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3. National Association of Counsel for Children and American Professional Society on the Abuse of Children in Support of Respondent, Giles v. California.

Thomas D. Lyon, *University of Southern California*

No. 07-6053

IN THE
Supreme Court of the United States

DWAYNE GILES,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Counsel for Children (NACC) is a section 501(c)(3) nonprofit child advocacy and professional membership association founded in 1977. The mission of NACC is to improve the condition of America's court-involved children. NACC programs include professional training and technical assistance, policy advocacy, and programs to establish the practice of law for children as a legal specialty. NACC has approximately 2500 members, representing all fifty-one jurisdictions. Its members include primarily attorneys and judges but also other professionals involved with children and families in the legal system.

The American Professional Society on the Abuse of Children (APSAC) is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy. Founded in 1987, APSAC has more than 2,500 members, including professionals from all fifty states. APSAC seeks to increase knowledge about abuse and to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals.

Amici submit this brief to highlight the importance of forfeiture standards in assessing the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

admissibility of testimonial hearsay from witnesses who are either too young or too scared to testify. Consistent with Framing Era law and sound Constitutional policy, *amici* urge the Court to articulate the relevant constitutional standards in terms that prevent defendants from taking advantage of the incapacities of child witnesses.[2]

SUMMARY OF THE ARGUMENT

A criminal defendant's confrontation right extends to all testimonial hearsay, unless an equitable exception existed at common law. The question presented in this case concerns one such exception—forfeiture by wrongdoing. More precisely, the Court must decide whether this exception is limited to circumstances when defendants, in their wrongdoing, *both* cause and specifically intend to create a witness's absence.

This issue critically impacts child witnesses and victims. This Court's prior historical analyses in *Crawford* and *Davis* did not specifically consider how Framing Era courts handled children's testimonial hearsay. Thus, the Court has not explicitly identified an appropriate Confrontation Clause standard for this unique category of cases.

In the absence of specific guidance, courts have repeatedly cited *Crawford* as requiring the categorical exclusion of such evidence, contrary to

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[2] *Amici curiae* acknowledge the assistance and contributions of Thomas D. Lyon, J.D., Ph.D., Judge Edward J. and Ruey L. Guiardo Chair in Law and Psychology, University of Southern California, and the assistance of Tracey Chenoweth, Nicole Hebert, Joel Purles, Maya Roy, and Abe Tabaie, members of the University of Southern California Law School Class of 2008.

the prevailing practice at the time of the Framing. As an unfortunate result, courts now routinely reverse murder and child rape convictions on this basis, and prospective prosecutions are impeded. These results do not simply represent bad policy, but are in sharp contradiction to the pre-Framing practice that *admitted* unconfronted hearsay reports of child victims when they were too young to testify in court.

This Framing Era rule is well documented. It was cited by the leading jurists of the era both in their judicial decisions and in their extracurial writings. In fact, case reports from the period document that members of the Twelve Judges of England employed this rule when presiding over Framing Era criminal trials.

The rationale for this rule was simple: The nature of the defendant's acts in these cases (e.g., child rape) ensured that the natural and often only witness to the crime (e.g., the child victim) would be unavailable to testify—the witness was predictably incompetent to testify at the time the defendant acted. Paralleling the rationale articulated for admitting dying declarations, courts cited principles of moral necessity and equitable fairness to admit this hearsay in derogation from standard procedure—"the nature of the offense, which is most times secret" made it such that "no other testimony can be had of the very doing of the fact."[3]

As a leading jurist of the era wrote: "In cases of foul facts done in secret, where the child is the party

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[3] 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736).

injured, the repelling their evidence entirely is, in some measure, denying them the protection of the law."[4] Regrettably, courts endeavoring to apply *Crawford* have reached the opposite result and excluded reliable and often corroborated evidence without regard to these equitable principles from the Framing Era. *Amici* hope to alert the Court to this concern so that the rule the Court fashions may accommodate these ancient equitable principles and guide courts accordingly.

Historically, this exception for witnesses of tender years carried no requirement that the defendant "intend" unavailability at trial or "cause" that unavailability. To the contrary, the rule operated in circumstances in which the defendant did not "cause" the incapacity of youth but merely took advantage of that vulnerability in perpetrating his crime. Nevertheless, the strong equitable considerations in play—necessity and fairness—effectuated a forfeiture of confrontation rights in those cases.

The forfeiture standard that this Court articulates in this case will have an immediate and serious impact on how testimonial hearsay from children is assessed. *Crawford* should not be extended to unavailable child witnesses without considering the strong equitable principles applied by Framing Era courts. Framing Era practice demonstrates that there is no constitutional basis for categorically insulating defendants in cases in which defendants act in the face of the predictable

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[4] Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 415–16 (Dublin, Elizabeth Watts 1768).

unavailability of vulnerable or very young witnesses. Sound constitutional policy likewise mandates the same conclusion.

Part I of this Brief describes the pre-Framing treatment of child hearsay at common law. Part II demonstrates how the rigid application of *Crawford* to child hearsay has led to unjustifiable results. Part III address reliability concerns regarding child hearsay.

ARGUMENT

I. THE PRE-FRAMING HISTORICAL RECORD DEMONSTRATES THAT THE FRAMERS WOULD NOT HAVE UNDERSTOOD THE CONFRONTATION CLAUSE TO APPLY CATEGORICALLY TO CHILDREN'S TESTIMONIAL HEARSAY.

Children's out-of-court reports of abuse were routinely admitted by English courts in the pre-Framing period without regard to a defendant's confrontation right. These reports included statements that would today be categorized as "testimonial." The rationale for admitting this evidence was one of necessity and fairness, mirroring the justification advanced for the dying declaration exception. These guiding principles meant that a defendant could not complain of his inability to confront a hearsay declarant when his wrongful actions had created the situation that ensured that the primary witness to his crime would be unavailable.

