No. 09-1396

In the Supreme Court of the United States

RICKY LEE ALLSHOUSE, JR.,
Petitioner,

v.

PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Western District

BRIEF IN OPPOSITION

JEFFREY D. BURKETT
Counsel of Record
JEFFERSON COUNTY
DISTRICT ATTORNEY
200 MAIN STREET
JEFFERSON COUNTY COURTHOUSE
BROOKVILLE, PA 15825
(814) 849-1628
jburkett@jeffersoncountypa.com

Counsel for Respondent

September 29, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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ARGUMENT

Although your Respondent prevailed in the Pennsylvania Supreme Court, it would be intellectually dishonest to argue that there is not a considerable difference of opinion in the courts of this nation as to how the precepts of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006) should be applied to the statements of child declarants. On that point, Respondent agrees with Petitioner. It also is no secret, as has been pointed out by Petitioner (See Petition for a Writ of Certiorari (hereinafter "Petition") at p. 8), that the Pennsylvania Supreme Court rested its holding that the child declarant's statements were nontestimonial on different grounds than the ones which Respondent urged it to do so.

Thus, if this Court chooses to take up the issue of *Crawford*'s application to a child declarant's statements to a child protection worker, the Court would bring clarity to Confrontation Clause jurisprudence that is presently lacking. Your Respondent submits that three general categories of questions must be answered by this Court to bring this much-needed clarity: 1) What are the objective circumstances that determine whether a child declarant is "bearing testimony"? Does the concept of what the "objective witness" would "reasonably believe" about his statements include consideration of the witness's age?; 2) how broad is the scope of this Court's definition of "police interrogation" in its Confrontation Clause/*Crawford* lexicon? Specifically, who are the "police"? Are all individuals who work for the government (such as child protection workers) to

be considered "police officers" for purposes of *Crawford* analysis. Or does "police" mean "police"?; and 3) Even if a child protection worker was deemed a police officer, should the "primary purpose test", as announced in *Davis,* be automatically used in all circumstances when a child declarant makes a statement to the worker?

The above being said, Respondent would posit that the deep divide of authority discussed by Petitioner stems from facets of the *Crawford* and *Davis* holdings that must be clarified to bring order to Confrontation Clause jurisprudence in this particular sphere. First, the *Crawford* court stated specifically that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial'." *Id.* at 68, 124 S.Ct. at 1374. Although the general principles of what constitutes a testimonial statement seem somewhat clear, courts have differed in their interpretations when applying those principles to the statements of child declarants. This difficulty is certainly not surprising given that the facts of such cases are so dissimilar to those in *Crawford* and *Davis*, both of which involve adult declarants. Indeed, it would be most difficult, if not impossible, to attempt to forumulate an all-encompassing rule defining testimonial statements. Justice Thomas made a prophetic statement in his concurring opinion in *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736 (1992), when he said,

> "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. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation..." *Id.* at 364, 112 S.Ct. at 747.

Indeed, *Crawford* demands exactly that kind of line drawing. Thus, it is especially difficult for lower courts to characterize the statements of children within various factual guises as either ones that "bear testimony" or not without the guidance of any cases from this Court involving child declarants.

Secondly, this Court has not yet addressed the scope of what is encompassed by its term "police interrogations." In *Crawford,* this Court dealt with a classic police interrogation. Sylvia Crawford was given *Miranda* warnings and was subjected to two separate interrogations when giving the subject statements. Accordingly, searching analysis as to what constitutes "police interrogation" was unnecessary. Within that factual setting, this Court stated the seemingly *per se* rule that police interrogations produce testimonial statements ("Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.").[1] *Id.* at 52, 68, 124 S.Ct. at 1354, 1374. However, in *Davis*, this Court reconsidered this absolute statement and found

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[1] Courts have commented that this rule seemed to have no exception. See e.g. *Commonwealth v. DeOliveira*, 447 Mass. 56, 63, 849 N.E. 2d 218, 225 (2006).

that, in certain circumstances, even police interrogation can produce nontestimonial statements. See *id.* at 822, 126 S.Ct. at 2273-74. Two statements were considered. One was the product of another classic police interrogation and the other was produced during a 911 call. In a footnote, this Court stated,

> "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford*...(internal citation omitted), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial." *Id.* at 823, n. 2, 126 S.Ct. at 2274.

