No. 13-1352

In The
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF FOR THE STATE OF NEW MEXICO AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

GARY K. KING
Attorney General of New Mexico
JOEL JACOBSEN
Assistant Attorney General
Counsel of Record
111 Lomas Blvd. SW, Suite 300
Albuquerque, NM 87102
(505) 222-9061
Jacobsen@nmag.gov

KAY CHOPARD COHEN
Executive Director
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
99 Canal Center Plaza, Suite 330
Alexandria, VA 22314

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE AMICI CURIAE

Amici Curiae State of New Mexico and the National District Attorneys Association appear in support of the State of Ohio.[1] If adopted nationwide, the Ohio Supreme Court's erroneous interpretation of the Confrontation Clause would effectively prevent the prosecution of many acts of cruelty against the Nation's children. As the State of New Mexico's chief law enforcement officer, the undersigned Attorney General has a powerful interest in ensuring that the Ohio Supreme Court's interpretation of the Confrontation Clause is rejected.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." This case presents questions of importance to prosecutors nationwide. The

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

issues here relate to statements made by a child to a teacher concerning child abuse, and how those statements should be treated under the Confrontation Clause. All 50 states have mandatory reporting laws for teachers and many others who become aware of child abuse. How statements made by children to mandated reporters should be treated under the Confrontation Clause is a matter affecting a significant percentage of child abuse prosecutions. Your Amici have expertise in such prosecutions, and believe that additional briefing will be of assistance to the Court.

SUMMARY OF THE ARGUMENT

This brief addresses the Petition's second question. Prosecutions of child abuse frequently turn on the question whether a young child's out-of-court statements are testimonial for purposes of the Confrontation Clause. Under the Court's recent precedent, whether a statement is testimonial often depends on the purpose of the interrogation. But when the expectations of interrogator and declarant diverge radically, as they do in cases involving young children and likewise when an adult becomes the subject of an undercover investigation, the purpose of the interrogation changes depending on whose perspective is adopted, that of the interrogator or that of the declarant. In irreconcilable-purpose cases involving adult declarants, courts universally evaluate the circumstances from the perspective of the declarant.

But when the witness or victim is a young child, some courts instead adopt the perspective of the interrogator, as the Supreme Court of Ohio did below. The interrogator-centric analysis employed by the Supreme Court of Ohio is contrary to the Court's precedent, inconsistent with the Confrontation Clause's text, and illogical. It also exemplifies an unjust double standard that should be eliminated from American constitutional jurisprudence.[2]

ARGUMENT

In criminal trials since *Crawford v. Washington*, 541 U.S. 36 (2004), a critical and often decisive question is whether a given out-of-court statement is classified as "testimonial" or "non-testimonial." If hearsay is classified as testimonial, its admissibility is severely restricted when the declarant is unable to testify at trial, as for example when the declarant is a child too young and traumatized to undergo what this Court has aptly called "the ordeal of cross-examination." *Mattox v. United States*, 156 U.S. 237, 244 (1895).

The proper classification of a hearsay statement is often dependent on the perspective adopted to evaluate it. This is most true under the purpose-based

[2] Although the term "interrogator" is generally employed in the cases, outside of police-citizen encounters "listener" is often factually more accurate.

test adopted in *Davis v. Washington*, 547 U.S. 813 (2006), and developed in *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). When the interrogator's purpose is to gather evidence pertinent to a police investigation or criminal prosecution, but the declarant's purpose is entirely unrelated to that goal, whether the declarant's words are deemed testimonial will depend entirely on whose perspective counts.

The Ohio Supreme Court evaluated the circumstances surrounding L.P.'s statements from the teachers' perspective. It analyzed the questions, not the answers. That was backwards, for "it is the statements, and not the questions, that must be evaluated under the Sixth Amendment." *Bryant,* 131 S. Ct. at 1160 n.11. Applying the incorrect standard as it did, the court answered incorrectly the Petition's second question.