A. This Court Recognizes the Constitutionality of Hearsay Exceptions That Existed at the Time of the Framing.

This Court has long recognized that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see also Salinger v. United States*, 272 U.S. 542, 548 (1926) ("The purpose of [the Confrontation Clause], this court often has said, is to continue and preserve that [common-law] right, and not to broaden it or disturb the exceptions."); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (interpreting Confrontation Clause as "securing to every individual such [rights] as he already possessed as a British subject").

Early American cases specifically referencing confrontation rights appear limited to those that addressed statements "of the most formal sort." *Davis v. Washington*, 547 U.S. 813, 826 (2006). Thus, this Court has held that the best evidence of the Framers' intentions is to be found in Framing Era British sources, which are "progenitors of the Confrontation Clause." *Id.*[5] The Court treats the

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[5] This Court examined the inconsistencies of the early American approach to confrontation in *Mattox*. 156 U.S. at 240–42; *cf. Davis*, 547 U.S. at 825 n.3 (comparing *State v. Atkins*, 1 Tenn. 229, 229 (Super. L. & Eq. 1807) (disallowing even cross-examined prior testimony), with *Kendrick v. State*, 29 Tenn. 479, 491 (1850) (allowing it)). In *Mattox*, the Court upheld the constitutionality of admitting a deceased declarant's prior testimony. 156 U.S. at 244. The Court emphasized that, although early American courts originally had excluded such hearsay, both later American cases and Framing Era British cases clearly supported admissibility. *Id.* at 240–42.

Clause as incorporating the parameters and limitations that were recognized at the time of the Framing. *Crawford*, 541 U.S. at 54; *Salinger*, 272 U.S. at 548; *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897); *Mattox*, 156 U.S. at 243.

B. A Tender-Years Exception Founded on Necessity and Fairness Applied at the Time of the Framing to Admit Children's Hearsay Without Confrontation.

1. Children's Unconfronted Reports of Abuse Were Routinely Admitted in Framing Era Criminal Prosecutions When the Child Was Unable to Testify.

Eighteenth-century English courts observed a long-standing exception to the hearsay rule that applied to the accusatory statements of child rape victims who were too young to testify. Sir Matthew Hale's treatise, which was written in the late 1600s but not published until 1736, noted that "if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken." 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736). Echoing Hale, Sir William Blackstone noted that "the law allows what the child told her mother, or other relations, to be given in evidence." 4 William Blackstone, *Commentaries on the Laws of England* 214 (Oxford, Clarendon 1769).

The treatises took the admissibility of unavailable children's hearsay for granted when they argued that young children, who were presumed incompetent to take an oath, should

nevertheless be allowed to testify unsworn. *See id.*; 1 Hale, *supra*, at 634. The oath requirement for live testimony, not the admissibility of hearsay, was the only issue regarding child witnesses that occupied the Twelve Judges[6] during the eighteenth century. *See R. v. Powell*, 1 Leach 110, 168 Eng. Rep. 157 (1775); *R. v. Travers*, 2 Strange 700, 701, 93 Eng. Rep. 793, 794 (Kingston Assize 1726) (Raymond, C.J.); *cf. R. v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), discussed *infra* Part I.B.4.

Rex v. Powell, a child rape case tried at the York assizes in 1775, illustrates the extent to which the practice of admitting the hearsay reports of abused children was well accepted at the time. *See* W. Williamson, *The Trials at Large of the Felons, in the Castle of York* 17–22 (York, N. Nickson 1775). In *Powell*, the defense attorney strenuously objected to receipt of the six-year-old victim's hearsay. *Id.* at 19. The judge, Sir Henry Gould, Justice of the Court of Common Pleas, rejected the defense argument. *Id.* Justice Gould not only allowed the hearsay, but also questioned the unsworn child. *Id.* at 19, 20–21.[7] Justice Gould acknowledged that there was disagreement over the propriety of questioning

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[6] The Twelve Judges of England comprised the four jurists who presided over each of the three royal courts—the Courts of the King's Bench, Common Pleas, and Exchequer. The Twelve Judges would meet periodically in a quasi-appellate capacity to review points of exception. *See, e.g.*, John H. Langbein, *The Origins of Adversary Criminal Trial* 212–13 (2003). Individually, the same jurists would also ride circuit in the regional assizes to preside over local criminal prosecutions. *See, e.g.*, *id.* at 181 & n.9.

[7] The detailed case report provides no basis for thinking that the defendant was afforded any opportunity to cross-examine the witness. *See* Williamson, *supra*, at 20–21.

unsworn child witnesses, but, "[w]ith regard to the admitting the declaration of the child to the mother, lord Hale speaks of that as a *clear and settled thing*; for he says, if you hear the child at second hand, she should be heard also at first hand." *Id*. at 19 (emphasis added). Justice Gould reserved the question regarding the child's unsworn testimony for the Twelve Judges to consider. *See id*. The Twelve Judges (albeit less than unanimously) held that the unsworn testimony should not have been received. *See Powell*, 1 Leach at 110, 168 Eng. Rep. at 157. The admissibility of the hearsay went unquestioned.

Because the opinions of the Twelve Judges focused on the propriety of unsworn testimony—rather than on the receipt of children's hearsay or the related absence of confrontation—the best source for illuminating Framing Era treatment of unavailable children's hearsay is the Old Bailey Session Papers, a commercial publication summarizing criminal trials at London's Old Bailey, the felony trial court for London and the adjoining county of Middlesex.[8] The jurists who presided over

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[8] The Old Bailey Session Papers (OBSP) were published from the late-seventeenth century until the early nineteenth century as periodicals under titles such as *Proceedings on the King's Commission of the Peace, Oyer and Terminer, and Gaol Delivery*. *See* Langbein, *supra*, at 180 n.7. A near-complete collection of the OBSP reports is available online in a searchable format at www.oldbaileyonline.org. Citations herein to cases reported in the OBSP will begin with the defendant's surname, followed by notation that the case is found in the OBSP, the case's date, and the online case reference number that allows retrieval of the report at www.oldbaileyonline.org. Scholars consider the OBSP—which often includes detailed, near-verbatim reports of trials—to be one of the best available sources for illuminating eighteenth-century English criminal procedure. *See* John H.

trials at the Old Bailey included the Twelve Judges, who also sat on the regional assize circuits. *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 17, 181 (2003). "Hence, while the special problems of the metropolis shaped the trial procedure that we see in the Old Bailey, there was no means of confining the developments to London. What was created was not London law but English law." *Id*. at 181.

