although under that version of §2254, a state appellate court's findings of fact may be presumed correct when certain conditions were met, they were not presumed correct unless an evidentiary hearing on the relevant facts had been had in the state and/or federal court, and then, where the findings of fact were supported in the record, they were not presumed correct when the federal district court found they were not. Herein, the state appellate court findings of fact are not presumed correct because no evidentiary hearing has ever been held on the relevant facts surrounding the forensic videotape, and, more importantly, herein below, the federal district court found that state appellate court findings were not supported by the record and were erroneous. In fact herein, the federal district court declared them unreasonable.

Accordingly, the federal district court findings of fact are actually presumed correct herein, not those of the state trial or appellate court.

Additionally, it should be noted that the State herein claims that the federal courts should defer to state court interpretation of state law. This claim is a red herring. Interpretation of state law has no bearing in this case.

III. The Opinions Below

In 2003, respondent Orlando Bobadilla was charged with 1st and 2nd degree criminal sexual conduct against his nephew. About five (5) days after the nephew's allegations of sexual assault, at the police station, a forensic interview of the nephew taken by a child protection worker and police detective was videotaped.

At the beginning of trial, the nephew was found incompetent

to testify. At trial, the nephew did not testify, but over objection, the trial court, applying Roberts v. Ohio, admitted the videotaped statement as substantive evidence. Respondent never had the opportunity to confront the nephew face to face in open court, and respondent never had the opportunity to cross-examine the nephew. In fact, the respondent never had the opportunity to ever question the nephew about his allegations. At trial, the child protection worker also testified about the contents of the videotape. At trial, the respondent testified, denying the allegations. Other minimal testimony was offered by the nephew's mother, the nephew's dad, the examining physician, and the police detective. The jury returned a verdict of guilty. Respondent was sentenced to 144 months in prison.

Respondent took a direct appeal to the Minnesota Court of Appeals. During the pendency of the appeal, this Court decided Crawford v. Washington, 541 U.S. 36 (2004).

The New Clearly Established Test

In Crawford, the United States Supreme Court provided a new test. It clearly established in its holding that testimonial statements are barred by the Confrontation Clause, unless the defendant had had a prior opportunity for cross-examination of the declarant. Further, this Court in Crawford set forth types of statements which it considered part of the core class of testimonial statements.[4] Crawford, at 51. The Court stated those types included the following:

(1) ex parte in-court testimony or its functional

[4]. It is inaccurate to say, as the State claims, that the Court did not establish a definition of testimonial. It is accurate to say that the Court did not establish a "comprehensive" definition of what constitutes testimonial statements. However, the Court did set forth what does constitute some testimonial statements. The Court just did not set forth, "comprehensively," every type of testimonial statement possible. That does not make the law unclear.

equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

(2) extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

(3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and

(4) statements taken by police officers in the course of interrogation are also testimonial; police interrogations bear a striking resemblance to examinations by justices of the peace in England.

Crawford, at 51 - 52 (emphasis added).

Later in its opinion, this Court again stated that at a minimum, testimonial statements includes the following:

(1) prior testimony at a preliminary hearing;

(2) testimony before a grand jury;

(3) testimony at a former trial; and

(4) **police interrogations.**

Crawford, at 68.

Applying Crawford, in a unanimous decision, the Minnesota Court of Appeals held that "[t]he victim's videotaped statement to a child-protection worker and police detective was testimonial in nature and inadmissible under Crawford v. Washington, 124 S.Ct. 1354 (2004), because the victim was unavailable to testify at trial, and the defendant did not have a prior opportunity to cross-examine him." It then reversed respondent's conviction and remanded the case for a new trial.

The State of Minnesota appealed to the Minnesota Supreme Court. With Justice Page dissenting, the majority of the Minnesota Supreme Court reversed the Minnesota Court of Appeals.

Respondent Bobadilla then brought a petition for a writ of certiorari to this Court. It was denied.

Respondent Bobadilla then, in May 2007, under 28 U.S.C. §2254, in federal district court, brought his petition for a writ of habeas corpus by a person in state custody on the grounds that he was in custody in violation of his Constitutional rights, namely, in violation of his Sixth Amendment right of confrontation. He brought his petition in the United States District Court, District of Minnesota, the Honorable Patrick J. Schiltz presiding.

During the proceedings, the parties submitted numerous documents as exhibits. Additionally, respondent Bobadilla requested an evidentiary hearing. Petitioner State of Minnesota opposed the request for an evidentiary hearing. Notably, the State of Minnesota failed to submit as an exhibit the videotaped statement of Bobadilla's nephew, and failed to submit as an exhibit any transcript of the videotaped statement. Hence, the State of Minnesota failed to make said videotape or transcript a part of the record herein.