Thus, police interrogation was assumed *arguendo* and, no specific analysis was conducted by the Court on the issue of what constitutes a police interrogation and exactly who stands in the shoes of the "police".

Although this Court specifically restricted the applicability of its "primary purpose" test to cases involving police interrogations[2], various courts are applying it to cases in which police are not directly involved in the rendering of the statement. For instance, a number of cases speak of statements being given to a "proxy" or "agent" of police. See e.g. *State v. Pitt,* 209 Or. App. 270, 147 P.3d 940 (2006); *State ex*

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[2] *Ibid.*

rel. Juvenile Dep't of Multnomah County v. S.P., 346 Or. 592, 215 P.3d 847 (2009); *State v. Contreras,* 979 So.2d 896 (Fla. 2008). In this same vein, Petitioner expends some effort to show the statutory link and relationship between a child protection services caseworker and law enforcement in Pennsylvania. See Petition at p. 13-14 (discussing a Pennsylvania child protection worker's statutory obligation to coordinate investigations with law enforcement). This approach is not novel and various courts have credited such arguments, equating an interviewer with a relationship with law enforcement with the actual police. These courts focus mainly on that theoretical or statutory link even though this link has nothing to do with the circumstances surrounding the giving of the statement and had little or no bearing on the mindset of the declarant at the time of the statement at issue. See e.g. *State ex rel. Juvenile Department of Multnomah County v. S.P., supra*; *Hernandez v. State,* 946 So.2d 1270 (Fla. Dist. Ct. App. 2007); *People v. Stechly*, 225 Ill. 2d 246 (2007).[3] Respondent submits that *Crawford* and *Davis* do not sanction such a pursuit. Those cases show that the inquiry is to be factually driven with the focus on the circumstances surrounding the giving of the statements at issue and thus, known to the declarant, rather than some theoretical link between the questioner and the police.

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[3] But see *State v. Buda,* 195 N.J. 278, 306-7, 949 A.2d 761, 779 (2008), in which the court specifically found such a statutory link to be "insufficient" to show a child protection caseworker has become "an extension of law enforcement" when "standing alone".

Further, as can be seen by the above cases and many of those cited by Petitioner, courts are generally not recognizing the limitations that this Court explicitly imposed on its holding in *Davis*. In addition to the above-quoted language limiting the application of the decision to cases involving police interrogation, this Court further circumscribed the reach of its decision by stating, "our holding is not an 'exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation,'..., but rather a resolution of the cases before us and those like them." Also, the holding was referred to as "the rule we adopt for the narrow situations we address." See *id.* at 830, n. 5, 126 S.Ct. at 2278. Obviously, much can be learned about the nature of testimonial statements by an examination of *Davis*. However, in light of the above language which clearly limits the applicability of the holding of *Davis* to police interrogations (and not necessarily all police interrogations at that) and to the "narrow situations" addressed therein, *Davis* can give little specific guidance in the instant case and cases like it. Even with this self-limiting language, a cursory scan of the above cases and many of those cited by Petitioner reveals that courts have eagerly applied its primary purpose test to cases involving child declarants, non-law enforcement personnel and completely different facts. See e.g. *State v. Hopkins,* 154 P.3d 250 (Wash. Ct. App. 2007); *Rangel v. State,* 199 S.W.3d 523 (Tex. Ct. App. 2006); *Contreras, supra; In re Rolandis G.,* 902 N.E.2d 600 (Ill. 2008); *State v. Justus,* 205 S.W.3d 972 (Mo. 2006). Even in some cases where the court explicitly found no substantial link to law enforcement whatsoever, they have still applied the primary purpose test of *Davis*. See e.g. *State v. Buda,* 195 N.J. 278, 949 A.2d 761 (2008) (although finding that CPS

worker was acting completely independently of law enforcement, employed primary purpose test and found statements made to a child protective services worker to be nontestimonial because of an ongoing emergency).[4]