In a review of all child rape cases reported in the Old Bailey Session Papers from 1684 to 1789, twenty-two cases were identified in which thirty witnesses repeated children's hearsay and no mention was made of *any* testimony by the child, either sworn or unsworn. Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1041 (2007). These cases spanned almost the entire length of the search, from 1687 to 1788. *Id*.

2. Testimonial Statements Describing the Crime and Identifying the Defendant Were Admitted Without Confrontation.

Nothing in the Old Bailey Session Papers suggests that children's hearsay was limited to nontestimonial statements or statements that had been subject to earlier cross-examination. The children's hearsay detailed the facts of the charged crimes and identified the defendants as the perpetrators. In court, the children's statements were most often testified to by family members

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Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 268–72 (1978).

(seventeen witnesses), but the courts also heard testimony from neighbors and other nonfamily members (five witnesses), medical personnel (five witnesses), and witnesses to formalized examinations of the child victims (three witnesses). *Id*. at 1041–42.

In only one case could the child's report be described as an emergency cry for help. *See Street*, OBSP (Aug. 27, 1725) (t17250827-14). The more common case was one in which a parent had noticed signs of venereal disease, questioned the child, and then had the child examined by a surgeon. Of course, any signs of venereal disease would necessarily take some time to appear. Indeed, the reports often explicitly describe the delay between the time of the rape and the time when the child victim made her report. *See Craige*, OBSP (July 3, 1771) (t17710703-33); *Allam*, OBSP (Sept. 7, 1768) (t17680907-40); *Moulcer*, OBSP (Oct. 17, 1744) (t17441017-25). In *Powell*, the York assizes case discussed above, Justice Gould considered Hale's reference to complaints made "presently" and rejected any requirement that the complaints be made "immediately," holding instead that the term meant "in convenient time, when it appears to the parent that the child is wronged." Williamson, *supra*, at 19.

In only three cases did it appear that any of the children's reports were made in the presence of the defendant. *See Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18) (statement given to magistrate); *Tibbel*, OBSP (Oct. 16, 1765) (t17651016-2) (neighbor confronted the defendant with the child present); *Senor*, OBSP (Aug. 28, 1741) (t17410828-

63) (statement made to local justice of the peace). In *Ketteridge* and *Tibbel*, the report was specifically made to identify the defendant as the perpetrator. Cross-examination is not mentioned, which is unsurprising considering the children were incompetent to testify at trial.

Nor did the Framing Era jurists treat the issue of admissibility lightly. In several cases, otherwise admissible hearsay statements were nevertheless excluded if deemed unreliable. *See, e.g.*, *Grimes*, OBSP (May 30, 1754) (t17540530-1) (excluding the victim's hearsay statements that were obtained by the parent's coercive questioning). Similarly, the importance to these prosecutions of unconfronted hearsay cannot be diminished by noting what appears to be the era's high acquittal rate for rape.[9] Rape prosecutions utilizing unavailable children's hearsay exhibited acquittal rates similar to those of rape cases generally, including adult rape prosecutions in which the victim testified. *See* Lyon & LaMagna, *supra*, at 1047–48.

The fact that this hearsay was admitted cannot be linked to witness tampering or intimidation. The hearsay was allowed without evidence of coercion. Threats were mentioned in only a few cases, and evidence of threats appeared to be admitted only to explain the victim's delay in reporting the crime. *See Craige*, OBSP (July 3, 1771) (t17710703-33); *Moulcer*, OBSP (Oct. 17, 1744) (t17441017-25). Threats were not offered as a foundation for finding

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[9] In Framing Era practice, an unavailable child's hearsay was insufficient to justify a capital rape conviction, although it could support assault or attempted rape charges. Lyon & LaMagna, *supra*, at 1052; *see also* Langbein, *supra*, at 241 n.277.

that the defendant had forfeited confrontation rights. Rather, the rationale for forgoing confrontation lay in the rules of equity.

3. The Rationale for Admitting Hearsay from Unavailable Children Was That the Defendant's Actions Made Admission Both Necessary and Fair.

The rationale for admitting unavailable children's hearsay reports without confrontation was explained in the leading commentaries of the era. Sir Matthew Hale, Chief Justice of the King's Bench, argued that this procedure was necessary considering the nature of the defendant's wrongful acts: "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, though there may be other concurrent proofs of the fact when it is done." 1 Hale, *supra*, 634. Sir William Blackstone concurred: "[T]he law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof." 4 Blackstone, *supra*, at 214.

Sir Francis Buller, who sat on the King's Bench from 1778 to 1794 during the heart of the Framing Era, elaborated on the equitable rationale: "In cases of foul facts done in secret, where the child is the party injured, the repelling their evidence entirely is, in some measure, denying them the protection of the law." *See* Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 415–16 (Dublin, Elizabeth Watts 1768).

