January, 2007

2. National Association of Counsel for Children in Support of Respondents. Adrian Martell Davis v. Washington, Hershel Hammon v. Indiana (2007).

Thomas D. Lyon, *University of Southern California*

Nos. 05-5224 and 05-5705

IN THE
Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

v.

WASHINGTON,

Respondent.

HERSHEL HAMMON,

Petitioner,

v.

INDIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF WASHINGTON AND INDIANA

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

TREATISES, STUDIES, AND ARTICLES

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

OTHER MATERIALS

INTEREST OF *AMICUS CURIAE* [1]

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional organization founded in 1977. The NACC has approximately 2,000 members from all fifty states, including attorneys who represent children before family and juvenile courts, physicians, psychologists, social workers, law professors, and other professionals concerned with the protection of children. The NACC's mission is to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and educates public officials about the needs of children.

Amicus submits this brief out of concern that Petitioners' proposed standard for defining "testimonial" statements under the Confrontation Clause is overbroad and unworkable and would further impede the States' ability to prosecute child abusers and protect the welfare of our children.[2]

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the NACC, its members and counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioners and Respondents have consented to the filing of this brief, and pursuant to Rule 37.3(a), the NACC has filed the letters of consent with the Clerk of the Court.

2. Amicus curiae acknowledge the assistance of Thomas D. Lyon, J.D., Ph.D., Professor of Law, University of Southern California and Raymond LaMagna, University of Southern California Law School Class of 2006, in the preparation of this brief. Amicus also acknowledge the assistance of Jacob E. Smiles, an Arnold & Porter LLP associate who is admitted to practice only in Maryland and is practicing law in D.C. pending approval of his application for admission to the D.C. Bar and under the supervision of principals of the firm who are members in good standing of the D.C. Bar.

SUMMARY OF THE ARGUMENT

Child sexual abuse and other forms of child maltreatment are pervasive, yet most victims suffer in silence. Children's secrecy is maintained by their closeness to their perpetrators, by threats and inducements, and by violence in the home. Reporting is rare, and prosecution rarer still. Prosecutions are hobbled by child witnesses' vulnerabilities and by jurors' skepticism. States have responded by adopting statutes allowing children's out-of-court statements to be introduced at trial.

How this Court interprets its holding in *Crawford* in the present cases is likely to affect the continued viability of these statutes in prosecutions where an abused child is unable to testify. Although children's statements are not at issue here, Petitioners' proposed standard for defining "testimonial" statements should be considered in light of its implications for thousands of child maltreatment prosecutions.

Petitioners' standard—which asks whether a "reasonable person" would anticipate use of the statement for law enforcement purposes—is inherently flawed. Nowhere is this more evident than when the test is applied to cases of child sexual abuse.

First, a "reasonable person" standard is overbroad because it has the capacity to include as "testimonial" statements that declarants never anticipated would be used prosecutorially. For instance, a young child reporting sexual abuse may not appreciate that a statement could be used at trial, when a "reasonable person" would.

Some courts, attempting to preserve the objective nature of the test without embracing its inflexibility, have suggested that the reasonable person may be a "reasonable child." Others

have shifted to a subjective test when considering children's statements. Indeed, the leading scholarly proponents of Petitioners' standard have suggested that a subjective test for certain children declarants may be appropriate. *See* Richard D. Friedman, *Grappling With the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 272-73 (2005); *see also* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243, 249-52 (2002).[3]

All variations of the test are unworkable. An inflexible objective test all but begs for exceptions for certain classes of declarants (*e.g.*, children, the mentally retarded). An age-based objective test would compel courts to make developmental assessments of children's understanding of "investigation," "prosecution," and "crime." A "reasonable child" test or subjective test would permit consideration of an actual or hypothetical child's abilities, experience, and contextual understanding. But these approaches would require courts to do exactly what Petitioner Hammon says they should not: "flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court." (Hammon Pet. Br. 18.)

Second, Petitioners' proposed test is overbroad because it could encompass statements made to non-governmental officials. (*Id.* at 17 ("[F]or a statement to be deemed testimonial, it is not essential that it be received by a government officer.")). Again, child abuse cases illustrate the complexities and flaws with such an approach.