Part I begins by canvassing the various statements about perspective found in the Court's recent Confrontation Clause jurisprudence. Part II examines the Ohio Supreme Court opinion in this case, showing that its interrogator-centric analysis is based on a misreading of *Davis*. Part III then shows how some courts, including Ohio's, have established an intolerable double standard in cases involving young witnesses and victims. The brief asks the Court to direct lower courts to apply the same standards and perform the same Confrontation Clause analysis in cases involving children as they already do in cases involving adult witnesses who, like young children but for

vastly different reasons, do not understand their words will be used as evidence in a criminal trial.

I. The Treatment of Perspective in the Court's Recent Confrontation Clause Cases.

Under *Davis*, determining whether an out-of-court statement is testimonial requires identifying the "primary purpose of the interrogation." 547 U.S. at 822. In evaluating the purpose of the interrogations in *Davis* and its companion case, *Hammon v. Indiana*, the Court considered "all of the circumstances," *id.* at 828, from a variety of perspectives. Both Michelle McCottry's perspective and that of the 911 operator were explicitly considered. *Id*. at 827. In analyzing *Hammon*, the Court considered what the officers saw and heard upon first arriving, *id.* at 829-30, and then considered matters from Ms. Hammon's perspective. *Id.* at 830-32. Because its analysis considered the perspectives of both interrogator and declarant, the Court carefully employed the phrase "purpose of the interrogation" rather than "the declarant's purpose" or "the interrogator's purpose."

As developed below, the Ohio Supreme Court misinterpreted *Davis's* phrase to mean "the officer's reason for initiating the interrogation." *See Bryant*, 131 S. Ct. at 1160 n.11 (explaining the origin of that misreading). *Bryant* definitively cleared up that misunderstanding when it held that "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator." *Id.* at 1160 (footnote omitted).

The obvious logical difficulty presented by the *Davis/Bryant* formulation is that an interrogation, being an incorporeal abstraction, "does not have a purpose except for the purposes assigned to it by the participants." *Lollis v. State*, 232 S.W.3d 803, 806 n.3 (Tex. App. – Texarkana 2007). That difficulty is of little practical significance when the purposes of declarant and interrogator coincide, as they generally do when interrogations occur in formal and solemn circumstances. For example, when an interrogation occurs in court or a deposition, the interrogator's purpose is to obtain testimony and the witness's purpose is to provide it. There is no other reason for them to conduct themselves in such a stilted, formalized manner. Given this mutuality of individual purpose, the purpose of the interrogation is self-evident: to produce testimony. *Crawford*, 541 U.S. at 68 (testimony is testimonial).

A detective's formal stationhouse interview with a witness or suspect resembles in both layout and procedure an *ex parte* deposition. Whether the purpose of the stationhouse interrogation is evaluated from the perspective of the interviewer or that of the interviewee, the result will generally be the same: its purpose is to obtain or memorialize verbal evidence relevant to a criminal investigation and possible prosecution. *Id*. at 52, 68. *See also Davis*, 547 U.S. at 836-37 (Thomas, J., concurring in the judgment in part and dissenting in part).

Taking an additional step across the spectrum from formal to informal, when a police officer asks a

victim of domestic violence to draft an affidavit, and the victim complies, their purposes coincide. *Id.* at 820. Whether the drafting of the affidavit is evaluated from the perspective of the Peru, Indiana officer who provided the form to Amy Hammon, or from Ms. Hammon's perspective as she filled it out, its purpose was to generate evidence for use in the police investigation of her complaint and any possible future prosecution.

However, once police-citizen encounters move more decisively from formal to informal, and from solemn to chaotic, it becomes increasingly difficult to say that the purposes of the participants coincide. Two significant problems quickly present themselves: the participants may, and as a practical matter almost invariably will, be acting on a multiplicity of purposes; and the purposes of the interrogator and declarant may be inconsistent or even contrasting. But if the participants do not agree on the purpose of their exchange, how can a single purpose be meaningfully assigned to the exchange itself?

The Court addressed some of these difficulties in *Bryant*. The majority identified the purpose of the interrogation by considering the situation from both the officers' perspective and that of the dying man. *Id*. at 1160-61, 1162. It found a shared purpose in their response to the emergency: everyone was motivated to deal with the unfolding tragedy. *Id.* at 1162-67.