The necessity and fairness rationale for the tender-years exception was remarkably similar to that expressed by Framing Era authority for other exceptions, such as the dying declaration exception. Lord Chief Justice William Lee of the King's Bench explained that the general principle of necessity that permitted such exceptions was "not an absolute necessity, but a moral one." *Omychund v. Barker*, 1 Atk. 21, 46, 26 Eng. Rep. 15, 31 (1744). Sir Edward Hyde East described the rationale for allowing unconfronted dying declarations in terms parallel to Hale's explanation for the use of children's hearsay: "Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness . . . the party injured himself, is gotten rid of." 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 353 (London, A. Strahan 1803); *cf.* 1 Hale, *supra*, at 634.[10]

The moral necessity for admitting the statements of both young children and dying victims was that the defendant's actions had ensured that the primary witness to his crime would be unavailable to testify. In murder cases, the defendant caused the subsequent unavailability by killing a primary witness. In child rape cases, the defendant's abuse of a vulnerable and predictably unavailable victim in secret ensured that the only

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[10] This Court has cited these principles in upholding the dying declaration exception. *See Carver v. United States*, 164 U.S. 694, 697 (1897) (holding that admission was proper based on "necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present"); *Mattox*, 156 U.S. at 244 (admission based on "necessities of the case, and to prevent a manifest failure of justice").

witness to his crime would be unavailable later. It was never argued in either type of case that the defendant had to intend (or even contemplate) the testimonial effects of his actions. Rather, the consequences of the defendant's actions could, in fairness, be held against him. In both types of cases, the principles of moral necessity and equitable fairness ensured that the defendant would not be allowed to create a situation in which the state's primary witnesses were unable to give evidence due to the nature of the defendant's actions.

4. *Brasier* Ended the Presumption of a Child's Incompetence and the Use of Unsworn Testimony, But Not the Practice of Admitting Unavailable Children's Hearsay.

In 1779, in *Rex v. Brasier*, the Twelve Judges unanimously held that children should not categorically be presumed incompetent, but that even the youngest child should be allowed to give sworn testimony if the child could demonstrate understanding of the oath. This ended the practice of allowing children to testify unsworn. *Brasier*, 1 Leach at 200, 168 Eng. Rep. at 202–03; 1 East, *supra*, at 443–44; *see also Wheeler v. United States*, 159 U.S. 523, 524–25 (1895).

Because the Twelve Judges believed that the five-year-old victim in the case might have been found competent, they held that her hearsay should not have been received—that is, necessity was not established as unavailability had not been established. *See Brasier*, 1 Leach at 200, 168 Eng. Rep. at 203; *see* also *Commonwealth v. Bardino*, 3

Berks 350, 1911 WL 3681 (Pa. O. & T. 1911) ("As far back as Brazier's Case, 1 East P. C. 443, it seems to have been virtually allowed that in such cases proof of the complaint and its details might be received, though in that instance it was held improper because the child was not shown incompetent to testify; which in effect was but saying . . . that a rule of evidence dictated by necessity becomes inapplicable wherever that necessity does not exist"). Although the Judges discussed the admissibility of the hearsay if the child should be presumed incompetent, they did not resolve that issue, because they eliminated the presumption that led to making the hearsay necessary in that case. *See* 1 East, *supra*, at 444.

Brasier was about unsworn live testimony, not inadmissible hearsay. After *Brasier* was decided, Framing Era courts continued to admit hearsay from incompetent children in criminal trials. *See* Lyon & LaMagna, *supra*, at 1044–45. For example, four months after *Brasier* was decided, one of the Twelve Judges, Sir Beaumont Hotham, Baron of the Court of Exchequer, presided over a child rape case at Old Bailey. *See Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18). Following *Brasier*, Baron Hotham did not presume the four-year-old victim to be incompetent; rather, he attempted to qualify the child to take the oath. *See id*. When the young victim failed to qualify, Baron Hotham allowed the mother to testify to the child's reports of abuse. *Id*.

This same practice was followed by other jurists in even later cases. *Rex v. Fyson* in 1788 illustrates the use of an unavailable child victim's hearsay nine years after *Brasier* was decided. *See Fyson*, OBSP

(June 25, 1788) (t17880625-93). There, Judge James Adair first asked the father whether the child might be competent to take the oath, but the father testified that she was not. *See id.* The judge then asked, "Do you know any thing of this business of your own knowledge?" *Id.* The father proceeded to testify to two out-of-court statements by the child: her response to her mother's initial discovery of the abuse, and her account when she showed her father "where the affair was committed." *Id.* Immediately after the receipt of this second hearsay statement, the defense counsel began his cross-examination, with no objection noted in the report. *See id.*[11]

Subsequent discussions of *Brasier* confirmed that the Twelve Judges did not intend to disrupt the equitable principle that a child's unconfronted hearsay might be admitted as a matter of moral necessity and fairness when the child was unqualified to testify in court. As late as 1840, Baron Parke noted: "In Brazier's case, the child . . . was only five years old, and incapable of taking an oath; and it was there held, that the complaints she made to her mother and another woman on her coming home, were receivable in evidence, as she herself was not heard on oath." *R. v. Guttridges*, 9 Car. & P. 471, 472, 173 Eng. Rep. 916, 917 (1840) (citation omitted). Baron Parke concluded: "At the time of Brazier's case, it seems to have been considered, that, as the child was incompetent to

[11] Commentators who have opined that *Brasier* affected the admissibility not only of unsworn in-court testimony, but of children's hearsay as well, have failed to review trial reports post-*Brasier*. *Cf.* Langbein, *supra*, 241.

take an oath, what she said was receivable in evidence." *Id*.

Dean Wigmore agreed, citing the exception in his seminal treatise: "[I]n Brazier's case, the use of these complaints, not merely as a formal prerequisite nor yet as corroborative, but *assertively as evidence of the details related*, was perceived; and it was seen to be necessary to use them, if at all, as a Hearsay exception." 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1760, at 2271 (1904) (emphasis added). Dean Wigmore summarized: "If the female was an infant and incompetent to testify there would be some reason for doing this on the principle of necessity." *Id*.

The underlying principles of moral necessity and equitable fairness were thus utilized throughout the Framing Era to prevent a defendant's actions from ensuring that evidence from the primary witnesses to his crime was unavailable at trial. A defendant could not cause the unavailability of a witness and then claim the right to confront him. Nor could a defendant act in the face of the predictable unavailability of a natural key witness and later complain of his inability to cross-examine the witness. *Brasier* did not change this equitable rule.