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3. *See also* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at *22 n.12; Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 901782, at *26 & n.44.

Children typically disclose abuse (if ever) to a trusted adult. Adult recipients of the information tend not to report, even in instances when they are legally mandated to do so. Nevertheless, Petitioners would have courts attempt to determine whether a "reasonable person" would expect the recipient to report abuse.

Such an approach is as historically unsound as it is unworkable. Child sexual abuse cases from the time of the Framing establish that children's out-of-court reports were routinely admitted into evidence, even if the child failed to testify at trial.

In sum, Petitioners' overbroad test would further silence child victims. Currently, less than 10% of all child sexual abuse comes to the attention of authorities, and still fewer are ever prosecuted. Additional obstacles that are not grounded in the text or history of the Confrontation Clause should be rejected.

ARGUMENT

I. MILLIONS OF CHILD VICTIMS ARE SILENCED BY ABUSE AND BY PROCEDURES DESIGNED TO PROTECT THEM.

A. Child Maltreatment Is Pervasive.

Child maltreatment[4] is pervasive and exploits the most vulnerable victims. Child sexual abuse, defined as sexual contact between an adult and a child, has been reported by 20% of women and 5 to 10% of men in the United States and other nations. Jennifer J. Freyd et al., *The Science of Child Sexual Abuse*, 308 Sci. 501 (2005). Based on the population of children in the United States, this means that more than 500,000 children fall victim to abuse every year. *See* Terry Lugaila & Julia Overturf, United States Census Bureau, *Children and the Households They Live In: 2000* (2004). These are conservative estimates, given the likelihood of underreporting and memory failure. Freyd, *supra*, at 501.

Child physical abuse is even more common than sexual abuse. David Finkelhor & Jennifer Dziuba-Leatheman, *Victimizaton of Children*, 49 Am. Psychologist 173, 175 (1994). Moreover, child maltreatment overlaps with domestic violence. Children are disproportionately present in homes to which police are called for domestic violence crimes.

4. Child maltreatment includes physical child abuse, sexual child abuse, and child neglect. Child neglect includes a failure to provide for the child's needs or a failure to protect, and may include exposure to domestic violence. Douglas Barnett et al., *Defining Child Maltreatment: The Interface Between Policy and Research*, *in Advances in Applied Developmental Psychology: Child Abuse, Child Development and Social Policy*, at 7 (Dante Cicchetti & Sheree L. Toth eds.). This brief emphasizes child sexual abuse because it is among the most commonly prosecuted crimes against children.

John W. Fantuzzo, et al., *Domestic Violence and Children: Prevalence and Risk in Five Major U.S. Cities*, 36 J. Am. Acad. Child & Adolescent Psychiatry 116, 120 (1997). Approximately 40% of children in maritally violent homes are themselves physically abused. Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. Fam. Psychol. 578, 583 (1998) (review of 31 studies). Beyond that, children exposed to domestic violence suffer from ill-effects akin to physically abused children. Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. Consulting & Clinical Psychol. 339, 345-46 (2003) (meta-analysis of 118 studies).

B. Child Victims Are Silenced by Their Abusers and Few Cases Are Prosecuted.

Only about 10% of child sexual abuse is ever reported to the authorities (either police or social services). Freyd, *supra*, at 501. Indeed, most victims of child sexual abuse fail to disclose abuse to anyone until they reach adulthood. A nationally representative survey of 3,423 American men and women found that 78% of those disclosing sexual abuse to the surveyor failed to disclose abuse during their childhood. Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* (1994). Delays of more than ten years have been reported by a majority of respondents in other nationally representative surveys. *See* Jessie Anderson et al., *Childhood Sexual Abuse Experiences in a Community Sample of Women*, 32 Am. Acad. Child & Adolescent Psychiatry 911, 915 (1993) (of 3000 New Zealand women surveyed, 52% failed to disclose abuse during childhood); *accord* Jillian M. Fleming, *Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women*, 166 Med. J. of Austl. 65, 67 (1997). And over a quarter of respondents in other national

surveys never told *anyone* they were abused until the survey, "not mothers, best friends, or husbands." Daniel W. Smith et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 Child Abuse & Neglect 273, 283 (2000).