Justice Scalia argued in dissent that the situation should instead have been evaluated strictly from the speaker's perspective:

> The declarant's intent is what counts. . . . For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.

Id. at 1168-69 (Scalia, J., dissenting).

Justice Ginsburg wrote separately to agree that "'[t]he declarant's intent is what counts.'" *Id.* at 1176 (Ginsburg, J., dissenting).

The *Bryant* majority agreed with the dissents in principle that "[a]t trial, the defendant's statements, not the interrogator's questions, . . . must therefore pass the Sixth Amendment test." *Id*. at 1162. *Accord id.* at 1160 n.11 ("it is the statements, and not the questions, that must be evaluated under the Sixth Amendment"). To avoid the inherent subjectivity of an inquiry into the speaker's purpose, however, the majority directed lower courts to consider the perspective of "a reasonable victim in the circumstances of the actual victim." *Id.* at 1161. That inquiry, in turn, is part of a larger inquiry into "the purpose that reasonable participants would have had." *Id*. at 1156.

Since *Crawford,* then, members of this Court have disagreed from whose perspective the circumstances surrounding an interrogation should be evaluated. Three possibilities have found their advocates: that only the declarant's intent counts; that the perspectives of both interrogator and declarant must be considered together; and that the purposes of hypothetical reasonable participants govern.

The one approach that no justice has ever championed is the one adopted by the Ohio Supreme Court below: evaluating the declarant's statement by ignoring the declarant's perspective, considering only the purpose and expectations of the interrogator. *Cf. Bryant*, 131 S. Ct. at 1162 (rejecting that approach).

II. The Ohio Supreme Court Improperly Evaluated the Circumstances from the Perspective of the Teachers, Who Were Not the Witnesses.

The Court's post-*Crawford* cases have not previously dealt with conversations between private parties. Accordingly, the Court has not yet decided whether the *Davis*/*Bryant* test applies in any context outside of police-citizen encounters. The Ohio Supreme Court's designation of mandated reporters as agents of law enforcement is singularly unpersuasive for the reasons set forth in Ohio's merits brief. (Pet. Br. pt. II.) However, the admissibility of small children's disclosures to a wide variety of adults remains a contentious and active area of litigation, with courts

disagreeing about the constitutional admissibility of children's out-of-court statements to medical personnel, forensic interviewers, police officers and social workers. *See, e.g., State v. Arnold*, 933 N.E.2d 775, ¶¶ 20-28 (Ohio 2010) (noting some of the national split in authority); *id.* ¶¶ 68-69 (Pfeifer, J., dissenting) (same). Courts generally employ the *Davis*/*Bryant* primary purpose test to evaluate children's statements made to adults belonging to all of these classes, and even statements to family members. *See, e.g., Seely v. State*, 282 S.W.3d 778, 788 (Ark. 2008).

In accordance with Sup. Ct. R. 37.1, Amici do not duplicate Ohio's arguments, which they support. Rather, Amici's focus is on the double standard that has developed in Confrontation Clause jurisprudence around the Nation, by which many courts, and not just the Ohio Supreme Court, alter their analysis depending on the age of the hearsay declarant.

A. The Ohio Supreme Court Viewed the Circumstances of the Case Strictly from the Teachers' Perspective.

Davis and *Bryant* require a determination of "the primary purpose of the interrogation." 547 U.S. at 822. The Ohio Supreme Court rewrote that requirement in a subtle way, stating: "the United States Supreme Court's Confrontation Clause analysis requires that we ascertain the 'primary purpose' for the questioning." *State v. Clark*, 999 N.E.2d 592, ¶ 16

(Ohio 2013). The court's paraphrase is ambiguous, when viewed in isolation, because "questioning" could function either as a noun or a verb. As a noun, it is a synonym for "interrogation." As a verb, however, it describes the actions of the questioner.