C. The Rule Articulated in This Case Should Respect the Historical Equitable Exception to Confrontation That Applied When the Nature of a Defendant's Actions Ensured That Key Witnesses Would Be Unavailable.

English practice at the time of the Framing demonstrates that there is no valid distinction between the actions of a defendant that *cause* a witness's unavailability and those that take advantage of a vulnerable witness's prospective unavailability. *Amici* respectfully suggest that this Court should not articulate a rule that recognizes such a distinction or permits defendants to victimize vulnerable and predictably unavailable witnesses and then demand confrontation rights. As we have shown, Framing Era confrontation rights did not extend to situations in which defendants exploited young, vulnerable children who would naturally be unavailable to testify. As a matter of equity, allowing defendants to benefit procedurally from the nature of their crimes would be contrary to the era's equitable principles—it rewards the wrong at the expense of "denying [victims] the protection of the law." *See* Buller, *supra*, at 415–16; *cf.* 4 Blackstone, *supra*, at 214; 1 Hale, *supra*, at 634.

This approach is also consistent with the equitable principles that this Court has long held animate the Confrontation Clause. *See Mattox*, 156 U.S. at 243; *Reynolds v. United States*, 98 U.S. 145, 158 (1878). "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds*, 98 U.S. at 158. As this Court has recognized, the common-law

considerations that defined the scope of the confrontation right included the "safety of the public." *Mattox*, 156 U.S. at 243. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of [children] is compelling." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quotation omitted).[12] When the nature of a defendant's acts extinguishes the confrontation right, the Constitution does not impede the States from securing safety for its most fragile citizens.

II. EFFORTS TO APPLY *CRAWFORD* AND *DAVIS* TO CHILDREN'S HEARSAY HAVE LED TO EXCESSIVE EXCLUSION, CONTRARY TO FRAMING ERA PRACTICE.

Today, as in eighteenth-century England, young children are often the victims or primary witnesses of a crime. Frequently, their evidence can be

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[12] This Court repeatedly has recognized that constitutional rights must accommodate the "surpassing importance" of a state's interest in child safety. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60–61 (1987) (limiting the right of access to exculpatory evidence); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490–92 (1983) (limiting the right to abortion); *New York v. Ferber*, 458 U.S. 747, 756–757 (1982) (preventing "abuse of children [that] constitutes a government objective of surpassing importance"); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Considerations of public policy may never allow relaxation of the "irreducible literal meaning" of the Confrontation Clause, *see Maryland v. Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting), but there is no question that "other important interests" are legitimate concerns when analyzing the reach of the Clause with respect to hearsay. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). Those important interests include a defendant's inequitable conduct. *See Davis*, 547 U.S. at 833.

presented only through hearsay, as these primary witnesses are often too young to testify or unable to endure cross-examination. Before *Crawford* and *Davis*, these witnesses' hearsay was often admitted once reliability concerns were satisfied. As we have shown, this paralleled pre-Framing English practice.

After *Crawford* and *Davis*, however, trial courts routinely have barred testimonial hearsay from unavailable child witnesses on constitutional grounds, and appellate courts have used the admission of such evidence to reverse convictions, leading to unjustifiable results.

For example, in *State v. Henderson*, 160 P.3d 776 (Kan. 2007), a three-year-old child diagnosed with gonorrhea disclosed in a videotaped interview that the defendant "touched my body and it was hurting," adding "with the ding ding," the defendant's term for his penis. *Id.* at 779–80. The mother reported that the defendant was the only man who had unsupervised contact with the victim. *Id.* at 778–79. The defendant acknowledged being tested and treated several times for sexually transmitted diseases. *Id.* at 780. When the child could not qualify as competent to testify, the trial court admitted the videotaped interview after assessing its reliability. *Id.* at 781. The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay. *Id.* at 792.

In *State v. Hooper*, 176 P.3d 911 (Idaho 2007), a mother awoke to find her six-year-old daughter locked in the bathroom with the child's father. *Id.* at 912. After questioning her child and the father, the

mother called the police. *Id*. The child described the sexual abuse in a videotaped interview, and a physician confirmed "breaking and swelling in the rectal area." *Id*. at 913. When the victim failed to qualify as competent to testify, the trial court admitted the videotape after assessing its trustworthiness. *See id.* The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay. *Id*. at 917–18.[13]

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[13] Similarly, in *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. Ct. App. 2004), a mother entered the room to see the defendant pulling up his pants, whereupon her four-year-old son stated that the defendant "had me suck his pee pee." *Id*. at 488. The victim repeated the allegation in a videotaped interview but failed to qualify as competent to testify, and the interview was admitted after the trial court assessed its reliability. *Id*. The appellate court held the hearsay testimonial and reversed the conviction. *Id*. at 490–91.

In *Seely v. State*, 100 Ark. App. 33 (Ark. Ct. App. 2007), *cert. granted*, 2007 Ark. LEXIS 626 (Ark. Nov. 29, 2007), a three-year-old was incompetent to testify, but her hearsay was admitted under a hearsay exception requiring reliability. *Id.* at 35–37. The victim complained of vaginal pain to her mother, which was corroborated by physical evidence. *Id*. The child explained that "[m]y daddy put his fingers in my booty." *Id*. She repeated this to a hospital social worker, adding that "[h]e said he would whip my ass if I told." *Id*. at 37. The appellate court held the hearsay to the social worker testimonial and reversed the conviction. *Id*. at 39, 42.

In *Anderson v. State*, 833 N.E.2d 119 (Ind. Ct. App. 2005), another three-year-old was incompetent to testify, but her hearsay was admitted under an exception requiring reliability. *Id.* at 124. The victim told her grandmother the defendant was "going to let me suck his dick" and described oral sex and other abuse to a social worker and police detective. *Id*. at 121 (stating defendant "puts it in my mouth all the time" and "wet, yucky candy" comes out). The appellate court vacated the conviction on other grounds but held the hearsay testimonial. *Id*. at 122, 125–26.