The United States District Court, the Honorable Patrick J. Schiltz presiding, then issued its decision, without an evidentiary hearing, granting Bobadilla's petition for a writ of habeas corpus on the grounds that his Sixth Amendment rights had been violated because the videotape admitted as substantive evidence was testimonial, and, Bobadilla had never had the opportunity to confront and cross-examine the nephew. More specifically, the federal district court explicitly held that the

Minnesota Supreme Court unreasonably applied clearly established law in concluding that Bobadilla's right to confrontation was not violated by the introduction of the nephew's out of court statement. The federal district court specifically found as fact that the police detective leading the criminal investigation of Bobadilla decided to interview the nephew, and asked for the child protection worker's assistance with the interview. The federal district court pointed out that the police detective was present during the questioning of the nephew and making of the videotape, and that the Minnesota Supreme Court had ignored that fact throughout its analysis. The federal district court also specifically held that the Minnesota Supreme Court's conclusion that the nephew's statement was not given in the course of a police interrogation for purposes of Crawford was objectively unreasonable. The federal district court noted that the interview served two purposes: criminal investigation and child protection, and, that the child protection worker, trained to do a forensic interview, was a surrogate interviewer for the police. The federal district court went on to hold that

> "it was objectively unreasonable for the Minnesota Supreme Court to conclude that a recorded interview of a child that was conducted at the request of a police detective, in that detective's presence, at a law-enforcement center, by a government actor specially trained in the forensic interviewing of children, pursuant to a statutory scheme requiring the police and the social-welfare agency to combine their investigatory efforts, that took place five days after the event that was being investigated, when the child was clearly not in any immediate danger, and that involved using highly structured questioning to elicit a statement inculpating a suspect, was not a 'police interrogation' within the meaning of Crawford."

The federal district court also recognized that it was

somewhat unclear whether certain assertions of the Minnesota Supreme Court were factual findings or legal conclusions, but went on to hold that

> to the extent that the Minnesota Supreme Court's decision rests on what might be considered findings of fact, this Court holds that the court's decision 'was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' for purpose of §2254(d)(2)."

Thus, in summary, the federal district found against the State under both paragraphs of 28 U.S.C. 2254(d).

Then, it was not until AFTER it was ruled against that the State sought to introduce the videotape of the out of court statement of the nephew and transcript of same. The State, after it lost, after the federal district court had ruled, brought its Motion to Expand the Record, to admit said videotape and/or transcript of the statements of the nephew. The federal district court denied that motion. The State has omitted these facts from its petition for a writ of certiorari, although it does complain that the videotape was not part of the record.

The State then took a direct appeal to the Eighth Circuit Court of Appeals. In a unanimous decision, the Eighth Circuit affirmed the federal district court. The Eighth Circuit held that "[t]he Minnesota Supreme Court unreasonably applied Crawford in holding [the nephew's] statements made during his interview with [the child protection worker] and Detective Akerson were not testimonial." Bobadilla v. Carlson, 575 F3d. 785, 793 (8th Cir. 2009). The Eighth Circuit highlighted that "Detective Akerson asked [the child protection worker] to 'assist him' in questioning [the nephew,] and that [the child protection worker had] not [been] involved in the criminal investigation until Detective Akerson 'asked [her] to assist him.' Id. at 791. The Eighth

Circuit highlighted that because the interview was not conducted until five days after the abuse was first alleged, the purpose of the interview was to confirm a past allegation of abuse, rather than to assess immediate threats to the nephew's health and welfare. The court noted that there was no evidence that the nephew's health or welfare was in further danger. Id. at 792. The Eighth Circuit then noted that because of these circumstances, the videotaped interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation. Id. at 791. The Eighth Circuit noted that the only significant difference between the interview in Bobadilla and the one held to be testimonial in Crawford was, instead of a police officer actually asking the question about a suspected criminal violation, the detective in Bobadilla sat silent. Id. at 791 - 792. The Eighth Circuit said "We find this to be a distinction without a difference." Id. at 792.

The Eighth Circuit also noted that the child protection worker utilized a structured, forensic method of interrogating the nephew and that Crawford identified a '"recorded statement, knowingly given in response to structured police questioning," as qualifying under any conceivable definition of interrogation. Id. at 792 (citing 541 U.S. at 53 n.4, 124 S.Ct. 1354). The Eighth Circuit pointed out that the dissenting Justice in the Minnesota Supreme Court decision, Justice Page, was correct to conclude that the child protection worker was simply acting as a "surrogate interviewer" for the police. Id. at 792 (citing Bobadilla, 709 N.W. 2d at 258 (Page ,J., dissenting)). The child protection worker was simply a Police Assistant. The Eighth Circuit went on

to write:

> [The child protection worker] was contacted by a police officer to assist with the criminal investigation, the interview took place several days after the abuse allegedly occurred, the interview was conducted at police headquarters with a police officer present, and [the child protection worker] utilized a structured method of questioning to elicit [the nephew's] statements. As such, it was unreasonable for the Minnesota Supreme Court to conclude, even though the questioning was undertaken by a social worker, the statements made by [the nephew] during his interrogation were in any way different than the statements found to be testimonial in Crawford.