One reason that children so frequently fail to disclose abuse is that most sexual abuse is perpetrated by adults who are close to the child. Most childhood rapes are by relatives, friends, and known acquaintances. In one nationally representative survey, only 10% of childhood rapes were by strangers. Smith, *supra*, at 278. Sexual abusers typically exploit a trusting relationship, either one that is born of family relationships and living arrangements, or one they create through their encounters with the child and his or her family. Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 Child Abuse & Neglect 579, 585 (1995).

It stands to reason that the closer the relationship between the child and the perpetrator, the greater the chance that abuse will not be disclosed, or that disclosure will be delayed. As the Court has recognized, "a child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Children also fail to disclose because the abusers often threaten to harm them or their loved ones. In one nationwide survey of 954 criminal cases of childhood sexual abuse, children were threatened in over a fourth of the cases:

> [W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a

> young child whose abuser is also a "beloved" parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant's intimate—the child's mother—would blame the child for "having sex" with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse.

Barbara Smith & Sharon G. Elstein, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report* 93, 122 (1993).[5]

When victims do come forward, their first disclosure is usually to a family member or friend, and virtually never to authorities. Moreover, most disclosures to private parties are never brought to the attention of authorities. Smith, *supra*, at 279 (6.6% of childhood rape victims first told police/social worker/clergy; only 12% *ever* reported to authorities). Abusers closer to the child are least likely to be pursued, given the child's and family's reluctance to proceed. Rochelle F. Hanson et al., *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 560 (1999) (rapes by strangers more likely to be reported to authorities than rapes by perpetrators the child knew). Often, the child's

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5. A study examining over 500 cases of child sexual abuse prosecuted in Canada had similar findings, noting that threats were more common among children who delayed disclosure, threats were reported by about half of the children, and that "overt threats were not necessary if the man had a history of violence within the home." Louise D. Sas & Alison H. Cunningham, *Tipping the Balance to Tell the Secret: Public Discovery of Child Sexual Abuse* 1, 91-92, 122 (1995) (reporting threats to hurt the child or a third-party, harm the mother emotionally, withdraw privileges, and warnings that the abuser would be harmed by the disclosure or that the child would no longer be loved by his or her mother).

mother is herself the victim of domestic violence and unwilling to notify authorities. Appel & Holden, *supra*, at 582 (sexual abuse higher in homes with domestic violence).

As a result of non-disclosure, child sexual abuse is among the least prosecuted serious crimes. Further, even when the abuse is disclosed, various factors discourage prosecution. In large part because of the vulnerabilities of the victims—their age, their reluctance to testify, and the reluctance of their family members to pursue charges—most sexual abuse cases substantiated by social services are not prosecuted. Patricia G. Tjaden & Nancy Thoennes, *Predictors of Legal Intervention in Child Maltreatment Cases*, 16 Child Abuse & Neglect 807, 816-18 (1992) (19% of substantiated sexual abuse cases prosecuted). Even among cases presented for prosecution by the police, as many as half were rejected. *See* Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 Trauma, Violence, & Abuse 323, 330 (2003).

C. Child Abuse Cases Are Notoriously Difficult To Prosecute.

As the Court has recognized, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Ritchie*, 480 U.S. at 60. This has long been the case. Matthew Hale, *The History of the Pleas of the Crown* 634 (T. Payne et al., 1778) ("The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed.").

Prosecutors face a number of hurdles when presenting child witnesses. Children who understand the importance of telling the truth may nevertheless fail to qualify to take the oath because of the way in which competency questions are

phrased. Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competency to Take the Oath*, 3 Applied Developmental Sci. 16, 1617 (1999); Thomas D. Lyon, et al., *Reducing Maltreated Children's Reluctance To Answer Hypothetical Oath-Taking Competency Questions*, 25 Law & Hum. Behav. 81, 8182 (2001). Children who testify truthfully are susceptible to error because of the intimidating nature of the courtroom or because of the aggressiveness of cross-examination. Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and their Perceptions of Stress In and Out of the Courtoom*, 17 Child Abuse & Neglect 613, 619-20 (1993) (children less accurate when questioned in courtroom environment); Rachel Zajac & Harlene Hayne, *I Don't Think That's What Really Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. Experimental Psychol. Applied 187, 193 (2003) (children less accurate when cross-examiner challenges their testimony). Protective devices designed to reduce children's trauma are also likely to reduce their credibility in the eyes of the jury, who expect to see live witnesses. *See, e.g.*, Gail S. Goodman, et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 Law & Hum. Behav. 165 (1998) (closed-circuit testimony increased children's accuracy but reduced jurors' perceptions of children's credibility).