Courts also have excluded or reversed the admission of out-of-court statements of child victims who were called to testify but were either unwilling or unable to do so.

For example, in *State v. Pitt*, 147 P.3d 940 (Or. App. 2006), *aff'd on reh'g*, 159 P.3d 329 (Or. App. 2007), the four-year-old victim, while living with her mother and the defendant, began to resist being alone with the defendant and disclosed sexual abuse to her mother. *Id.* at 942. She made consistent statements to a physician, a psychologist, and a forensic interviewer in a videotaped interview. *Id.* at 942–43. The physician found physical evidence of abuse. *Id.* at 942. The child also disclosed having seen the defendant sexually abuse the child's five-year-old cousin, who confirmed abuse of both girls in a videotaped interview. *Id.* at 942–43. The state presented both girls at trial, but they appeared too upset and frightened to answer questions and were declared unavailable. *Id.* at 943. The videotaped interviews of both children were admitted, but the conviction was reversed because the videotapes were testimonial and deemed to violate confrontation. *Id.* at 945–46.

In *State v. Waddell*, 2006 WL 1379576 (Kan. App. May 19, 2006), a seven-year-old disclosed sexual abuse to her grandmother, a teacher, a nurse, a day-care provider, a therapist, and a social services investigator in a videotaped interview. *Id.* at *1–3. Her videotaped disclosures included descriptions of "sexual intercourse, anal sex, the touching of her breast, and touching of [defendant's] penis," as well as an incident in which the defendant "had a knife in his hand and said he would kill her unless she

stayed." *Id*. at *2. The victim reported that the defendant showed her a picture of his naked daughter. This was corroborated when a picture of a naked young girl was found in the defendant's bedroom and the defendant's daughter testified that the defendant had sexually abused her and taken naked pictures of her when she was a child. *Id*. at *2–4. In court, the defendant admitted to abusing his own daughter. *Id*. at *4–5. The child victim, however, was unable to talk about her abuse in court. *Id*. at *5.[14] The court found the victim unavailable and admitted her hearsay after determining that it was reliable. *Id*. The conviction was reversed because the videotaped statement was testimonial hearsay. *Id*. at *9.[15]

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[14] There was no evidence that the defendant had contact with the victim after his detention. The victim testified to being scared, but not that "anyone in the room would do anything to her." Thus, the court held that statutory forfeiture was not established. *Waddell*, 2006 WL 1379576, at *9.

[15] Likewise, in *People v. Sharp*, 155 P.3d 577 (Colo. Ct. App. 2006), a five-year-old was found unavailable because she was "too traumatized." The trial court admitted a videotaped statement, in which she disclosed to a forensic interviewer her father's sexual abuse, which was consistent with what she previously had told her mother. *Id*. at 578. The appellate court held the videotaped hearsay testimonial and reversed the conviction. *Id*. at 581–82.

In *State v. Noah*, 162 P.3d 799 (Kan. 2007), an eleven-year-old broke down during the preliminary hearing. *Id*. at 802. Her hearsay was allowed under an exception requiring reliability. *Id*. at 801. She had told her brother and mother that the defendant touched her "private spot" and had recounted seven specific incidents of abuse to a social worker and police. *Id*. at 800–01. The Kansas Supreme Court upheld reversal of the conviction on the ground that the statements to the social worker and the police were testimonial hearsay. *Id*. at 806.

Similarly, in *In re S.R.*, 920 A.2d 1262 (Pa. Super. Ct. 2007), *cert. granted*, 2007 Pa. LEXIS 2951 (Pa. Dec. 28, 2007), a four-year-

Courts also have excluded or reversed admission of statements from child witnesses in murder cases where the children were the only witnesses to the murder and their accounts were wholly consistent with the physical evidence. For example, in *State v. Siler*, 876 N.E. 2d 534 (Ohio 2007), a three-year-old witnessed his father beat and then hang his mother in their garage. In response to questioning by a detective trained to interview children, the child stated that his mother was "sleeping standing" in the garage. *Id*. at 536. The child told how "Daddy, mommy fighting" in the garage had scared him. *Id*. at 537. When asked "if anyone was hurting mommy," he responded, "Daddy did." *Id*. Although officers prevented the child from seeing his mother's body, the child informed the detective that "the yellow thing" had held his mother upright in the garage. A yellow cord had been tied around his mother's neck. *Id*. When asked who put the yellow thing on her, the child responded, "Daddy." *Id*. Despite this vivid account of the murder and other corroborating evidence of threats the father made against the mother as well as past incidents of domestic violence, the conviction was reversed because the child's out-of-court statements were testimonial. *Id*. at 554.

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old was deemed unavailable after becoming "hysterical" at trial, but her hearsay was admitted after the trial court assessed its reliability. *Id.* at 1264. The mother had heard the child say "Do you want me to do it to you?" during play, and the victim disclosed that the defendant had digitally penetrated her anus. *Id.* The victim later disclosed other details of abuse to a forensic interviewer. *Id.* She also acted out sexually with her baby sister. *Id.* The appellate court reversed the conviction on the ground that the forensic interview was testimonial hearsay. *Id*. at 1269.

In *Bell v. State*, 928 So. 2d 951 (Miss. Ct. App. 2006), the victim's daughters (ages four and five) were the only witnesses to their mother's murder. The younger daughter told police officers that her father (Bell) "asked [her mother] for money" and that her mother "emptied her purse out on the floor." *Id.* at 953. She then told the officers that "Bell pushed [her mother] down over a table, broke the table . . . broke a mirror in [the] bathroom . . . [and] used a small knife to put 'blood on [her mother's] back.'" *Id.* The child's statements were corroborated by the physical evidence—police found an overturned coffee table, a purse with its contents emptied, a broken mirror in the bathroom, and multiple knife wounds in the mother's body. *Id.* at 954. Both girls were found unavailable after they were unable to endure a mock pretrial practice session. *See id.* at 956. The conviction was reversed because the statement was testimonial. *Id.* at 959.[16]

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[16] *See also Flores v. State*, 120 P.3d 1170 (Nev. 2005). The defendant's five-year-old daughter told her foster mother and police that after her step-sister "peed on her [own] pants," her mother hit her and "she never woke up." *Id.* at 1172–73. The child refused to testify against her mother and the trial court admitted her hearsay after assessing its reliability. The Nevada Supreme Court reversed the murder conviction on the grounds that the statements to police were testimonial hearsay. *Id.* at 1179–80.