COURTS DIFFER ON WHEN CHILDREN BEAR TESTIMONY

Because of the wooden application of the primary purpose doctrine (was the declarant describing past acts or was the situation an "ongoing emergency") in child declarant cases, lower courts have lost the proper focus of *Crawford* analysis, i.e. was the declarant "bearing testimony?" In *Crawford,* this Court emphasized that the Confrontation Clause only applies to "witnesses" against the accused, who thus, "bear testimony." *Id.* at 51, 124 S.Ct. at 1364. "Testimony" was discussed as being "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."(internal citation omitted). *Ibid.* From this, it was posited that, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The Constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Ibid.*

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[4] The Ohio Supreme Court is a remarkable exception to this trend. In *State v. Stahl*, 111 Ohio St. 3d 186, 855 N.E.2d 834 (2006), it shunned the primary purpose test when police interrogation was not involved in favor of an "objective witness test" pursuant to the "third *Crawford* formulation" of core class statements.

To further elucidate the concept of testimonial statements, the Court referred to a "core class" of such statements as,

> "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pre trial statements that declarants would reasonably expect to be used prosecutorially, ...extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions...statements that were made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial, ..." *Id.* at 51-52, 124 S.Ct. at 1364 (internal citations omitted).

Clearly, all of the statements proposed to be in the "core class" of testimonial statements share one common denominator: when making the statement at issue, the declarant has every objective reason to believe that he is "bearing testimony" against the accused that would be the basis of some future proceeding. When one gives testimony in front of a judicial officer, signs a formal affidavit, or is interrogated by a police officer, all of the circumstances and the formality of the occasion objectively indicate to the declarant that he is "bearing testimony" and providing information that will likely be used and relied upon in later formal proceedings. The declarants in all of these situations would clearly know and understand that they are "on the record" and that their words have legal significance and effect. In light

of this, the reasoning of courts employing merely statutory or theoretical links to find police involvement seems particularly spurious. Clearly, a young child who is talking to a "cop" would objectively have a different mindset than one who is talking to a caseworker in blue jeans on her grandparents' front porch. Some courts cited above would most likely find that this is insignificant in light of some statutory or theoretical link to law enforcement such as the Petitioner proposes.

Further support for the Respondent's contention is shown when this Court noted that, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not" as well as "(m)ost of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy. *Id.* at 51, 56, 124 S.Ct. at 1364, 1367. The point this Court was making seems abundantly clear: Statements such as the "casual remark", those contained in business records, and statements in furtherance of a conspiracy all share the fact that the declarant has no intention or reasonable expectation that his declarations will be used and relied upon in the making of a future, formal claim by the recipient of his statements.

Thus, the overarching mandate of *Crawford* is the Confrontation Clause's preclusion of out-of-court statements made by a declarant under circumstances, objectively determined, which indicate that the declarant was knowingly "bearing testimony" without unavailability and the opportunity for prior cross examination. However, as can be seen by many of the

cases cited above and by Petitioner, in the post-*Davis* era, despite *Davis'* language explicitly limiting its application to factually similar cases, the focus of analysis has shifted from a thorough examination of the facts to determine if the declarant is "bearing testimony" to a trend of *pro forma* application of the primary purpose test. See e.g. *People v. Sharp*, 155 P.3d 577 (Colo. App. 2006) (pre-*Davis* Colorado appellate court originally held 5-year-old child's statements to be nontestimonial based upon an "objective person in the child's position" analysis, however, the same court reversed when directed by state Supreme Court to re-evaluate in light of *Davis* and a state court precedent); *State v. Siler,* 116 Ohio St.3d 39, 876 N.E.2d 534 (2007) (citing cases in which there was direct or indirect police involvement in the giving of the statement and stating that it is aware of no case post-*Davis* in which a "declarant's age rendered statements to police nontestimonial").