Sexual abuse cases also present unique difficulties because of jurors' unrealistic expectations. Jurors expect medical evidence of sexual abuse, yet there usually is none. Susan Morison & Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 Child Abuse & Neglect, 595, 607-08 (1992); Astrid Heger et al., *Children Referred For Possible Sexual Abuse: Medical Findings In 2384 Children*, 26 Child Abuse & Neglect 645, 652 (2002). Jurors expect children to exhibit strong emotional reactions when describing abuse,

yet children usually do not. Pamela C. Regan & Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13 J. Fam. Violence 187 (1998); Barbara Wood et al., *Semistructured Child Sexual Abuse Interviews: Interview And Child Characteristics Related to Credibility of Disclosure*, 20 Child Abuse & Neglect 81, 88 (1996). Moreover, jurors, particularly males, hesitate to convict if they believe that the child consented to the abuse, even if the "consenting" child is as young as eleven years old. Peter K. Isquith et al., *Blaming The Child: Attribution Of Responsibility To Victims Of Child Sexual Abuse, in Child Victims, Child Witnesses: Understanding & Improving Testimony* 203, 223 (G.S. Goodman & B. L. Bottoms eds., 1993).

Notwithstanding these hurdles, prosecutors still strive to produce a live witness in court, knowing that jurors likely will give hearsay evidence less credence. *See* John E.B. Myers et al., *Jurors' Perceptions of Hearsay In Child Sexual Abuse Cases*, 5 Psychol. Pub. Pol'y & L. 388 (1999) (hearsay evidence is generally used to supplement a child's testimony, not in its place). Nevertheless, prosecutors may be forced in some cases to rely upon the child's out-of-court statements where the child fails to qualify to take the oath, is too frightened to testify, or is kept away from trial.

II. CHILD MALTREATMENT CASES ILLUSTRATE THAT PETITIONERS' PROPOSED STANDARD FOR DEFINING "TESTIMONIAL" STATEMENTS IS INHERENTLY FLAWED.

Petitioners urge the Court to adopt a "simple" standard to define when a statement is "testimonial" for Confrontation Clause purposes: "whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime" (Hammon Pet. Br. 7), or whether "a reasonable declarant would have anticipated

that her statement might be used for law enforcement purposes." (Davis Pet. Br. 41.)[6]

As a threshold matter, Petitioners cite no historical support for the standard. Likewise, they provide no textual support. A defendant has a right to confront "witnesses," not "witnesses who reasonably would anticipate" that their statements may be used in the prosecution of a crime. Further, members of the Court have noted the practical difficulties with such a test:

> Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights.

White v. Illinois, 502 U.S. 346, 364 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment). Child maltreatment cases aptly illustrate these deficiencies.

A. Child Maltreatment Cases Illustrate That the "Reasonable Person" Standard Is Unworkable

The "reasonable person" test is overbroad because it will include as "testimonial" statements the declarant never anticipated would be used at trial.

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6. Though his position is not entirely clear, Hammon suggests that this test presumptively is met whenever a declarant makes a "statement . . . to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime. . . ." (Hammon Pet. Br. 7.)

