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 OF SOUTHWESTERN LAW STUDENT BERNADETTE M. BOLAN, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

NORMAN M. GARLAND
Counsel of Record
MICHAEL M. EPSTEIN
AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL
3050 WILSHIRE BLVD.
LOS ANGELES, CA 90010
(213) 738-6774
amicusproject@swlaw.edu

TABLE OF CONTENTS

TABLE OF APPENDICES iii

TABLE OF AUTHORITIES v

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT........................... 2

ARGUMENT.. 4

I. UNDER THE PRIMARY PURPOSE TEST OF CRAWFORD AND ITS PROGENY, L.P.'S STATEMENTS WERE TESTIMONIAL 4

A. Statements Do Not Require A Formal Interrogation To Be Testimonial 5

B. The Primary Purpose Test Should Include Both The Questioner's Intent And The Declarant's Understanding........................ 7

C. The Totality Of Circumstances Objectively Indicates That L.P.'s Statements To His Teachers Were Testimonial 12

II. ACKNOWLEDGING THAT A CHILD'S STATEMENTS ARE TESTIMONIAL WILL NOT NECESSARILY HANDICAP PROSECUTING CHILD ABUSERS...... 17

A. Utilizing Court Accommodations For Children Is Necessary And Feasible 18

1. Maryland v. Craig Is Still Good Law 19

2. State Legislation Can, And Does, Provide Solutions For Victim Witnesses 21

B. States Must Amend Competency Rules To Allow Young Children To Testify In Criminal Cases 25

1. Systems Like Ohio's Evidence System Are Flawed 26

2. Competency Rules That Allow For Child Testimony Will Aid Prosecution 29

3. The Solution: Evidence Rules That Do Allow For Children To Be Able To Testify 32

CONCLUSION 34

TABLE OF APPENDICES

APPENDIX A 1a

TAXONOMY OF STATE ALTERNATIVE TESTIMONIAL METHODS 1a

Statutes That Allow For CCTV Testimony 1a

A. Statutes That Allow For CCTV Testimony 1a

B. Statutes That Allow For Pre-Recorded Testimony 3a

C. Statutes That Allow For Alternative Methods Of Testimony 4a

D. Case Law That Allows For Alternative Testimony 5a

E. How States Handle Face-to-Face Confrontation 5a

APPENDIX B 7a

TAXONOMY OF WITNESS COMPETENCY RULES 7a

A. States With Rules Similar To Fed. R. Evid. 601 .... 7a

B. Rules That Make Competency Conditional 8a

C. Rules With Special Provisions For Child Victims 10a

TABLE OF AUTHORITIES

CASES

Blanton v. State,
978 So.2d 149 (Fla. 2008) 21

Bugh c. Mitchell,
329 F.3d 496 (6th Cir. 2003) 31

California v. Green,
399 U.S. 149 (1970)...29

Crawford v. Washington,
541 U.S. 36 (2004) ....*passim*

Davis v. Washington,
547 U.S. 813 (2006) ....*passim*

Delaware v. Fensterer,
474 U.S. 15 (1985) 30, 31

Horn v. Quarterman,
508 F.3d (5th Cir.) 20

Hutchinson v. Cobb,
90 A.3d 438 (Maine 2014).....................................22

Maryland v. Craig,
497 U.S. 836 (1990) ....*passim*

Michigan v. Bryant,
131 S.Ct. 1143 (2011) ....*passim*

Ohio v. Roberts,
448 U.S. 56 (1980) 10, 19

People v. Phillips,
315 P.3d 136 (Colo. Ct. App. 2012) 21

Roadcap v. Commonwealth,
653 S.E.2d 620 (Va. Ct. App. 2007).......................21

State v. Arroyo,
935 A.2d 975 (Conn. 2007) 21

State v. Blanchette,
134 P.3d 19 (Kan. Ct. App. 2006) 21

State v. Griffin,
202 S.W.3d 670 (Mo. Ct. App. 2006) 21

State v. Jackson,
717 S.E.2d 35 (N.C. Ct. App. 2011) 21

State v. Stock,
256 P.3d 899 (Mont. 2011) 21

State v. Vogelsberg,
724 N.W.2d 649 (Wis. Ct. App. 2006) 21

United States v. Kappell,
418 F.3d 550 (6th Cir. 2005) 20

United States v. Owens,
484 U.S. 541...29, 30, 31

United States v. Rosenau,
870 F. Supp. 2d 1109 (W.D. Wash 2012) 21

CONSTITUTION

U.S. Const. Art. VI, cl 2 26

STATUTES

Ala. Code 1975 § 15-25-3(e) (Lexis 2011) 33

Alaska Stat. § 12.45.046(a)(2) (2012) 23

Alaska Stat. § 12.45.046(f) (2012) 23

Conn. Gen. Stat. Ann. § 54-86g(a) (West 2009) 22

Del. Code. Ann. Tit. 10, § 4302 (2014) 33

Ga. Code Ann., § 17-8-55(f) (Supp. 2014) 24

RULES AND REGULATIONS

Fed. R. Evid. 601 25

Ohio R. Evid. 601 27

Ohio R. Evid. 807 28

OTHER AUTHORITIES

Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 594-96 (2005) 31

INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence, Constitutional Criminal Procedure, Trial Advocacy, and Advanced Criminal Procedure. He writes about Evidence and Criminal Procedure. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. Amicus Bernadette M. Bolan is an upper-division J.D. candidate at Southwestern Law School with extensive academic and professional interest in Constitutional Law.

Amici have neither interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation of the Confrontation Clause.

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[1] All parties have consented in writing 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. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. This brief was researched and prepared in the Amicus Project Practicum at Southwestern Law School.

SUMMARY OF THE ARGUMENT

This brief assumes that individuals required to report suspected abuse to law enforcement serve as state actors for the purposes of the Confrontation Clause. The focus, accordingly, is the second question the Court certified when it granted certiorari in this case: do a child's out-of-court statements to a teacher in response to the teacher's questions about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

A conversation between a teacher and her student differs significantly from formal interrogation by law enforcement officers, which is most indicative of an exchange that results in testimonial statements under this Court's Confrontation Clause jurisprudence. Yet, formality is not the touchstone of testimonial statements and a declarant may make testimonial statements without interrogation. Other factors should and may be determinative under the primary purpose test.