Although Respondent contends that the holding in Davis has limited application to the instant case, it would also propose that the way this Court analyzed the facts lends further support to Respondent's position that the ultimate inquiry always involves whether the declarant is bearing testimony. Simply stated, although both declarants gave statements in response to police interrogation (assumed *arguendo* with regard to Davis), one declarant was making statements in an attempt to save her skin (McCottry), while the other (Hammon) was calmly telling police officers what her husband had done to her while the police took notes. Clearly, McCottry's mindset was not one of "bearing testimony" or "being on the record". On the other hand, Hammon clearly knew she was "on the record". The police were taking a report; she knew

it; and she even executed a formal affidavit at the end of the interview. See *id.* at 826-828, 126 S.Ct. at 2276-7. Amy Hammon had every objective reason to think that her report was starting legal machinery and it would have been in the forefront of her mind. During Michelle McCottry's statement, starting legal machinery (other than getting physical help) was not in the forefront of her mind. The analysis of the *Davis* court was fact-intensive and focused on the actual circumstances surrounding the giving of the questioned statements.[5] Thus, in the final analysis, the holding of *Davis* was still born out of the same ultimate question posed in *Crawford:* do the circumstances objectively indicate that the declarant was "bearing testimony" or not?[6]

If *certiorari* were to be granted in the instant case, it would give this Court an excellent vehicle in which

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[5] The Court in *State v. Arroyo*, 284 Conn. 597, 628, 935 A.2d 975, 994 (2007) noted this, stating, "We first note that the court, in applying the test it articulated in *Davis*, essentially performed a fact intensive test, based on the totality of the circumstances, to each of the cases before it." Speaking of *Davis* and *Hammon,* the Ohio Supreme Court said, "Both cases instruct that a court should view statements *objectively* when determining whether they implicate Confrontation Clause protection pursuant to *Crawford*." *State v. Stahl, supra at* 192, 855 N.E.2d at 841.

[6] It would appear that the expectations of this "objective witness" is, indeed, still a relevant inquiry based upon this Court's recent pronouncement in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527, 2532 (2009). This Court specifically noted that forensic analysts' "certificates of analysis" were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (quoting *Crawford).*

to clarify that the ultimate inquiry in cases involving child declarants, child protection workers and *Crawford* Confrontation Clause analysis is whether the factual circumstances of the case, objectively determined, show that the declarant was "bearing testimony"— as opposed to ---application of a "primary purpose test" that has little or no relevance to such cases. Indeed, being that the declarants in such cases are completely different than adult declarants, then the factual inquiry must involve different questions and an objective evaluation of *all* of the circumstances.

Scholars have acknowledged this reality. Professor Richard Friedman, a University of Michigan constitutional scholar whose work was cited in the *Crawford* case, has stated,

> "I tend to believe that some very young children should be considered incapable of being witnesses for Confrontation Clause purposes. Their understanding is so undeveloped that their words ought to be considered more like the bark of a bloodhound than like the testimony of an adult witness. And perhaps, in accordance with Sherman Clark's theory, we should consider that morally they are so undeveloped that we do not want to impose on them the responsibility of being witnesses." (footnote omitted). R. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 Brook. L. Rev. 241, 272 (2005).

When discussing an "objective" vs. "subjective" standard, he states that, "there is something a little odd about asking, with respect to a statement by a young child, what the anticipation of a reasonable

adult would be." *Id.* at 273. Professor Friedman also wrote on this subject in 2002, saying,

> "the younger and less mature and understanding a child is, the less likely her statement should be considered testimonial, subject to the Confrontation Clause, and therefore, all other things being equal, the more likely the statement should be admitted. This conclusion, however, is really not paradoxical at all. Even statements by very young children may be highly probative. But very young children are not yet at a stage where they can be expected to take the responsibility of being a witness--the responsibility of speaking under oath, subject to questioning by the accused, under the implicit injunction, "Look me in the eye and say that." With respect to very young children--I will not try to say here just how young--we should admit their statements for what they are worth, without pretending that the children have the capacity to act like adults." (footnotes omitted). R. Friedman, *The Conundrum of Children, Confrontation and Hearsay*, 65 Law and Contemp. Problems. 243, 251-252, (2002).