Likewise, in *State v. Mack*, 101 P.3d 349 (Or. 2004) (en banc), the three-year-old brother of a two-year-old who died of "smothering by facial compression" reported in a videotaped interview that the defendant "knocked [the victim's] crib over, hit him on the head, and rubbed him on the floor." *Id.* at 349–50. The boy was incompetent to testify, and the trial court found that the hearsay was reliable, but held that it should be excluded as testimonial hearsay; the Oregon Supreme Court agreed. *Id.* at 353.

These applications of *Crawford* and *Davis* enable individuals who commit crimes against or in the presence of young children to benefit from young children's unavailability. If the child witnesses are mentally or emotionally unable to testify in court, their testimonial hearsay is categorically excluded. Although some hearsay may qualify as nontestimonial and still be admitted, the reversals in these cases highlight the insufficiency of that evidence alone. By these courts' standards, careful preservation of children's early statements on videotape is futile, and trial court screening for reliability is irrelevant. This broad view of confrontation rights does not comport with Framing Era practice. Nor does it comport with sound public policy.

III. EXTINGUISHING CONFRONTATION RIGHTS UNDER THESE EQUITABLE EXCEPTIONS ENABLES THE STATES TO PROMOTE JUSTICE BY ADMITTING THE BEST EVIDENCE AVAILABLE.

Recognizing an equitable exception to the Confrontation Clause's application to testimonial hearsay does not mandate an *evidentiary* exception to the hearsay rule. The scopes of confrontation and hearsay are not coextensive. *Crawford*, 541 U.S. at 51. A confrontation exception does not guarantee admissibility under federal or state evidence laws. The basis for extinguishing "confrontation claims on essentially equitable grounds . . . does not purport to be an alternative means of determining reliability." *Id*. at 62.

For the equitable exception to operate, the unavailability of a witness must be demonstrated. This requires the state to make a good faith effort to present the witness at trial. *Barber v. Page*, 390 U.S. 719, 724–25 (1968). Only after good faith efforts fail may considerations of fairness set aside confrontation rights. In the absence of confrontation rights, the Constitution does not bar the States from seeking to admit hearsay evidence, so long as proper steps are taken to protect the defendant's due process interest in the reliability of that evidence.

The hearsay rule and its exceptions are founded on maximizing accuracy and reliability. *See, e.g.*, 2 Wigmore, *supra*, § 1420, at 1791. Where confrontation rights are inapplicable, the States should enjoy the flexibility to develop and apply their hearsay rules as they see fit. This facilitates admitting only the most reliable out-of-court statements, including properly vetted children's hearsay.

A. Reliability Concerns Rather Than Equitable Considerations Motivated Post-Framing Changes in the Tender-Years Hearsay Exception.

Although modern reliability assessments advance the accuracy of children's hearsay, early to mid-nineteenth-century notions of reliability affected its admissibility. *Rex v. Brasier* required that the actual competency of all young witnesses be tested. While the inability of children to comprehend the oath heightened the necessity and fairness rationales for admitting hearsay evidence, it also undermined the apparent reliability of the child's

report—at least to the extent that nineteenth-century notions of reliability assumed that a child's report was unreliable if the child could not qualify to testify. As a result, courts looked to alternative guarantees of reliability.

Originally, reliability concerns regarding incompetent children's hearsay were addressed under the theory of res gestae, whereby the child's prompt complaints of abuse were considered part of the "transaction." 1 East, *supra*, at 444 (discussing *Brasier*).[17] Throughout the nineteenth century, however, the res gestae exception was increasingly limited. *See* David Bentley, *English Criminal Justice in the Nineteenth Century* 218 (1998).[18]

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[17] Later evidence treatises cited *Brasier* for *both* the proposition that incompetent children's hearsay should be excluded as a general rule, *and* that it could be admitted if it fell within the res gestae. *See* S.M. Phillipps, *A Treatise on the Law of Evidence* *14–15, *203 (New York, Gould, Banks, & Gould 1816) ("[I]n an indictment for a rape, what the girl said recently after the fact (so that is excluded a possibility of practicing on her), has been held to be admissible in evidence, as a part of the transaction."); 1 Thomas Starkie, *A Practical Treatise of the Law of Evidence* 308 (London, J. & W.T. Clarke 1824) (*Braiser* allows "the complaint made by a person in case of rape, or an attempt to commit a rape, immediately after the injury"). Failure to recognize the res gestae exception led to assumptions that testimonial incompetency precluded admissibility of children's hearsay. Hence, revisions to Blackstone's *Commentaries* cited *Brasier* for the proposition that "no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn." *See* 4 William Blackstone, *Commentaries on the Laws of England* 214 (R. Burn, ed., London, W. Strahan 1783). Later editors failed to recognize admissibility of any hearsay as "res gestae" until 1826. *See* 3 William Blackstone, *Commentaries on the Laws of England* 368 n.25 (W. Chitty, ed., London, Walker et al. 1826).

[18] *See also R. v. Guttridges*, 9 Car. & P. 471, 472, 173 Eng. Rep. 916, 917 (1840) (adult complaint of rape one day after event fails to qualify under res gestae; "[t]he law was not so well settled [at the time

Hence, by midcentury, children's testimonial incompetency led to assumptions in England that children's statements were unreliable. *See, e.g.*, *R. v. Nicholas*, 2 Car. & K. 246, 248, 175 Eng. Rep. 102, 102 (1846). American courts in the mid-nineteenth century also leaned toward exclusion, but courts later began admitting hearsay from incompetent children under relaxed res gestae standards. *See* John Henry Wigmore, *A Supplement to a Treatise on the System of Evidence in Trials at Common Law* § 1761, at 170 & n.3 (1908).