Where the declarant is a young child and the questioner is a public school teacher with a statutorily mandated duty to report child abuse, a one-sided primary purpose test is ill-suited. Especially when the intent of the participants conflict, or are not easily ascertained, the primary purpose test must give weight to the perspective of both the declarant and the questioner. And when the relevant circumstances objectively show that the declarant's statements could "potentially [be] relevant to later criminal prosecution," such statements should be deemed testimonial. *Davis v.*

Washington, 547 U.S. 813, 822 (2006). Isolating the questioner's or the declarant's point of view produces neither a fair nor a logical result under such a test.

The relevant circumstances in this case indicate that an objective witness would know that L.P.'s statements to his teachers could and would be used for later criminal investigation and prosecution. This conclusion does not threaten the ability to prosecute child abuse or domestic violence cases; Ohio's rules of evidence do.

A trial court's determination that a person is incompetent to be a witness cannot defeat an accused's confrontation rights. Some states' competency rules stand in the way of resolving this problem, as Ohio's did in this case. Protective measures exist to facilitate child and abuse victim testimony when such potential witnesses have problems that arguably prevent them from coming to court. These measures include providing alternative settings and amending competency rules to permit even very young child victims and adults with problems to testify. Amending and utilizing existing state laws to accommodate children and abuse victims provides prosecutors with the ability to use such witnesses' statements, while upholding an accused's constitutional rights.

ARGUMENT

I. UNDER THE PRIMARY PURPOSE TEST OF CRAWFORD AND ITS PROGENY, L.P.'S STATEMENTS WERE TESTIMONIAL

Assuming, *arguendo*, that a child's statements to a public school teacher with a statutorily mandated duty to report abuse may be testimonial, the analysis does not stop there. The mere fact that a statement was made to a mandatory reporter does not itself make that statement testimonial, just as the mere fact that a statement was made to a police officer does not alone make that statement testimonial.

In defining "more precisely which police interrogations produce testimony," *Davis*, 547 U.S. at 822, the Court distinguished statements made during an "ongoing emergency" from those made after the immediate threat was over. Intertwined with this distinction, the Court also identified a divide between statements that relate "what is happening" from those that relate "what happened." *Id.* at 830. Justice Scalia, writing for the Court, opined that statements are testimonial when they serve as "a substitute for live testimony, because they do precisely what a witness does on direct examination." *Id.* To determine objectively the primary purpose of a conversation, and its resulting statements, a court should evaluate both the listener's and declarant's perspectives, as well as the totality of the surrounding circumstances.

Under each of these guidelines, a young child's statements, given while he was isolated from the rest

of the classroom, and in response to repeated questioning from public school teachers with a statutory mandate to report abuse, fall much closer to the formal end of the continuum outlined in *Crawford*; such statements are clearly not just "offhand, overheard remark[s]." *Crawford*, 541 U.S. at 51. When a child leaves school uninjured and returns the next day with visible marks of physical harm, as L.P. did, there is no reason to suspect that another child in the classroom is at fault. After the teacher elicits information that supports suspicion of wrongdoing outside the school, even through observation and deduction alone, any questioning beyond that becomes investigative with a purpose likely leading to criminal charges. Here, there was no ongoing emergency, L.P.'s statements were about something that had happened, and in answering his teacher's interrogative questions, he did exactly what witnesses do. Accordingly, L.P.'s statements were testimonial.

A. Statements Do Not Require A Formal Interrogation To Be Testimonial

To determine a conversation's primary purpose, a court "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 131 S. Ct.1143, 1156 (2011). Statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S., at 822. Formality and interrogation are two parts of the testimonial test

that often are present together. Formality helps to distinguish an interrogation from a casual conversation. Yet, neither of these elements are necessarily a requirement for a declarant's statement to be "testimonial."

For example, assume a man happens to see a police officer and approaches her. Before she can say anything to him, he tells her that he observed a crime that morning. He states who committed the act, where it occurred, and at what time. This situation lacks both formality and interrogation yet there is little doubt that these statements are testimonial. These statements, though freely offered in a casual setting, make accusations and provide information that may be used to investigate a crime and prosecute the identified person.

Formality, while relevant to the totality of circumstances, cannot be an absolute requirement. Although many American cases applying the Confrontation Clause have "involved testimonial statements of the most formal sort . . . which invites the argument that the scope of the Clause is limited to that very formal category," early English cases that gave rise to the American constitutional right "did not limit the exclusionary rule to prior court testimony and formal depositions." *Davis*, 547 U.S. at 826 (pointing to *Crawford*, 541 U.S. at 52, and n. 3). Furthermore, "although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution,' informality does not necessarily indicate the presence of an emergency or

the lack of testimonial intent." *Bryant*, 131 S.Ct. at 1160 (quoting *Davis*, 547 U.S. at 822).

The act of questioning itself cannot stand as an absolute requirement, either. Unsolicited accusations and reports of past events cannot be categorically barred from being testimonial. The focus should be on whether the declarant's statements established facts of a past crime and identified a perpetrator for the perceived purpose of investigation and prosecution – not whether the information was asked for or voluntarily given.

B. The Primary Purpose Test Should Include Both The Questioner's Intent and the Declarant's Understanding

This Court, in *Bryant*, clearly reaffirmed *Davis's* determination that both the questioner's and declarant's perspectives must be taken into account. Justice Sotomayor, writing for the Court and joined by Justices Roberts, Kennedy, Bryer, and Alito, asserted that proposition: "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator." 131 S.Ct. at 1160. A primary purpose test that alone relies on the questioner's intent or the declarant's perspective is inadequate. This is particularly so in situations where a questioner acts with more than one purpose, such as when she wants to help a victim declarant reach safety or heal from a trauma. The combined inquiry is even more necessary when the declarant is a young child with minimal understanding of the prosecutorial system. While the questioner's and the declarant's perspectives may diverge, one perspective

cannot uniformly trump the other. "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1156.