The next sentence of its opinion reveals that the Ohio Supreme Court was using the word as a verb, directing inquiry into the subjective purpose of the questioner: "Here, the circumstances objectively indicate that the primary purpose *of the questions asked* of L.P. was not to deal with an existing emergency but rather to gather evidence. . . ." 999 N.E.2d 592, ¶ 16 (italics added). The court was inquiring into the "purpose of the questions," examining the teachers' reasons for asking what they asked. Under the *Davis*/*Bryant* dual-perspective test, that much would have been appropriate – if it had been coupled with an even more searching inquiry into the purpose of the three-year-old's answers. *Bryant,* 131 S. Ct. at 1160-61. But the Ohio Supreme Court did not engage in the second inquiry. It looked into the subjective purpose of the teachers and then stopped. At no point did the opinion consider why the child – the actual Sixth Amendment witness – spoke. It did not analyze the substantive evidence itself, but only what prompted its creation. The court effectively deemed the child irrelevant to his own words.

Confirming that it was applying an interrogator-focused inquiry, the court held: "When teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements

obtained are testimonial for purposes of the Confrontation Clause." *Id.* ¶ 17. This passage exclusively examined the imputed primary purpose of the teachers. Subsequently the court held that "the nature and focus *of the questions asked* indicate a purpose. . . ." *Id.* ¶ 31 (italics added). The opinion did not examine the nature and focus *of the answers given*.

The court acknowledged that *Bryant* requires the statements and actions of the declarant be examined, *id.* ¶ 31, but it did not examine them. It did not engage in "a combined inquiry that accounts for both the declarant and the interrogator." *Bryant*, 131 S. Ct. at 1160 (footnote omitted). Nor, for that matter, did it apply Justice Scalia's proposed alternative test and ask whether the child "[made] the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused." *Id.* at 1169 (Scalia, J., dissenting). By viewing the circumstances solely from the teachers' perspective, it failed to examine the purpose behind the actual words that constituted the evidence against Respondent. Instead it ruled the child's words constitutionally inadmissible based on the uncommunicated knowledge of other people. That approach was illogical, contrary to this Court's precedent, and unrelated to either the text or purpose of the Confrontation Clause.

B. The Ohio Supreme Court's Interrogator-Centric Analysis Was Based on a Misreading of *Davis* that Was Cleared Up in *Bryant*.

The decision below relied heavily on the analysis found in *State v. Siler*, 876 N.E.2d 534 (Ohio 2007). In *Siler*, the court purported to find an inconsistency between *Crawford* and *Davis*. Specifically, while *Crawford* directed attention to the declarant's reasonable expectations, *Davis* supposedly directed focus elsewhere when the interrogation was conducted by police – even though *Crawford,* too, involved a police interrogation, a point the *Siler* opinion ignores. *Id.* ¶¶ 28-29.

Siler's interrogator-centric analysis was built on the fundamental misreading of *Davis* identified in *Bryant*:

> Some portions of *Davis*, however, have caused confusion about whether the inquiry prescribes examination of one participant to the exclusion of the other. *Davis*' language . . . could be read to suggest that the relevant purpose is that of the interrogator. In contrast, footnote 1 in *Davis* explains, "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."

Bryant, 131 S. Ct. at 1161 n.11 (citations and one comma omitted).

The body of the *Bryant* opinion cleared up that misunderstanding, clarifying that the proper test is the "combined inquiry." *Id.* at 1160-62. *Siler* appeared in October, 2007, over three years before *Bryant*. But the opinion below, issued two and a half years after *Bryant*, all-too-faithfully followed *Siler*, persisting in its misreading of *Davis* long after that misreading ceased to be excusable.[3]

III. Some Lower Courts, Including Ohio's, Switch Between Perspectives Depending on the Age of the Speaker, Creating and Enforcing an Intolerable Double Standard.