Similar reliability concerns led to limits on the scope of the dying declaration exception. These reliability concerns were originally addressed by requiring the apprehension of *imminent* death. *See* 1 East, *supra*, at 353–54 (belief in imminence required "in order to preserve as far as possible the purity and rectitude of such evidence"). Doubts about the reliability of such statements led British courts to narrow the exception throughout the nineteenth century. Bentley, *supra*, at 214–18; *see also* 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 156, at 187 (Boston, Little & Brown 1842) (doubts about reliability rationale for dying declarations left the exception "to stand only upon the ground of the public necessity of preserving the lives of the community").

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of *Brasier*] as it is now"); *R. v. Tucker*, (1808), in *Select Cases from the Twelve Judges' Notebooks* 102–05 (D.R. Bentley ed., 1997) (trial court admitted child's report of rape three weeks after the event on basis of "necessity" since child could not qualify to testify, recognized the "point was new," and submitted the case to the Twelve Judges, who pardoned the prisoner without opinion).

But changes in beliefs about the reliability of dying declarations and children's hearsay, particularly those that occurred post-Framing, are not guides to defining the Confrontation Clause's scope with respect to hearsay. Quaint notions about whether a person would dare die with a lie upon his lips or how excitement stills the capacity for reflection are not constitutionally mandated limitations on the equitable principles underlying the Confrontation Clause. Once the equitable exception for considering children's hearsay is satisfied—and confrontation concerns are thus extinguished—courts need not be constrained by common law or historical approaches to assessing the reliability of hearsay. The Confrontation Clause did not constitutionalize the rules of *hearsay* at the Framing; it constitutionalized the era's *right of confrontation*. With the equitable, constitutional requirements of confrontation met, the States should be free to substitute modern reliability assessments in order to promote justice and accurate outcomes in criminal proceedings.

B. Modern Reliability Assessments Can Assure the Trustworthiness of Children's Hearsay.

If the Court accommodates the full scope of the equitable confrontation exceptions known at common law, then courts will again be able to consider certain testimonial statements made by young child witnesses. This will improve fact-finding accuracy by facilitating the admissibility of hearsay that is both easier to assess for reliability and more likely to be reliable.

For example, many children's hearsay statements excluded by appellate courts post-*Crawford* were formal interviews captured on videotape,[19] making the statements uniquely susceptible to careful review of their trustworthiness. The videotaped statements were often admitted under special statutory hearsay exceptions that require reliability assessments.[20] Ironically, structured and professional questioning with careful documentation—which improves reliability—renders these statements "testimonial" and thus subject to exclusion under *Crawford*. *See* Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009, 1009 (2007) ("*Crawford* and *Davis* . . . defeat the admission of testimonial statements, including the highly regarded best practice of videotaping multidisciplinary forensic interviews.").

Once confrontation issues have been resolved, videotaping child interviews enables a court to directly assess the reliability of the child's statements and the bias of the interviewer. Without videotaping, interviewers have difficulty remembering the form (and therefore suggestiveness) of their questions. *See* Amye Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall*

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[19] *See, e.g.*, *Hooper*, 176 P.3d at 913; *Henderson*, 160 P.3d at 779; *Sharp*, 155 P.3d at 578; *Pitt*, 147 P.3d at 942; *R.A.S.*, 111 P.3d at 488; *Mack*, 101 P.3d at 350; *Waddell*, 2006 WL 1379576, at *2.

[20] *See, e.g.*, *Hooper*, 176 P.3d at 913; *Henderson*, 160 P.3d 780–81; *R.A.S.*, 111 P.3d at 488; *Mack*, 101 P.3d at 350; *Waddell*, 2006 WL 1379576, at *5.

Their Interviews with Children? 5 Psychol., Pub. Pol'y & L. 355, 369 (1999). Even careful note-taking captures far fewer details about the interview than audio- or videotaping. Michael E. Lamb et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 Law & Hum. Behav. 699 (2000). Videotaping thus responds to Framing Era concerns over the reliability of children's hearsay, such as Hale's admonition that "such a relation may be falsified, or otherwise represented at second-hand, than when it was first delivered." 1 Hale, *supra*, at 635.

Nor is reliability affected by the fact that such videotaped statements may be from children too young to qualify as competent to take the oath. Contemporary research demonstrates that relying on an inability to qualify as competent to testify is a poor means for assessing children's reliability. Children may appear incompetent to take the oath because of the way in which questions are asked. Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 Applied Dev. Sci. 16, 16–17 (1999). Likewise, modern research shows that children's testimonial competency does not correlate well with their honesty. Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and Its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 Law & Hum. Behav. 395, 396 (2002). Hence, a comprehensive inquiry into the circumstances of a child's statement is a more effective approach to guaranteeing reliability than that employed over 200 years ago.

In sum, it will not violate the notions of equitable fairness and moral necessity that are reflected in the Confrontation Clause to recognize that confrontation rights do not extend when the nature of the defendant's actions—such as choosing to abuse a predictably unavailable victim—ensure that evidence from the primary witnesses to the crime will be unavailable at trial. Such a rule mirrors the equitable confrontation exceptions known to the Framers such as dying declarations. Moreover, such a rule would not lead to the wholesale admissibility of unreliable hearsay. Rather, it will enable the States to scrutinize and admit the most reliable hearsay without resorting to antiquated assumptions about trustworthiness that the Confrontation Clause neither mandates nor supports.

CONCLUSION

There is no constitutional basis for holding that confrontation requires the exclusion of hearsay statements in cases in which defendants have acted in the face of the predictable unavailability of vulnerable or very young witnesses. The articulation by this Court of a forfeiture rule that recognizes this principle will serve the Framers' intent, as well as the States' interests in accurate verdicts and the protection of children.

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