Even the leading proponents of the "reasonable person" test repeatedly have acknowledged that it may be ill-suited when the declarant is a young child abuse victim. *See* Friedman, *Grappling*, *supra*, at 272-73; *see also* Friedman, *Conundrum*, *supra*, at 249-52.[7] As Professor Friedman has explained:

> Suppose a child is so young that she has no sense that what she is reporting is wrongful conduct . . . and no sense that the person she identifies as the perpetrator is subject to punishment for it. Consider, for example, these two cases:
>
> 1. Webb: An eighteen-month-old girl, on being lowered into the bath, said, "Ow bum," and then after the bath, while her mother was examining her, "Ow bum daddy."
>
> 2. Rhea: A two-and-one-half year-old child was interviewed by a child protection specialist of the

7. *See also* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, *supra*, 2003 WL 21754958, at *22 n.12 ("Amici candidly acknowledge that statements by young children will present some of the closest issues under the testimonial approach, just as they do in the current framework. Pre-trial statements by children to care-givers such as parents and physicians may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial."); Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, *supra*, at *26 & n.44 ("Statements made by children often pose difficult issues. . . . Professor Friedman would consider other factors with respect to children. For example, a very young child might have so little understanding that she should not be deemed a witness for Confrontation Clause purposes.").

> Department of Human Resources. In response to questions, she denied that her father had done anything wrong to her, but she nodded in agreement to the question, "Did daddy make you put his tee-tee in your mouth?"
>
> It seems dubious to say that the children in these cases were acting as witnesses.

Friedman, *Conundrum*, *supra*, at 250 (footnotes omitted).

Courts, too, have recognized the tendency of the "reasonable person" test to sweep in statements that the declarant might not anticipate being used at trial. *See Maryland v. Snowden*, 867 A.2d 314, 328-29 (Md. 2005) ("Although . . . there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."). Yet, some courts have adopted the test nonetheless. *See id.* at 328; *Hawaii v. Grace*, 111 P.3d 28, 38 (Haw. 2005); *Rangel v. Texas*, __ S.W.3d __, No. 2-04-514-CR, 2006 WL 176839, at *5 & n.1 (Tex. App. Jan. 26, 2006).

Other courts have sought to remedy the shortcomings of a rigid reasonable person test by looking not to a "reasonable person," but rather, a reasonable person in the position of the declarant. Last week, for instance, the Colorado Supreme Court reinstated a conviction reversed by the intermediate appellate court, in part by finding that "an objectively reasonable person in the [seven-year-old] declarant's position would not have believed his statements to the doctor would be available for use at a later trial," where a police officer went with the child to the hospital and asked the doctor to

perform a forensic examination. *Colorado v. Vigil*, __ P.3d __, No. 04SC532, 2006 WL 156987, at *7 (Colo. Jan. 23, 2006).

Similarly, other courts address the over-inclusiveness of the test by turning the "reasonable person" standard into a subjective test which examines the perspective of the actual declarant. *See, e.g.*, *Minnesota v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (statement to doctor non-testimonial because defendant failed to show that "the circumstances surrounding the contested statements led the 3-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation."), *review granted* (Minn. Mar. 29, 2005). Indeed, the leading proponents of the test have suggested a variation of a subjective test in cases involving certain children may be appropriate. *See* Friedman, *Grappling*, *supra*, at 272-73.[8]

Though the "reasonable person in the position of declarant" or "subjective test" at least attempt to determine the understanding of a real or hypothetical declarant, these formulations would require courts to delve into the age and

8. It also has been suggested that certain children should potentially be relieved outright from the obligation of being "witnesses" for Confrontation Clause purposes. *See* Friedman, *Grappling*, *supra*, at 272; *accord* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003). To be sure, child abuse cases present unique circumstances that may warrant such accommodations. *See generally Maryland v. Craig*, 497 U.S. 836, 849 (1990); *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). The reasonable person test, however, is not flawed only when the declarant is a child. Child abuse cases simply provide an apt illustration of the inherent problems of any test that requires an assessment of the mental state of a (real or hypothetical) declarant.