The *Davis*/*Bryant* dual-perspective test produces predictable results when the participants share a mutual purpose, as they typically do when conversing in formal and solemn circumstances. But in less formal circumstances, as the purposes of the participants diverge, the test becomes increasingly difficult to apply, until we reach the situation in which the participants have completely different and irreconcilable purposes. One classic example is presented by undercover investigations. An officer working undercover, or an informant wearing a wire, obviously proceeds with the purpose of obtaining evidence. Just as obviously, the declarant – the unwitting "witness"

[3] Exactly the same misreading can be found in, *e.g., State v. Beadle*, 265 P.3d 863, ¶¶ 22-29 (Wash. 2011), another post-*Bryant* case.

of the Sixth Amendment – does not intend to provide evidence. In such situations the "purpose of the interrogation" flips to its opposite depending on whose perspective is adopted.

A second classic example is presented by the young victim or witness who for developmental reasons cannot know that his or her words might become evidence in a future criminal trial.

A. Small Children Do Not Understand What It Means to Provide Evidence and Therefore Have No Purpose to Provide It.

"A child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge." *J. D. B. v. North Carolina,* 564 U.S. ___, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (2011) (citations omitted). Peer-reviewed social science research confirms what common experience tells us: young children do not understand what a criminal prosecution is, and still less that their words may constitute evidence in one. *See, e.g.,* Catherine Maunsell, et al., "What happens in court? The development of understanding of the legal system in a sample of Irish children and adults," *Irish Journal of Psychology*, 21(3-4):215-226 (2000); Anna Emilia Berti and Elisa Ugolini, "Developing

Knowledge of the Judicial System: A Domain-Specific Approach," *The Journal of Genetic Psychology* 159(2):221-236 (1998); Rhona H. Flin, et al., "Children's Knowledge of Court Proceedings," *British Journal of Psychiatry* 80(3):285-297 (1989); Karen Saywitz, "Children's Conceptions of the Legal System," *Perspectives on Children's Testimony*, 131-157 (S.J. Ceci, et al., eds., 1989); Amye Warren-Leubecker, et al., "What Do Children Know about the Legal System and When Do They Know It?," *Perspectives on Children's Testimony* 158-183 (S.J. Ceci, et al., eds., 1989).

When the facts are viewed from L.P.'s perspective, there is no possibility that he spoke with the expectation of producing evidence for use at a future criminal trial. *Crawford,* 541 U.S. at 51-52. Nor is there any possibility that he understood himself to be providing the equivalent of in-court testimony. *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 310-11 (2009); *Davis*, 547 U.S. at 823-25; *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting). The same holds true when the facts are evaluated from the perspective of a reasonable person in L.P.'s circumstances, because those circumstances so prominently include his age. *Bryant,* 131 S. Ct. at 1161-62.

When evaluated from the declarant's perspective, in short, a young child's revelation of eyewitness knowledge about a violent crime, or disclosure of abuse, will almost never have been done for the purpose of providing evidence for use in a future legal proceeding. But most adults who hear the child's

words will realize their legal significance, and the adult's follow-up questions might sometimes aim to establish facts potentially relevant to a future prosecution, depending on the adult's professional responsibilities. In cases where the *Davis*/*Bryant* dual-perspective test applies, how can such irreconcilable perspectives give rise to a single "purpose of the interrogation"? Unavoidably, courts must adopt the perspective of one participant or the other.

Courts frequently encounter just such radically divergent purposes in cases involving adult declarants, too. When the declarant is an adult, courts invariably adopt the declarant's perspective.

B. In Cases Involving Unwitting Adult Witnesses, Courts Uniformly View the Exchange from the Perspective of the Declarant.

In *Davis,* this Court described "statements made unwittingly to a Government informant" as "clearly nontestimonial." 547 U.S. at 825 (paraphrasing holding of *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987)). However, the Court left it to lower courts to explain why that result was clear. They have done so by viewing such exchanges strictly from the point of view of the declarant. The most pertinent examples concern police or FBI investigations into past crimes. For example, in *United States v. Johnson*, 581 F.3d 320 (6th Cir. 2009), one prisoner recorded another's detailed description of a long-unsolved

robbery-murder. The unwitting witness, O'Reilly, implicated his co-perpetrator Johnson, against whom the recording was eventually introduced. The prisoner equipped with the recording device obviously acted with the primary purpose "to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822. If the exchange were viewed from his perspective, it was clearly testimonial. But the Sixth Circuit adopted the opposite perspective, holding that "[b]ecause O'Reilly did not know that his statements were being recorded and because it is clear that he did not anticipate them being used in a criminal proceeding against Johnson, they are not testimonial and the Confrontation Clause does not apply." *Johnson*, 581 F.3d at 325.