Some courts in this nation have also recognized this. An example of an objective approach which looks at all circumstances including the age of the declarant is that of the Supreme Judicial Court of Massachusetts in *Commonwealth v. DeOliveira*, 447 Mass. 56, 849 N.E. 2d 218 (2006). In *DeOliveira*, a 6-year-old sexual assault victim described sexual abuse at the hands of

her mother's paramour to a social worker.[7] The social worker notified the police who responded to the victim's home and then transported the victim to the hospital to be seen by a physician. Once at the hospital and not in the presence of the police, the victim described the abuse to a pediatrician. See *id.* at 59-60, 849 N.E.2d at 222-223. In finding the victim's statements to the pediatrician nontestimonial, the Court noted that, "We have no difficulty concluding that, considering the circumstances, a reasonable person in Patricia's position, and armed with her knowledge, (footnote reference omitted herein) could not have anticipated that her statements might be used in a prosecution against the defendant." *Id.* at 65, 849 N.E.2d at 226. The footnote attendant to the above quote stated, "Our 'reasonable person' standard takes into account all of the facts in a given situation and, therefore, must be understood to allow, as a pertinent fact to be considered, a particular declarant's lack of knowledge or sophistication that is attributable to age." (citations omitted) *Id.* at 66, n. 11, 849 N.E 2d at 226. In that same footnote, the court went on to cite other instances where they had taken into account certain individual characteristics of the people involved and applied them to their reasonable person standard. *Ibid.*

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[7] The *DeOliveira* Court did not pass on the issue of whether the statements to the social worker were testimonial because there was no relevant hearsay exception in Massachusetts under which those statements could have been admitted without the victim's contemporaneous testimony. See footnote 3 of opinion. *Id.* at 60, 849 N.E.2d at 222. In that regard, it would appear that the Commonwealth did not contest the defendant's *Crawford* motion regarding the social worker's proposed testimony because the point was now moot.

This same approach was employed by the Colorado Supreme Court in undertaking Confrontation Clause analysis of statements of a seven-year-old child in *People v. Vigil*, 127 P.3d 916 (Colo. Sup. Ct. 2006). The defendant in that case argued that the "objective witness" referred to in *Crawford* should be defined as "an objectively reasonable adult observer educated in the law" and the state argued that it should be defined as "an objectively reasonable person in the position of the declarant." *Id.* at 924. In determining that the child's age should be taken into account, the court stated,

> "(b)ased on our reading of *Crawford* and our review of other Courts deciding this issue, we hold that the 'objective witness' language in *Crawford* refers to an objectively reasonable person in the declarant's position. Applying this test to the instant case, we determine that an objectively reasonable person in the declarant's position would not have believed that his statements to the doctor would be available for use at a later trial." *Ibid.*[8]

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[8] Although the Commonwealth agrees with the *Vigil* court on the above, it would possibly take issue with it on certain dicta in its opinion regarding whether statements to a social worker involved interrogation when the social worker's question was done "at the behest of the police". *Id.* at 922-923. This, however, is of no moment because there is no evidence in the present record of any police involvement in the CYS interviews.

The *Vigil* Court further explained its analysis, stating:

> We first discuss our holding that the term "reasonable, objective witness" refers to an objectively reasonable person in the declarant's position. This holding is consistent with the *Crawford* majority's reference identifying a hearsay statement from *Dutton v. Evans*, ...(citation omitted), as non-testimonial. *Crawford*, 541 U.S. at 58, 124 S.Ct. at 1354. In *Dutton,* the declarant was the defendant's co-conspirator, and he made a statement to his cell mate blaming the defendant for his predicament. (citation omitted) The Supreme Court characterized this statement as spontaneous and against penal interest. (citation omitted). If the *Crawford* Court had intended the objective witness test to be applied from the perspective of an objectively reasonable observer educated in the law, (footnote omitted) the *Crawford* Court would have labeled the co-conspirator's statement 'testimonial.' However, by labeling the statement non-testimonial, *Crawford* directs us to apply the objective witness test from the perspective of an objectively reasonable person in the declarant's position." *Id.* at 924-925.

From this, the *Vigil* Court concluded:

> "Based upon our review of these cases, an assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the

> expectations of a reasonable person in the position of the declarant. Expectations derive from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis." *Id.* at 925.