developmental stages of children concerning their potential understanding of the abuse and sophisticated concepts such as prosecution and punishment. *See* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. Rev. 41, 57-61 (2005) (providing hypotheticals and differing outcomes based on age groups). For instance, children as young as two years old are capable of providing truthful information in response to nonleading questions about distressing events. Carole Peterson, *Children's Memory for Medical Emergencies: 2 Years Later*, 35 Developmental Psych. 1493 (1999). Moreover, toddlers may have some understanding that inflicting injury is immoral and leads to punishment. Judith G. Smetana & Judith L. Braeges, *The Development of Toddler's Moral and Conventional Judgments*, 36 Merrill-Palmer Quarterly 329 (1990). At the same time, children will appear not to understand the meaning and morality of the oath until they are five years or older. Lyon & Saywitz, *supra*. Still older children will lack understanding of court processes that might be integral to an awareness of the legal significance of one's statements. *See* Allie Phillips, *Child Forensic Interviews After* Crawford v. Washington: *Testimonial or Not?*, 39 Prosecutor 17, 21-27 (Aug. 2005) (discussing studies). Hence, one could conclude that children at a particular age are both capable and incapable of making "testimonial" statements, depending on how narrowly or broadly one defines "investigation," "prosecution," and "crime."[9]

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9. Indeed, it is not even clear that the "reasonable" adult anticipates that accusatory statements made to the police may be used at trial. Research on adult domestic violence victims' calls to the police has found that many victims do not want the police to make an arrest, much less for the district attorney to pursue prosecution. *See, e.g.*, Robert Apsler et al., *Perceptions of the Police by Female Victims of Domestic Partner Violence*, 9 Violence Against Women 1318, 1326, Table 1 (2003) (only 1/3 of victims reporting abuse to police wanted arrest).

In sum, these judicial and scholarly struggles with the "reasonable person" test for children declarants reveal the inherent problem with *any* test that seeks to define "testimonial" based on a declarant's state of mind. An inflexible objective test all but begs for exceptions for certain classes of declarants (*e.g.*, children, the mentally retarded), while the subjective approaches would require courts to do exactly what Petitioner Hammon says they should not: "flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court." (Hammon Pet. Br. 18.) That the proposed test here is unworkable for many child abuse cases—one of the core areas of law impacted by *Crawford*—is telling. More telling is that a resemblance test, which puts the focus on the actions of the police, bypasses most, if not all, of these difficulties.

B. Petitioners' Test Is Overbroad Because It Could Potentially Define as "Testimonial" Reports of Abuse by Children to Family Members.

Petitioners' proposed test also is overbroad because it could encompass statements made to non-governmental officials. (Hammon Pet. Br. 17 ("[F]or a statement to be deemed testimonial, it is not essential that it be received by a government officer.")).

Again, child maltreatment cases illustrate the flaws with such an approach. Children typically disclose the abuse (if ever) to a trusted adult: a parent, a teacher, or a friend. Smith et al., *supra*, at 279. Petitioners would have courts attempt to determine whether a "reasonable person" making such disclosures would anticipate that the listener would report those statements to authorities for use in prosecution. Determining the mental state of a "reasonable person" in such circumstances would be unworkable. For instance, would a "reasonable person" assume that disclosure to an adult will

result in official intervention? If so, he would be wrong. Christopher Bagley & Richard Ramsay, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, 4 J. Soc. Work & Hum. Sexuality 33, 37 (1986) 37 (majority of disclosures to adults did not result in reports to authorities). Would a "reasonable person" be aware of applicable mandatory reporting laws, or how mandated reporters interpret and respond to those laws? *See* Nat'l Clearinghouse on Child Abuse and Neglect Information, *Mandatory Reporters of Child Abuse and Neglect* (2003) (documenting variability among states regarding who is mandated to report); Steven Delaronde et al., *Opinions Among Mandated Reporters Toward Child Maltreatment Reporting Policies*, 24 Child Abuse & Neglect 901 (2000) (finding variability among mandated reporters in their tendency to report).

Further, this broad approach is not rooted in the text of the Sixth Amendment. As one scholar explained:

> When Abner tells his best friend Betty—before the government has even appeared on the scene—that he saw Carl rob the liquor store, Abner is not a Confrontation Clause "witness" simply because Betty later takes the stand against Carl, and tells the jury what Abner told her. Within the meaning of hearsay doctrine and evidence law, Abner may indeed be an "out-of-court declarant" . . . . But this is not the proper test of the meaning of the word "witness[]" in the Constitution's Confrontation Clause. Within the meaning of both constitutional law—as evidenced by text, history, and structure—and common sense, Betty is the "witness," not Abner.

Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045-46 (1998) (footnote omitted).

C. Petitioners' Test Is Inconsistent with Admission of Children's Out-of-Court Statements Reporting Child Sexual Abuse in 18th Century Trials.

Beyond the textual deficiencies with Petitioners' proposed test, child sexual abuse cases decided around the time of the Framing refute any notion that all out-of-court statements by child victims are "testimonial." At that time, courts frequently admitted out-of-court disclosures of sexual abuse made by children to trusted adults, even when the child was unavailable for cross-examination.[10] Child rape trials in London's Old Bailey courthouse between 1744 and 1779 illustrate the point.[11] For example, in *R. v. Allam* (Old Bailey Proceedings Sept. 7, 1768), *available at* http://

10. A rule of best evidence was the central guiding principle for the admissibility of extrajudicial statements during the 1700s. *See* 1 Geoffrey Gilbert, *The Law of Evidence* 3-4 (Lintot 1756). A party was required to produce the best evidence that was in their possession or control. *Id*.; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (I. Riley & Co. 1806); Thomas Peake, *A Compendium of the Law of Evidence* 8 (P. Byrne 1806). If a child was deemed incompetent to testify, her out-of-court statements could be heard utilizing a best evidence rationale: they constituted the best evidence available of her complaint.

11. Reports of these trials are available on a searchable database at www.oldbaileyonline.org. The database revealed no further proceedings in the cases discussed herein. It should be noted that

> To write legal history from the [Old Bailey Proceedings] is . . . a perilous undertaking which we would gladly avoid if superior sources availed us. However, on the present state of our knowledge about the best surviving sources, it has to be said that the [Old Bailey Proceedings] are probably the best accounts we shall ever have in what transpired in ordinary English criminal courts before the later eighteenth century.

John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 261, 271 (1978).

www.oldbaileyonline.org/html_units/1760s/t17680907-40.html, the mother of the eight-year-old victim testified to the following: "the child then said, William Allam had had to do with her in the shed two days before. . . . [S]he said the first time was in the shed, when the peas were in blossom; I understood by the child he had had to do with her three times." The child did not testify in the proceedings, yet the mother was still permitted to testify as to what her daughter had told her regarding the rape. *See id.*

Similarly, in *R. v. Craige* (Old Bailey Proceedings July 3, 1771), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17710703-33.html, the court permitted a neighbor to testify as to what he was told by the ten-year-old victim:

> [The child] burst out a crying, and said I will tell you who it was if you won't tell my dada; I said I would not, but would tell her mama. She said it was Mr. Craige. I asked her who he was; she said, the man that work'd for her father. I asked her how he met with her; she said she was playing with some peas, tossing them up upon the bed, as she sat in the room playing with her doll. As she went to get some of the peas, he throw'd her upon the bed, and did something that hurt her, and pressed her so hard upon her belly that she could eat no victuals all next day.

Id. The child never testified. *See id.*; *see also R. v. Ketteridge* (Old Bailey Proceedings Sept. 15, 1779), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17790915-18.html (admitting the four-year-old child's out-of-court statement identifying the alleged abuser and the details of the rape); *R. v. Tibbel* (Old Bailey Proceedings Oct. 16, 1765), *available at* http://www.oldbaileyonline.org/html_units/

1760s/t17651016-2.html (allowing the child victim's mother to testify that her daughter told her that the injuries to her genitals were caused by the defendant); *R. v. Crosby* (Old Bailey Proceedings Dec. 7, 1757), *available at* http://www.oldbaileyonline.org/html_units/1760s/t17660903-38.html (mother testified that her daughter told her "Mr. Crosby did it, the day his wife went to the hospital, and left me there; he got into bed, and call'd me to him. I went to him. Then he pull'd me to him, and put his c - k to me there, and hurt me sadly" and the child victim did not testify); *R. v. Moulcer* (Old Bailey Proceedings Oct. 17, 1744), *available at* http://www.oldbaileyonline.org/html_units/1740s/t17441017-25.html (mother testified that her daughter, who did not testify, told her "Francis Moulcer had taken her into a shed, and laid her down on the top of some hides, and pulled down his breeches and lay with her").[12]

The Old Bailey Proceedings illustrate that, around the time of our Founding, parents and other adults frequently were permitted to testify regarding out-of-court statements by minors, even when those statements identified the alleged abuser and the alleged crime.