Other circuits uniformly employ the same declarant-centered approach, finding an adult witness's unwitting admissions non-testimonial despite the interrogator's evidence-gathering purpose. *United States v. Dargan,* 738 F.3d 643, 651 (4th Cir. 2013); *United States v. Dale,* 614 F.3d 942, 956 (8th Cir. 2010); *United States v. Smalls,* 605 F.3d 765, 778 (10th Cir. 2010); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008).

Thus in cases involving official investigations into past crimes, in which the interrogator is consciously gathering evidence but the declarant does not know it, courts analyze the declarant's statements from the declarant's perspective – so long as the declarant is an adult.

In drug cases, too, courts routinely evaluate recorded exchanges from the perspective of the declarant, not that of the undercover officer or informant who elicited the incriminating remarks. *See, e.g., United States v. Tipton*, 572 Fed.Appx. 743, 747 (11th Cir. 2014); *Brown v. Epps*, 686 F.3d 281, 288 (5th Cir. 2012). The Second Circuit applied the same declarant-focused approach in a terrorism case, evaluating surreptitiously-recorded statements strictly from the perspective of the declarant, placing no importance on the agents' evidence-gathering purpose. *United States v. Farhane*, 634 F.3d 127, 162-63 (2d Cir. 2011) (relying on then-Judge Sotomayor's opinion in *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004)). Similarly, in a pimping prosecution, a prostitute's negotiation with an undercover officer was nontestimonial because "it cannot be said that a reasonable person, placed in the escort's position at the time the audiotape was made, would have anticipated the statements would later be used for prosecutorial purposes." *Helms v. State*, 38 So.3d 182, 187 (Fla. Dist. Ct. App. 2010).

In all of these cases, and many more that could be cited to the same effect, the listener and the adult declarant had radically divergent purposes for engaging in conversation, and radically divergent expectations about the use to which the declarant's words would be put. It was not possible to identify a "purpose of the interrogation" by amalgamating such incompatible purposes and expectations. When the declarant is an adult, courts uniformly resolve the

dilemma by examining the circumstances surrounding the exchange from the perspective of the declarant, not that of the interrogator.

C. By Contrast, Many Courts, Including Ohio's, Evaluate a Child's Hearsay Statement from the Perspective of the Adult Who Heard It, Creating and Enforcing a Double Standard.

The Illinois Appellate Court once declared: "The issue presented by the admission of hearsay is constitutionally identical in a child sex abuse case and a murder case, and the response of the sixth amendment is identical in both types of cases." *People v. Garcia-Cordova*, 963 N.E.2d 355, ¶ 66 (Ill. App. Ct. 2d Dist. 2011). That might sound like nothing more than boilerplate commitment to equal justice under law, but many courts effectively hold just the opposite, and a few do so openly, such as *State v. Moreno-Garcia*, 260 P.3d 522 (Or. Ct. App. 2011), where the court declared that "in the context of a child abuse investigation, the victim's purpose in making a statement is less important than the other factors." *Id.* at 527. By openly acknowledging a double standard for cases involving children, the Oregon court was being more forthright than the many other courts that enforce the double standard without acknowledging it. The double standard consists of switching from the perspective of the speaker to that of the listener – or even sometimes adopting the

perspective of an uninvolved third party, something never found in cases involving adult declarants.