Applying that analysis to the facts of that case, the *Vigil* Court then held as follows:

> "Turning now to the application of the objective witness test to the statements the child made to the doctor, we analyze the circumstances surrounding the statements to determine whether an objective witness in the position of the child would believe that his statements would be used at trial. We hold that no objective witness in the position of the child would believe that his statements to the doctor would be used at trial. Rather, an objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial." *Id.* at 926.

In *Bobadilla v. Minnesota*, 709 N.W.2d 243 (Minn. Sup. Ct. 2006)[9], a case involving a three-year-old

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[9] A Federal District Court subsequently granted habeas corpus relief based upon its disagreement with the reasoning of the *Bobadilla* Court which was affirmed by the 8th Circuit Court of

declarant, the Minnesota Supreme Court stated, "(m)oreover, given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial....Certainly, communications in initial assessment interviews may very well evolve into testimonial statements. An interview with an older child who understands the law-enforcement consequences of his statement, or an interview with a more significant law-enforcement involvement might both exhibit a greater purpose on the part of a declarant or government questioner to produce statements for use at a future trial." *Id.* at 255-6.

The Court of Appeals of North Carolina in *State v. Brigman*, 178 N.C. App. 78, 632 S.E.2d 498 (2006), stated that

> "at the time of his medical examination by Dr. Conroy, child 3 was not quite 3 years old. This Court found in the case against Kimberly Brigman that it was highly unlikely that child 2, who is almost 6 when he made statements to his foster parents, understood his statements might be used at a subsequent trial. (quotation omitted). We cannot conclude that a reasonable child under 3 years of age would know or should know that his statements might later be used at a trial. Therefore, we hold child 3's statement to Dr. Conroy was not testimonial, and defendant's right to confrontation was not violated." *Id.* at 8.

Appeals. See *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098 (D. Minn. 2008) (affirmed by 575 F.2d 785 (8th Cir. 2009).

In *Lagunas v. State*, 187 S.W.3d 503 (Tex. Ct. App.-Austin 2005), the court held that when a police officer located a 4-year-old kidnapping victim who was "terrified" and crying, the statements she made to him "when viewed in light of her age and state of mind, together with the circumstances surrounding her interaction with Officer Sullivan, lack the indicia of solemn declarations made to establish or prove a fact." *Id.* at 520. The court set out a list of factors that would come into play in deciding whether a statement is testimonial including consideration of the "age and sophistication of the declarant." *Id.* at 518.

On the other hand, various courts have chosen to employ what they call an "objective test" which incorporates all the facts *except* for the age of the declarant. For instance, in *State v. Snowden*, 385 Md. 64, 90, 867 A.2d 314, 329 (2005), the Maryland Supreme Court rejected consideration of the child's age in *Crawford* analysis, stating, "...we are satisfied that an objective test, using an objective person, rather than an objective child of that age, is the appropriate test for determining whether a statement is testimonial in nature..."[10] This so-called "objective

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[10] Other cases which hold to the same basic logic include such cases as: *State v. Henderson*, 129 P.3d 646 (Kan. Ct. App. 2006); *People v. Sithavath*, 118 Cal. App. 4th 1396, 13 Cal.Rptr.3d 753 (2004) (rejecting the notion that "an 'objective witness' should be taken to mean an objective witness in the same category of persons as the actual witness-here, an objective four-year-old"); *State v. Mack*, 337 Or. 586, 101 P.3d 349 (2004). See also *State v. Grace*, 107 Hawaii 133, 111 P.3d 28, *cert. denied* 107 Hawaii 348, 113 P.3d 799 (2005), in which the court employed an "objective observer" analysis; see also *California v. Sisavath*, 188 Cal. App.4th 1396 (2004) (if an "objective observer" would reasonably

test" seemingly focuses its inquiry solely on that elusive individual known as the "reasonable person", without assigning this person an age. In other words, if this ageless person with no discernible attributes can objectively foresee that a statement could be used in a subsequent investigation or prosecution, then the statements are testimonial.