R. v. Brasier, 1 Leach 199, 168 E.R. 202 (1779), relied on by Petitioner Hammon, is not to the contrary. (*See*

12. Although a number of these cases resulted in acquittal, this is consistent with acquittal rates for eighteenth-century rape cases in general. Low conviction rates may be explained by a requirement that the government prove penetration, *see, e.g.*, 1 Hale, *supra*, at 628, and in part from the overwhelmingly skeptical attitude with which rape accusations were viewed during the era. This highlights to some degree the significant societal and legal changes concerning child abuse that have taken place since 1791. *See* Myrna Raeder, *Remember the Ladies and the Children Too*, 71 Brook. L. Rev. 311, 311-12, 314 (2005) (questioning historic approach to Confrontation Clause given societal changes concerning domestic violence and child abuse).

Hammon Pet. Br. 27.) In *Brasier*, a five-year-old made a report of sexual assault to her mother, who testified to it at trial. *Brasier*, 168 Eng. Rep. at 202; 1 Edmond Hyde East, *A Treatise of the Pleas of the Crown* 443 (1806). The trial judge reserved the case for review, asking whether the child should have been allowed to testify unsworn. *Brasier*, 168 Eng. Rep. at 202 ("the judgment was respited, on a doubt, created by a marginal note" citing, *inter alia*, 1 Hale, *supra*, at 634; 2 Hale, *supra*, at 279).[13] The reviewing court considered and rejected Hale's proposal that a child could testify in court without taking the oath, holding "[t]hat no testimony whatever can be legally received except upon oath." *Brasier*, 168 Eng. Rep. at 202; *see also* 1 East, *supra*, at 443. The reviewing court added that the girl should not have been automatically presumed unavailable and incompetent to testify due to her age. *See Brasier*, 168 Eng. Rep. at 202-03; 1 East, *supra*, at 444. Rather, the trial court should have examined the girl to assess her ability to understand the oath. *See Brasier*, 168 Eng. Rep. at 202-03. Hence, her out-of-court statements were not the best evidence available, and the defendant was pardoned. The case simply does not address a situation in which a child is properly found incompetent to testify and her out-of-court statements are offered.

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13. Because young children were presumed incompetent, Hale proposed that courts hear children's unsworn testimony. 1 Hale, *supra*, at 634. Hale noted that parents were allowed to testify to their children's informal complaints; therefore, it made sense to hear directly from the children themselves: "Because if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken; yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself." 1 Hale, *supra*, at 634-35. *See also* 1 East, *supra*, at 441 (stating same). Hale justified this procedure by citing the best evidence rationale for admission: "The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed." 1 Hale, *supra*, 634; *see also* 2 Hale, *supra*, at 279 (stating that the "exigence of the case requires" examining young children unsworn).

Petitioner Hammon, however, depends on *Brasier* for a very different and far more expansive proposition—that a victim's informal statements are "testimony" that can *only* be given in court under oath. (Hammon Pet. Br. 27.) This reading would render all hearsay inadmissible, and is clearly overly broad. Moreover, it misreads the court's use of the word "testimony," which appears twice in the opinion: "That no testimony whatsoever can be legally received except upon oath," 168 Eng. Rep. at 202, and "if [children] are found incompetent to take an oath their testimony cannot be received," *id*. at 203. This discussion is not about confrontation rights, but about the necessity of the oath and the procedure by which children are qualified to take the oath.

* * *

Petitioners' overbroad "reasonable person" test would further silence child victims and impede the States' ability to prosecute abusers. The test is contrary to *Crawford* and the history and text of the Sixth Amendment. It should be rejected in favor of a standard that treats as "testimonial" only those statements that were produced from the abusive practices the Confrontation Clause was designed to prevent.

CONCLUSION

For the foregoing reasons, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be affirmed.

Respectfully submitted,

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