Evaluating the listener's intent and purpose can be challenging. A questioner often acts with the dual purposes of trying to help *and* gathering evidence potentially usable in prosecution. Many public employees and mandated reporters often so act. The very nature of their positions makes it difficult to discern which, if either, purpose was primary. The questioner in such a position may give the purposes equal weight. Except for instances where it is abundantly clear that one purpose outweighs the other, there may be no clear answer to the question. It is not so clear whether reporting abuse is primarily protective or prosecutorial in nature when the two motives are entwined.

One of the surest ways to end abuse is to charge and convict an abuser; efforts to help and prosecute are inseparably intertwined. Where one purpose cannot be separated from the other, it becomes quite difficult to determine which purpose is "primary," from either perspective. Even prosecution itself can be characterized as primarily for the purpose of protecting and helping individuals and society as a whole. Teachers regularly act to protect their students while they are at school but their concerns may also extend to potential harm a student faces outside of school. Although these concerns may extend beyond the classroom, however, a teacher's

power to act often does not. Here is such an instance where the purpose to protect and to potentially prosecute are inseparable, for the only way a teacher can effectively protect a student from dangers outside of school is to report her knowledge and suspicions to law enforcement authorities in the hope that they will apprehend the abusive or neglectful person posing harm to the student. Without more information, it is difficult to determine whether the student declarant's statements should be considered testimonial.

A declarant is the single element that all Confrontation Clause issues share. Not even a listener is a constant, for testimonial statements may be made by written affidavit, without a specific individual recipient in mind. The declarant's intent, therefore, inarguably weighs heavily in the primary purpose analysis. Justices Scalia and Ginsburg singled out this perspective as the one that matters most in their dissents in *Bryant*, 131 S.Ct. at 1168-69, 1176. Yet, relying solely on the declarant's perspective is also problematic. If the declarant's understanding alone determines whether the statement is testimonial, young children's statements may well never be found to be testimonial, even though such a result would violate the purpose and spirit of the Confrontation Clause. When a child is incapable of understanding the prosecutorial consequences of an accusatory statement he makes, this raises questions of reliability – reliability being what most demands testing through cross-examination. Under a test that relies on the declarant's point of view alone, when a declarant cannot fully understand how his words

might be used for potential prosecution, those words will be labeled non-testimonial and not subject to this assessment of reliability. The result is the frustration of the *Crawford*-based Confrontation Clause test adopted by this Court when it rejected the *Roberts* reliability-based test: questionable statements go to a jury without allowing the accused the ability to test the witness's reliability by cross-examination. *See Ohio v. Roberts*, 448 U.S. 56 (1980), abrogated by *Crawford*, 541 U.S. 36.

Statements made by someone possibly incapable of understanding the future consequences of those statements are exactly those that an accused should be allowed to test through his right to confront witnesses against him. To say that a statement is not testimonial because the declarant did not understand that it could be used at trial, and therefore the accused is not guaranteed the right to challenge that statement, is illogical. Although the Court has moved away from the *Roberts* reliability test, reliability itself still plays a role in Confrontation Clause analysis. As the Court said in *Crawford*, 541 U.S. at 61:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point

> on which there could be little dissent), but about how reliability can best be determined.

A declarant's inability fully to comprehend the potential uses, and the consequences thereof, of his own statements immediately raises a red flag. If the declarant doesn't understand these things, who is to say that those statements were made honestly and sincerely? "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

To further avoid such a result, the primary purpose analysis should be from the objective viewpoint of a normally functioning, reasonable adult, rather than a reasonable child of the declarant's age. This would also apply in situations where the declarant is an adult with diminished faculties. Such a perspective would also protect against the threat of manipulating young children to make accusatory statements to state agents that are classified as non-testimonial. Bringing the child to a medical examiner or therapist could allow these state agents to collect non-testimonial statements even where the child clearly relates the facts of a crime and implicates an accused, because a young child in a doctor's office may believe that he is there for medical evaluation and nothing more. There is no reason a young child would know that his statements to a doctor, with no police present, would be used at a later trial, unless explicitly explained to him. Thus, a holding that statements to mandatory

reporters may be testimonial, but relying solely on the young child's perspective could produce such a result. The questioner's intent may be to gather information for trial but many children would not suspect this when speaking to a health professional. Accounting for both the questioner's intent and evaluating the declarant's statements from a reasonable adult's objective perspective reduces the possibility of such a manipulation.

Finally, requiring that the declarant understand the consequences of prosecution for his statements to be testimonial has no clear or workable boundary. Even an older child who understands that his statements will be used to punish someone and testifies in court cannot fully conceptualize what it means to sentence someone to years in confinement. How much of the prosecution process, and its consequences, must the declarant understand? Does the witness need to know every possible combination of prison terms, community service, and fines that an accused could be sentenced with for his statements before the court and jury to be testimonial?

C. The Totality of Circumstances Objectively Indicates That L.P.'s Statements To His Teacher Were Testimonial

At first glance, a conversation between a teacher and a student during schools hours looks nothing like a formal police interrogation. Unlike the recent cases before the Court, the questioners in this case are neither police officers nor 911 operators. In *Crawford*, *Davis*, *Hammon*, and *Bryant*, the presence

or absence of formal interrogation was easier to evaluate because the Court's jurisprudence has developed guidelines for assessing interactions with the police. What is informal in one situation, however, is not necessarily so in another. In this case, isolating L.P. and questioning him repeatedly was more formal than typical classroom conversation. Furthermore, the totality of circumstances objectively indicates that the teachers gathered information about a past event, there was no ongoing emergency, such as existed in *Davis* and *Bryant*, and, in answering his teachers' questions, L.P "[did] what witnesses do." *Davis*, 547 U.S. at 830.

While it is unclear where exactly on the spectrum of formality a conversation must fall to produce testimonial statements, the Court's emerging definitions of what is testimonial has included statements made outside of official interrogation settings. In *Davis*, the Court determined that "[i]t was formal enough that [the declarant]'s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 829 (citing App. in No. 05–5705, at 34). Although L.P.'s teachers did not act to separate him from the accused, they did draw him away from the other children and take him to the office. Typically, children spend most of their time together, with a few supervisory figures out taking charge of the group. Isolating a child in a school office, where he is outnumbered by adults, and asking the same questions repeatedly is, for a young school child, the equivalent of police interrogation at the station for an adult. Even a three year old boy

would understand that something unusual was going on, and that it was serious enough to involve three authority figures (Whitley, Jones, Cooper).