For example, in a very recent case, the Sixth Circuit held that a three-year-old child's statements to his therapist were testimonial. In so holding, the court did not consider the child's perspective. Nor, for that matter, did the court evaluate the sessions from the therapist's point of view. Rather, it considered only the perspective of a police officer who arranged the sessions, who was not even present when the statements were made. *McCarley v. Kelly,* 759 F.3d 535, 546 (6th Cir. 2014), *cert. pet. filed* (No. 14-430, Oct. 8, 2014). But, as shown above, when police arrange for a cellmate to record the conversation of an adult, the Sixth Circuit evaluates the resulting incriminating statements from the perspective of the declarant. *Johnson*, 581 F.3d at 325. Only when the declarant is a child does the Sixth Circuit ignore the declarant's perspective and evaluate the exchange from the point of view of police officers working behind the scenes.

The Iowa Supreme Court similarly ignored the speaker's perspective in a case in which a victim of sexual abuse was unavailable at trial because the defendant's brother had murdered her in retaliation for her disclosure. The state sought to introduce a video of her pre-trial disclosure. The Iowa Supreme Court ruled that "an analysis of the purpose of the statements from the declarant's perspective is unnecessary." *State v. Bentley*, 739 N.W.2d 296, 300 (Iowa 2007). Instead the court examined the circumstances

of the recorded interview from the point of view of the police officers involved in arranging for the interview, even taking into consideration the motivations of various unnamed government officials responsible for establishing the institution under whose auspices the interview took place. *Id.* at 299-300. Like the Sixth Circuit in *McCarley,* it examined the declarant's statements from every perspective but the declarant's own.

In *Bobadilla v. Carlson*, 570 F.Supp.2d 1098 (D. Minn. 2008), *aff'd*, 575 F.3d 785 (8th Cir. 2009), the district judge declared that to consider the perspective of a young child "would require carving out an exception" to *Crawford. Id.* at 1111. He seemed not to appreciate that by *refusing to* consider the child's perspective he was doing the very thing he deplored, making a special rule applicable only in child-abuse cases.

The Ohio Supreme Court's Confrontation Clause jurisprudence embodies the double standard. Its opinion in this case evaluated the declarant's statements from the listeners' perspective. But when the declarant is an adult, the court switches perspectives. *State v. Stahl*, 855 N.E.2d 834, ¶ 36 (Ohio 2006) (evaluating adult declarant's hearsay statement from the declarant's point of view).[4]

---

[4] Under the analysis adopted by the Ohio Supreme Court in this case, the result in *Stahl* would have been different if the declarant had been a child, for the hearsay statement in that

(Continued on following page)

D. A Young Child's Hearsay Statements Should Be Analyzed Under the Same Standard Applied to Statements of an Unwitting Adult Witness.

A young child answering an adult's questions has no idea that she or he is providing evidence for a criminal prosecution. The child's lack of comprehension has a different basis than that of the unwitting adult witness in the scenarios described above, but the fact that both the child and the adult do not understand they are providing information for a criminal prosecution is the same. When evaluating statements made by a young child or by an unwitting adult witness, the radical asymmetry between the expectations of interrogator and declarant forces a court to choose one perspective or the other from which to view the circumstances in which the declarant spoke. The choice of perspective determines whether the hearsay will be deemed testimonial or not. But because it is the answers that must pass Sixth Amendment muster, not the questions, the only permissible option is to adopt the perspective of the person who is the "witness" described in the Sixth Amendment. If the Ohio Supreme Court had done so in this case, it would inevitably have found that the three-year-old's statements were non-testimonial because little L.P. had no more idea that he was providing evidence for use in a future criminal trial

---

case was made to a nurse, a mandated reporter. Ohio Rev. Code Ann. § 2151.421(A)(1)(b).

than does a drug dealer blithely negotiating a deal with an undercover agent. There is no justification for courts adopting the perspective of the declarant when the declarant is an adult but switching to the perspective of the listener when the declarant is a child.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

GARY K. KING
Attorney General of New Mexico
JOEL JACOBSEN
Assistant Attorney General
Counsel of Record
111 Lomas Blvd. SW, Suite 300
Albuquerque, NM 87102
(505) 222-9061
Jacobsen@nmag.gov

KAY CHOPARD COHEN
Executive Director
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
99 Canal Center Plaza, Suite 330
Alexandria, VA 22314