Id. at 792. The Eighth Circuit stated that "the interview consisted of highly structured questioning aimed at getting the nephew to repeat, on videotape, his allegation of abuse. Id. at 792. The Eighth Circuit's reasoning included the following:

> As the district court astutely noted, if a prosecutor six months after abuse occurred asked a social worker to help him videotape a statement for an upcoming trial, it would be unreasonable to conclude the purpose of the interview was to protect the child from immediate danger just because the statute says as much . . . and it was unreasonable for the Minnesota Supreme Court to conclude otherwise.

Id. at 792 - 793.

The statute to which the Eighth Circuit refers is Minnesota Statute §626.556. That statute requires that where a child makes allegations of criminal sexual conduct, the police department and social welfare agency are required to conduct an interview session with the child together, and to make a videotape of it, so that multiple interviews will be avoided. Further, the statute says the purpose of the interview is to assess immediate threats to a child's health and welfare. Id. at 792. The Minnesota Supreme Court therefore, based on this statute, concluded that neither the

child protection worker nor the nephew were acting, to a substantial degree, for the purpose of producing a statement for introduction at a trial, when the videotaped statement of the nephew was taken and made. The Minnesota Supreme Court went on to hold therefore, that the nephew's videotaped statement was not testimonial.

The Eighth Circuit went on to note however that the statute, rather than dispelling the hallmarks of traditional police interrogations, requires them. Id. at 793. The Eighth Circuit pointed out that the statute requires the interviewer, whether a social worker or police officer, to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation. Id. at 793. The Eighth Circuit wrote that where the social worker or child protection worker poses the questions, the social worker's interview is a substitute for, and functions as, the police interrogation. Id. at 793. Far from making such interviews unlike the police interrogation in Crawford, the statute mandates them to be the functional equivalent of such interrogations. Id. at 793.

The Eighth Circuit summed up its opinion as follows:

> In sum, Crawford held statements made during police interrogations are testimonial. The Minnesota Supreme Court unreasonably applied Crawford in holding [the nephew's] statements made during his interview with [the child protection worker] and Detective Akerson[5] were not testimonial. Just as in Crawford, the interview in the present case was initiated by a police officer to obtain

[5]. In its petition for writ of certiorari, the State fails to candidly mention that a police detective was involved in the videotaped interview. The federal district court noted that the Minnesota Supreme Court also ignored this fact. In fact, the State, in its framing of the issues, again fails to mention the Police Detective. Thus, the issues have not even been framed properly by the State herein.

> statements for use during a criminal investigation, was recorded so further law enforcement interviews would be unnecessary, and involved structured questioning designed to confirm a prior allegation of abuse. No one disputes should Detective Akerson have conducted the questioning, such statements would be testimonial under Crawford. It was unreasonable for the Minnesota Supreme Court to conclude just because he requested another government agent to ask the same questions in order to achieve the same purpose, the result is different. Our conclusion is reinforced by §626.526, which required [the child protection worker] to act as a substitute for a police interrogator. Thus, we agree with the district court about Bobabdilla's Confrontation Clause rights being violated and the Minnesota Supreme Court unreasonably applying Crawford in concluding to the contrary.

Id. at 793. The Eighth Circuit went to affirm the conclusion that the error was not harmless. Id.

The State has now brought its petition for a writ of certiorari to this Court. This Court should deny same.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE STATE HAS FAILED TO ESTABLISH UNDER RULE 10 OF THE SUPREME COURT RULES THAT IT SHOULD BE.

Rule 10 of the Rules of the Supreme Court of the United States set forth the standards which are used in evaluating whether a petition for a writ of certiorari should be granted or not. Rule 10 notes that review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 provides that a petition for a writ of certiorari will be granted only for compelling reasons. Rule 10 further provides in pertinent part the following:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the

> Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory powers;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consist of erroneous factual findings or the misapplication of a properly stated rule of law.

Rules of the Sup. Ct. of the United States, Rule 10 (2009).

Mr. Bobadilla will not address each of the positions individually. Rather, Mr. Bobadilla would simply argue that the State, in its petition, has not really set forth the standards in Rule 10, nor has the State argued that under the standards set forth in Rule 10 that its petition should be granted. Rather, it seems that the State has argued that the decision of the Eighth Circuit is incorrect. Under Rule 10, this does not seem a sufficient enough reason for the granting of a petition for a writ of certiorari. Accordingly, Mr. Bobadilla would request that this Court not grant the State's petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: December 1, 2009

Respectfully submitted,

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