A teacher's inquiries do not necessarily produce an interrogation leading to testimonial statements. Children fall in the play yard and quarrel with each other. It is unreasonable to expect a teacher to report every single injury to legal authorities without more information that may rule out these possibilities. When it is clear that an injury was sustained outside of school, obviously any information gathered may also be used in criminal prosecution against the source of those injuries. Whitely and her co-workers undoubtedly had the motive to make sure that L.P. was not harmed at school and to protect him from whatever harm he faced outside of school. The strong presence of a purpose to help, however, does not necessarily eliminate entirely the additional purpose to gather information for possible prosecution.

Ramona Whitley was confident that when L.P. left school on March 16, 2010, he did not have any injuries, but came to school with several marks on him the next day, March 17. 2010. Whitley adamantly affirmed that L.P. left school on March 16 uninjured no less than five times in her testimony. J.A. 31, 34, 36, 50. Whether the injuries came from an adult, another child, or an accident, they were severe enough to initiate investigation into L.P.'s home situation. Knowing that L.P.'s injuries were sustained sometime between leaving and returning to school was enough to trigger Whitley's duty to report suspected abuse. True, the statute does not

require reporters take on an investigation, but here the women did so. The report itself would serve Whitley's purpose to protect L.P. but there was no need for any of the teachers or school administrators to get a name from L.P.

At a point where the questions are to obtain information about a past crime, and not to address an ongoing emergency, a police officer starts to collect testimonial statements; so too at this point does the teacher. Repeatedly asking a child "who did this to you?" after a child has said that he fell down, regardless of that answer's truth, amounts to leading the child to report a specific person as an abuser. The totality of the circumstances that produced L.P.'s statements, however, also shows the teachers' desire to learn what had happened and, ultimately, who had inflicted the injury. The teachers did this with the full intent to report to the proper authorities and with the understanding that the report could and would be used in a subsequent criminal investigation and trial.

A reasonable adult in L.P.'s position would have known that his statements accusing "Dee" of inflicting his injuries could be used later in prosecution. From L.P.'s perspective, too, his statements were testimonial. Young children who are not informed about the intricacies of the American justice system are not entirely naïve. Children understand the concept of "getting in trouble" and subsequent consequences very early in their lives. While the declarant's purpose may not exactly align with the interrogator's purpose, interrogation seeking information for investigation

or prosecution is likely to alert the child to what is at stake. While L.P., at just three and a half years old, may not have understood that what he said could eventually be used in a criminal trial, he did understand that he was "telling on" someone and that there might be negative implications for that. Why else would such a young child repeatedly change his story about how he sustained his injuries? L.P. was reluctant to tell on "Dee." He said, multiple times, that he did not know what had happened or that he fell. Although L.P. had a number of injuries that he probably received over a number of incidents, it is unlikely that all three of these answers were correct. Whether he was instructed to lie, or did so of his own accord, this change in response and hesitance suggest that he understood the implications of reporting the responsible person to an authority figure.

Here, the teachers' preliminary questions in the lunchroom and classroom seem casual enough, and may not have crossed the line into interrogation. At the point at which L.P. provided "Dee's" name, however, he had been removed from his classroom, taken to the office, and had been questioned repeatedly by three different authority figures. While formal interrogation need not be an absolute requirement, it was present here, particularly from a young child's perspective.

Furthermore, although there may be dual purposes to a teacher's questioning, the argument that the repeated questioning here was *primarily* to ensure a child's continued safety fails. This totality of

circumstances objectively indicates that L.P.'s statements were testimonial.

II. ACKNOWLEDGING THAT A CHILD'S STATEMENTS ARE TESTIMONIAL WILL NOT NECESSARILY HANDICAP PROSECUTING CHILD ABUSERS

Direct statements from children are invaluable in abuse cases, particularly because child abuse usually happens behind closed doors and often is accompanied by threats, urging children not to tell anyone what has happened. It may be that a child's statements are the only evidence against the accused. A finding that those statements are testimonial requires that the child be available to the accused for cross-examination in order for those statements to be allowed into evidence. This requirement poses a challenge to the prosecution's case when the declarant is reluctant to testify, or if the court finds the declarant is incompetent to do so. Finding that a child's statements to his teacher are testimonial in nature will not prevent prosecutors from getting those crucial statements into evidence. While there is reluctance to make a young child testify, whether due to issues of trauma, competence, or any combination thereof, the justice system is not without recourse.

Rules that allow courts to better accommodate children opens the door for such recourse. This Court has stated that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or

her accusers in court." *Maryland v. Craig,* 497 U.S. 836, 853 (1990). In so stating, the Court made clear that a defendant's rights, while they may be outweighed, do still exist. *Id.* at 841-42. The solution, therefore, is to preserve Sixth Amendment rights while modifying the approach to children's testimony. The need to protect abuse victims should be accomplished by changing how courts are permitted to treat children, not by cutting off defendants' rights entirely in the name of promoting the public interest.

A. Utilizing Court Accommodations For Children Is Necessary And Feasible.

When a child is unavailable, for whatever reason, testimonial statements cannot be admitted into evidence, unless the accused had a prior opportunity to cross-examine. Skewing the concept of "testimonial" to gain admissibility into evidence of such statements is not an appropriate solution. The potential unavailability due to fear of re-traumatization can be addressed by alternative court room procedures tailored to children. These accommodating procedures are also valuable when a child's statements, while non-testimonial, do not meet a hearsay exception. The Court's holding that "so long as a trial court makes . . . a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case" makes way for such accommodations. *Craig*, 497 U.S. at 860.

1. *Maryland v. Craig* is Still Good Law

Back when the Court still examined potential Confrontation Clause violations under the *Roberts* reliability test, *Ohio v. Roberts*, 448 U.S. 56 (1980), one particular case stressed the importance of protecting child abuse victims. *Craig,* 497 U.S. at 841–42, 857. The Court held that when testifying in a defendant's presence would traumatize a child witness, courts may employ alternative methods to take the child's testimony. *Id.* The Court determined that allowing a child in such circumstances to testify via closed-circuit television did not violate the Confrontation Clause and noted that while face-to-face confrontation at trial may be preferred, this preference "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849.