As Professor Friedman and some courts above have opined, a test which considers the age of the child is actually a more truly objective one. The actual intent of the declarant is not considered. This would be a subjective test. Rather, an objective test would be one in which *all* the relevant factual circumstances surrounding the giving of the statement in question are considered, *including* the age of the declarant. Under this truly objective test, the declarant's age would be taken into account in objectively determining if that person was "bearing testimony" (i.e. knew they were "on the record").

Two years ago, in *Iowa v. Bentley*, No. 07-886, this Court was asked to grant certiorari to address the issue of a ten-year-old child declarant's statements to a forensic interviewer. In that case, the child was told that the police were listening. See *State v. Bentley,* 739 N.W.2d 296 (Ia. 2007). Ultimately, the Iowa Supreme Court stated that, "We leave for another day the decision whether statements made by children during interrogations conducted by forensic interviewers without police participation are testimonial." *Id.* at 300, n.3. The instant case is

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foresee that a statement would be used prosecutorially, then statement is "testimonial).

unclouded by any police presence or involvement, direct or indirect, in the rendering of the statement at issue. Police were not involved in the events which produced the statements elicited by the child protection services worker nor were they involved "behind the scenes." There is no evidence that suggests that the police requested those interactions, provided any direction in their handling or had any input whatsoever into what would happen. As the Pennsylvania Superior Court aptly noted, Geist did not even notify the police of what he found out from his discussion with A.A.; rather, he contacted his supervisor. See *Commonwealth v. Allshouse*, 924 A.2d 1215, 1223 (Pa. 2007). The statement in question was produced by a child talking to a child protection worker wearing blue jeans and no badge or sign of authority on the porch of her grandparents' house. The caseworker did not tell the child that she could be a witness in a court proceeding or that her statements could be used later against anybody. Tr. 103-107 (9/19/05). As the Superior Court also pointed out, "There was simply no semblance of formality during the interview." *Id.* at 1223. Thus, unlike a formal forensic interview, nothing about the situation would have signaled to the child that her statements would be the basis of a future legal claim. The child was only 4-years-old at the time of the giving of the statement. Despite the above, a majority of the Pennsylvania Supreme Court found that the CPS worker was a law enforcement officer for *Crawford* purposes. However, Justice Baer (with Justice Greenspan joining), in a concurring opinion, found that the caseworker was not an agent of law enforcement and that, accordingly, the primary purpose test was inapplicable. He then focused on the "objective witness" test of *Crawford,* stating,

> "Considering all of the circumstances of Geist's interview, an objective person in A.A.'s position would not reasonably have anticipated that her statements might be used in a later prosecution of Appellant. There is no evidence that Geist elicited A.A.'s statements to preserve them for trial. The lack of formality connected with the interview would have objectively indicated to A.A. that she was not "bearing testimony" against Appellant. An objective witness could have reasonably believed that her statement to Geist was made to ensure the children's safety." *Commonwealth v. Allshouse,* 985 A.2d 847, 871 (Pa. 2009) (Baer, concurring).

Thus, this case provides an excellent vehicle for this Court to set limitations on the definition of what a "police interrogation" or "law enforcement officer" is as it is referred to in *Crawford* and *Davis* as well as determining the effect that a child's very young age has in making a determination of whether she is "bearing testimony."

CONCLUSION

If this Honorable Court grants *certiorari,* your Respondent would ask it to consider the following questions: 1) Does consideration of what the "objective witness" would "reasonably believe" about his statements include consideration of the age of the child (i.e. when does a child "bear testimony"?; 2) Are statements produced by child protection service caseworkers' interviews of children "police interrogations?"; and, if applicable, 3) Even if a child protection caseworker is deemed to be a police officer, should the "primary purpose test", as announced in

Davis, be automatically used in all circumstances when a young, child declarant makes a statement to the caseworker?

Respectfully Submitted,

Jeffrey D. Burkett
Counsel of Record
Jefferson County District Attorney
200 Main Street, Jefferson County Courthouse
Brookville, PA 15825
(814) 849-1628
jburkett@jeffersoncountypa.com

Counsel for Respondent

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