The *Crawford* decision that abrogated *Roberts* did not invalidate the *Craig* holding. *Crawford* and *Craig* determined two related, but very different issues. *Crawford* addressed whether an out-of-court statement is testimonial, and therefore subject to the confrontation right, while *Craig* dictated the manner in which in-court testimony may be taken to satisfy that right. *Crawford* examined, and set out new rules for evaluating, the nature of an out-of-court statement for Confrontation Clause purposes. *Craig*, however, provided guidance for the delivery of testimony during trial.

Although *Crawford* reshaped the category of out-of-court "testimonial" statements, it did not provide any indication that the methods of delivering live

testimony in court as approved in *Craig* should change. The *Crawford* Court focused on the Confrontation Clause's procedural guarantee that a statement's "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. In finding that a defendant's right to confrontation did not absolutely require a face-to-face meeting between the defendant and the witness at trial, *Craig* opened the door for live testimony, subject to direct and cross-examination, to be transmitted to the court through close circuit television. If an alternative method for providing testimony, such as CCTV, provides the accused the opportunity to cross-examine the testifying witness, the lack of direct, in-person contact should not violate the accused's right to confrontation.

Lower courts, both federal and state, have generally continued to utilize *Craig's* reasoning to facilitate alternative methods of obtaining child testimony in the years since *Crawford*. *See, e.g., United States v. Kappell*, 418 F.3d 550, 554–55 (6th Cir. 2005) (finding that because *Crawford* only applies to testimonial hearsay from declarants who do not testify at trial, children's testimony taken outside of the court room did not violate the defendant's confrontation rights, particularly when the defendant acquiesced); *State v. Henriod*, 131 P.3d 232, 237-38 (Utah 2006) (noting "testimonial hearsay is significantly different from a child's testimony that is given under oath during trial and simply is transmitted into the courtroom by electronic means"). Those courts have rejected the notion that *Crawford* and *Craig* are incompatible. *See also Horn*

v. Quarterman, 508 F.3d 306, 318–19 (5th Cir. 2007); *United States v. Rosenau*, 870 F. Supp. 2d 1109, 114 (W.D. Wash. 2012); *State v. Stock*, 256 P.3d 899, 904 (Mont. 2011); *Blanton v. State*, 978 So.2d 149, 157–58 (Fla. 2008) (Bell, J., specially concurring); *State v. Arroyo*, 935 A.2d 975, 992 (Conn. 2007); *People v. Phillips*, 315 P.3d 136, 151 (Colo. Ct. App. 2012); *State v. Jackson*, 717 S.E.2d 35, 39 (N.C. Ct. App. 2011); *Roadcap v. Commonwealth*, 653 S.E.2d 620, 625 (Va. Ct. App. 2007); *State v. Blanchette*, 134 P.3d 19, 29–30 (Kan. Ct. App. 2006); *State v. Griffin*, 202 S.W.3d 670, 680–81 (Mo. Ct. App. 2006); *State v. Vogelsberg*, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006).

The discretion that *Craig* affords courts in determining how to take and present testimony is broad and should be utilized accordingly.

2. State Legislation Can, And Does, Provide Solutions For Victim Witnesses

Although a child may have the capacity to understand the implications of testifying in a traditional setting, few courts would hesitate to declare an abused child unavailable as a witness; the risk of re-traumatization is indeed very real. However, through CCTV, and similar methods of presenting out-of-court testimony to a jury, such as pre-recorded video, a child may testify in a more relaxed environment, away from spectators and possibly even the accused. A child's ability to give testimony away from the accused is particularly advantageous when part of the child's inability to

testify in the traditional courtroom is premised on intimidation by the defendant. Where testimony is given and taken in a location away from the accused, the accused is prevented from exercising his confrontation right to the fullest, but the ability to exercise that right is not lost entirely. The accused's representative counsel must still be allowed to be present, and to cross-examine the child

All but two states, Maine, and North Dakota, allow by statute for testimony via closed-circuit televised (CCTV), video, or other electronic means. *See* Appendix A. Even where legislation does not expressly permit this type of testimony, case law indicates that the practice has been accepted. *See* *Hutchinson v. Cobb*, 90 A.3d 438 (Maine 2014) (allowing a child gave testimony in chambers when his father waived the rule that every witness must give testimony in open court).

Whether the accused has a right to be in the room with the child witness varies from state to state, but even the states that do not guarantee such presence maintain the accused's right to have counsel cross-examine the witness. *See* Appendix A. For example, Connecticut statutory provisions allow for the defendant to be in the room with the child during his testimony, "except that the court may order the defendant excluded from the room or screened from the sight and hearing of the child." Conn. Gen. Stat. Ann. § 54-86g(a) (West 2009). If the defendant is excluded from the room or screened from sight, "the court shall ensure that the defendant is able to observe an d hear the testimony of the child" and "the defendant shall be able to consult privately with

his attorney at all times during the taking of the testimony." *Id.*

Beyond CCTV, states can additionally accommodate children through even more creative solutions. Alaska's Code of Criminal Procedure, for example, provides in part that:

> The court … may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.

Alaska Stat. § 12.45.046(a)(2) (2012). Alaska permits courtroom modifications for children even when the court does not find that normal court procedures will result in the child's inability to effectively communicate. Alaska Stat. § 12.45.046(f) (2012). Upon considering the surrounding circumstances, the court may "supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance. " *Id.* Additionally, the court may:

> (1) allow the child to testify while sitting on the floor or on an appropriately sized chair;
> (2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and

> comfort appropriate to the child's developmental age; and
> (3) order a recess when the energy, comfort, or attention span of the child warrants.

Id.

Some states leave the alternative approaches to child testimony more open-ended. Admirably in alignment with technological advances, Georgia grants courts broad leeway in delivering child testimony. The relevant statute, Ga. Code Ann., § 17-8-55(f) (Supp. 2014), states in part:

> The method used for allowing a child to testify outside the physical presence of the accused shall allow the judge, jury, and accused to observe the demeanor of the child as if he or she were testifying in the courtroom. When such testimony occurs it shall be transmitted to the courtroom by any device or combination of devices capable of projecting a live visual and oral transmission, including, but not limited to, a two-way closed circuit television broadcast, an Internet broadcast, or other simultaneous electronic means.

State legislative bodies can, and do, amend these statutory provisions; Georgia's innovative statute went into effect just last July, 2014.

Providing a child's testimony through special accommodations does have the potential to be

prejudicial to the defendant. But where the alternatives are the prosecution losing the ability to present valuable statements, or the accused losing his constitutional rights, this model serves to address the concerns of both parties.

B. States Must Amend Competency Rules To Allow Young Children to Testify In Criminal Cases

While the majority of states provide for alternative methods of obtaining child testimony, the witness competency rules in half of the states allow trial judges to find that very young children are incompetent to testify as witnesses. *See* Appendix B. Under such rules, a witness's lesser cognitive capacity stands in the way of using statements essential to the prosecution of crimes against children. A child's credibility, like any other witness's, should be an issue for the triers of fact to decide, not one that prevents testimony entirely. The Advisory Committee notes for Fed. R. Evid. 601 provide:

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo.Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness

> wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509.

Allowing young children to testify in criminal cases, even when they have a limited cognitive capacity, enables the prosecution to use valuable statements and guarantees the accused will get to confront the witnesses against him.

1. Systems Like Ohio's Evidence System Are Flawed

Although hearsay exceptions for unavailable declarants may still facilitate the admissibility of a child's non-testimonial statements, such evidentiary rules are entirely ineffective for testimonial statements in criminal prosecutions when they contradict the Confrontation Clause. The United States Constitution's Supremacy Clause, U.S. Const. Art. VI, cl. 2, demands this hierarchy of authority:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the constitution

> or laws of any state to the contrary notwithstanding.

The *Crawford* opinion, 541 U.S. at 61, reaffirms that rules of evidence cannot be used to escape the mandate of the Confrontation Clause:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." … Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, *but it is a procedural rather than a substantive guarantee.* It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Ohio's evidence rules have, in this case, produced such a disastrous result in terms of violation of the accused's confrontation rights. In Ohio, "[e]very person is competent to be a witness except . . . [t]hose of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio R. Evid. 601. Because L.P. was unable to provide consistent and accurate answers to questions

about matters such as the adult he lived with, the trial court declared that he was incompetent to testify under the provisions of this rule. J.A. 5-12. Consequently, the state lost its ability to use L.P.'s testimonial statements to prosecute Clark.

Even if L.P.'s out-of-court statements were not testimonial, Ohio's competency requirement would prevent the prosecution from admitting them into evidence through a hearsay exception. Traditional hearsay exceptions and exemptions are largely based on the rationale that qualifying statements are made under circumstances that ensure reliability and trustworthiness. When a trial court finds that a child is not competent to be a witness, it defies logic to conclude that the child's contested hearsay statements are reliable enough to be within a traditional hearsay exception. Ohio has enacted a special hearsay exception for children's statements in abuse cases, as has a number of other jurisdictions. Ohio's exception requires that "circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement." Ohio R. Evid. 807. A child cognitively incapable of consistently telling the truth for trial most likely would not have been capable of doing so months, or even years, before when he made the contested statements.

Therefore, when a court declares a child incompetent to testify, that declaration creates a likely possibility that the child's statements cannot be admitted *at all*. The "incompetent to testify" label itself destroys the reliability of the child's earlier

statements for hearsay purposes. The child's unavailability prevents the accused from the cross-examination required under the Confrontation Clause and therefore also bars the statement from evidence. A better solution is to allow the child to testify and to leave any credibility issues to the jury.

2. Competency Rules That Allow For Child Testimony Will Aid Prosecution

Restrictive competency rules prevent young children from testifying in court, severely hindering the prosecution's ability to enter statements into evidence. If a court does not permit a child to testify, the prosecution is unable to use any of the child's out-of-court testimonial statements no matter how valuable they are. However, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)).

While a young child may be too shy to testify, have memory difficulties, or give inconsistent statements, these factors should not prevent the child from appearing for cross-examination. The requirements to be available for cross-examination are rather limited. In *United States v. Owens*, 484 U.S. 5541, 561-61 (1988) the Court stated:

> Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and

> responds willingly to questions. Just as with the constitutional prohibition [of the Confrontation Clause], limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss . . . .

The victim witness in *Owens* remembered earlier identifying the accused during an interview with an F.B.I. agent but, due to injuries he suffered from the assault, he was unable to remember the incident of the assault itself. The Court concluded that the witness's memory loss did not render him unavailable for cross-examination. *Id.* at 560-61. The Court recalled its decision in *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985), quoting:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Taken together, the rules from *Crawford*, *Owens*, and *Fensterer* allow for a child to be available for cross-examination, even though he may be a poor witness on the stand. Accordingly, allowing a child to testify, even with flawed capacity, would allow the prosecution to admit any of the child's prior out-of-court statements without raising a Confrontation Clause issue.

Lower courts have commonly ruled that although a child witness may be evasive this does not alter the convention that a witness who willingly responds to questions is constitutionally available for cross-examination to satisfy the confrontation requirement. *See* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 594-96 (2005) (reviewing how courts have handled young children as witnesses available for cross-examination). An example discussed by Professor Mosteller is a case in which the United States Court of Appeals for the Sixth Circuit approved of a trial court's decision that allowed a young girl, who was four at the time she reported sexual abuse to her mother, to be available for cross-examination. The Sixth Circuit found that her appearance at trial, about one year later, satisfied the confrontation requirement. *Bugh v. Mitchell*, 329 F.3d 496, 510-11 (6th Cir. 2003). The girl only testified verbally about one act of abuse; she gave the remainder of her responses by nodding negatively or affirmatively or by shrugging. *Id.* at 502-04. The court, relying on the *Owens* and *Fensterer* opinions, explained that "[w]hile counsel's cross-examination of [the girl] may

not have yielded the desired answers, and [she] may not have recalled the circumstances surrounding her previous statements, counsel clearly had the opportunity to expose such infirmities, by pointing out [her] youth and lack of memory." *Id.* at 508. Furthermore, the court added, "the jury had the opportunity to observe [the girl's] demeanor, thus permitting the jury to draw its own conclusions regarding her credibility as a witness." *Id.*

Young children may be incapable of comporting themselves the same way adults do in court. Still, this should not bar them from being available for cross-examination. Testimonial deficiencies, such as non-verbal responses, should be factors for the jury to evaluate, not absolute bars to testifying. Witness competency rules do not need to be construed to allow for just any level of cognitive capacity, but these rules should at least permit child victims to testify in criminal cases. This allowance, complying with an accused's constitutional right to confront witnesses against him, will permit the prosecution to use these victim's statements to the fullest extent.

3. The Solution: Evidence Rules That Do Allow For Children To Be Available To Testify

Determinations of a child's competency to testify is not an issue in all jurisdictions. Federal Rule of Evidence 601, as noted, declares all persons to be competent. Half of the states have adopted the Federal Rules of Evidence without altering the substance of Rule 601. *See* Appendix B.

A few states go a step further to ensure admissibility of a child victim's statements and instead expressly declare that when a child is a victim or a witness of the crime being prosecuted, that child is absolutely competent to testify in the trial for that prosecution. *See* Appendix B. In Alabama, for example, state legislation provides that:

> Notwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense, or sexual exploitation, *shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding.* The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony. The court may also allow leading questions of the child witnesses in the interest of justice.

Ala. Code 1975 § 15-25-3(e) (Lexis 2011) (emphasis added).

Delaware expressly provides that a child's inability to understand the oath does not make him incompetent to testify and that a "child's age and degree of understanding of the obligation of an oath may be considered by the trier of fact in judging the child's credibility." Del. Code Ann. tit. 10, § 4302 (2014). Particularly where a child's statements are the crux of the evidence against an allegedly abusive defendant, the prosecution should seek to reinforce the statements' reliability through some form of the

child's testimony. Rather than sacrifice these valuable statements to equitably protect an accused's Sixth Amendment rights, state legislation should broaden competency rules to allow more child testimony, through whichever channels best serve the child's emotional and psychological needs, so that both the defendant and prosecution's procedural needs are met. Courts will proactively protect child victims, if enabled to do so.

Even if L.P.'s statements were not testimonial, they must have still satisfied some hearsay exception to be admitted into evidence. These hearsay exceptions are permitted on the premise that certain circumstances create a guarantee of trustworthiness for out-of-court statements. The determination that L.P. was incompetent to testify at trial, because he could not provide the same answers to the same questions in a competency hearing, is inconsistent with the notion that L.P.'s statements qualified for a hearsay exception and prevented the prosecution from using these statements.

CONCLUSION

The Court should affirm the Ohio Supreme Court's ruling and find children's statements to statutorily mandated reporters to be testimonial when the totality of circumstances indicates objectively that the statements would likely be relevant in a criminal investigation and prosecution. Such an affirmation will not restrain efforts to prosecute child abusers. A child's statements that are crucial to a prosecution can be admitted into evidence if state court rules accommodate child witnesses. Abuse

prosecutions must not proceed if the only way to make the case is by violating an accused's constitutional rights.

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Respectfully submitted,

Norman M. Garland
Counsel of Record
Michael M. Epstein
Amicus Project at
Southwestern Law School
3050 Wilshire Blvd.
Los Angeles, CA 90010
(213) 738-6774
amicusproject@swlaw.edu

APPENDIX A

TAXONOMY OF STATE ALTERNATIVE TESTIMONIAL METHODS

The following information details the different ways in which the states allow for children to provide testimony in abuse cases. No state is without statutes or case law that allows for the courts to enable a child to provide testimony away from the full courtroom, or from the face-to-face presence of a defendant. The laws allowing courts to facilitate child testimony range from those that specifically allow for CCTV only, to those that broadly allow for any alternative method the trial court sees fit. As technology develops, and becomes easier and less costly for courts to use, state legislative bodies should amend existing laws to allow for the courts to employ these newer methods.

A. Statutes That Allow For CCTV Testimony

ALABAMA: Ala. Code 1975 § 15-25-3 (LexisNexis 2011).
ALASKA: Alaska Stat. § 12.45.046 (2012).
ARIZONA: Ariz. Rev. Stat. § 13-4253 (2010). Arizona also allows for video recorded testimony. See below.
ARKANSAS: Ark. Code Ann. § 16-43-1001 (1999).
CALIFORNIA: Cal. Penal Code § 1347 (West Supp. 2014).
COLORADO: Colo. Rev. Stat. § 16-10-402 (2014).

CONNECTICUT: Conn. Gen. Stat. Ann. § 54-86g (West 2009).

DELAWARE: Del. Code Ann. tit. 11, § 3514 (2007).

FLORIDA: Fla. Stat. Ann. § 92.54 (West Supp. 2015). Fla. Stat. Ann. § 92.55 (West Supp. 2015).

GEORGIA: Ga. Code Ann. § 17-8-55 (Supp. 2014).

HAWAII: Haw. Rev. Stat. § 616-1 (1993).

ILLINOIS: 725 Ill. Comp. Stat. Ann. 5/106B-5 (West Supp. 2014).

IOWA: Iowa Code Ann. § 915.38 (West Supp. 2014).

KANSAS: Kan. Stat. Ann. § 22-3434 (2007).

KENTUCKY: Ky. Rev. Stat. Ann. § 421.350 (West 2005).

LOUISIANA: La. Rev. Stat. § 15:283 (Supp. 2014). MARYLAND: Md. Code Ann. Crim. Proc. § 11-303 (LexisNexis 2008).

MINNESOTA: Minn. Stat. Ann. § 595.02 (2010).

MISSISSIPPI: Miss. Code Ann. § 13-1-405 (2012); Miss. R. Evid. 617.

NEW JERSEY: N.J. Stat. Ann. § 2A:61B-1 (West 2014). N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 2014).

NEW YORK: N.Y. Crim. Proc. Law §§ 65.00 - 30 (McKinney 2004).

OHIO: Ohio Rev. Code Ann. § 2152.81 (West 2005); Ohio Rev. Code Ann. § 2945.481 (West 2006); Ohio Rev. Code Ann. § 2937.11 (West 2006).

OKLAHOMA: Okla. Stat. Ann. tit. 10, § 1-4-506 (West 2009); Okla. Stat. Ann. tit. 12, §§ 2611.3 - 2611.10 (West 2009).

OREGON: Or. Rev. Stat. § 419C.025 (2013). Oregon also allow for telephone appearances.

RHODE ISLAND: R.I. Gen. Laws § 11-37-13.2 (Supp. 2014).

SOUTH DAKOTA: S.D. Codified Laws § 26-8A-30 (Supp. 2014).

TENNESSEE: Tenn. Code Ann. § 24-7-120 (Supp. 2014). Tennessee has another statute, below, which addresses pre-recorded video separately.

TEXAS: Tex. Crim. Proc. Code Ann. art. 38.071 (West Supp. 2014).

B. Statutes That Allow For Pre-Recorded Testimony

These states allow for pre-recorded testimony to be used in trial, when the defendant has had an opportunity to cross-examine the witness during the making of the recording or the witness also appears to testify in court.

INDIANA: Ind. Code Ann. § 35-37-4-6 (2012).

MISSOURI: Mo. Ann. Stat. § 491.680 (2011).

NEBRASKA: Neb. Rev. Stat. Ann. § 29-1926 (2008).

NORTH DAKOTA: N.D. Cent. Code § 31-04-04.1 (2010). Pre-recorded video is permitted for sexual assault cases only.

SOUTH CAROLINA: S.C. Code Ann. § 16-3-1550 (Supp. 2014); S.C. Code Ann. § 19-1-180 (2014).

TENNESSEE: Tenn. Code Ann. § 24-7-117 (2000). Pre-recorded video is permitted for sexual assault cases only.

UTAH: Utah R. Crim. Proc. 15.5 (2014).

VERMONT: Vt. R. Evid. 807 (2003).

VIRGINIA: Va. Code Ann. § 18.2-67.9 (2014); Va. Code Ann. § 63.2-1521 (2012).

WASHINGTON: Wash. Rev. Code Ann. § 9A.44.150 (West).

WEST VIRGINIA: W. Va. Code Ann. §§ 62-6B-2 to -4 (LexisNexis 2014); W. Va. Child Abuse And Neglect Proceedings, R. 9 (LexisNexis 2014).
WISCONSIN: Wis. Stat. Ann. § 972.11 (West Supp. 2014).

ARIZONA: Ariz. Rev. Stat. § 13-4252 (2010). Arizona does not require that the defendant have had an opportunity to cross-examine the child, but if the video is used in trial, either party may call the witness to testify and be cross-examined.

C. Statutes That Allow For Alternative Methods Of Testimony

Idaho, Nevada, and New Mexico broadly allow for "alternative" means of testimony, meaning any form of testimony by which the child does not testify in an open forum, in the presence and full view of the finder of fact, or allowing for all of the parties to be present to participate and view or be viewed by the child.

IDAHO: Idaho Code Ann. §§ 9-1801-1808 (2010).
NEVADA: Nev. Rev. Stat. Ann. §§ 50.500-540; 50.570-610 (LexisNexis 2012).
NEW MEXICO: N.M. Stat. Ann. § 38-6A-1 to -9 (LexisNexis 2014).
MASSACHUSETTS: Mass. Gen. Laws Ann. ch. 278, § 16D (West 2014). Massachusetts allows for testimony via CCTV, recorded video, and simultaneous electronic means.
MICHIGAN: Mich. Ct. R. § 3.923; Mich. Comp. Laws Ann. § 712A.17b (West 2012). Michigan allows for CCTV and speaker telephone and "other

similar electronic equipment."

MONTANA: Mont. Code Ann. § 46-16-229 (2013). Montana allows for testimony via "two-way electronic audio video communication."

NORTH CAROLINA: N.C. Gen. Stat. § 15A-1225.1 (2013). North Carolina allows for any form of remote testimony, as long as the court can observe the demeanor of the child and the defense counsel is present.

PENNSYLVANIA: 42 Pa. Cons. Stat. Ann. §§ 5982, 5984.1, 5985 (West 2014). Pennsylvania allows for CCTV and other "contemporaneous" methods, such as streaming via the Internet.

WYOMING: Wyo. R. Cr. Proc. 26 (2014). Wyoming allows for testimony by "electronic means."

D. Case Law That Allows For Alternative Testimony

MAINE: In *Hutchinson v. Cobb*, 90 A.3d 438 (Me. 2014), the court allowed a child to give testimony in chambers when the father waived M. R. Civ. Proc. 43(a), which requires every witness to give testimony in open court.

NEW HAMPSHIRE: *State v. Hernandez*, 986 A.2d 480 (N.H. 2009) upheld the use of CCTV where the circumstances meet the factors articulated in *Craig*.

E. How States Handle Face-to-Face Confrontation

The following information comes from the same statutes as those listed above for each state.

These states only allow for the defendant's attorney to be in the room during the child's testimony.

ALABAMA, ALASKA, ARIZONA, ARKANSAS CALIFORNIA, COLORADO, DELAWARE, GEORGIA, HAWAII, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MONTANA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN.

These states allow for the defendant to be present in the room when the child provides alternative testimony, unless the court determines that it would traumatize the child.

CONNECTICUT, FLORIDA, IDAHO, MASSACHUSETTS, MINNESOTA MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, SOUTH DAKOTA, UTAH.

These states are silent on whether the defendant may be in the room with the child during alternative testimony.

INDIANA, MICHIGAN, NORTH CAROLINA, OREGON, SOUTH CAROLINA, WYOMING.

TENNESSEE allows the defendant to be present, in person, for a child's recorded testimony, but requires that the defendant remain in the courtroom during CCTV testimony.

APPENDIX B

TAXONOMY OF WITNESS COMPETENCY RULES

While almost half of the states have open-ended competency rules that allow for even a young child to testify in court, the remaining states have competency rules in place that may disqualify a young child from testifying in court. Only three of these states allow for a child victim to testify in a criminal trial, without a competency determination. While competency threshold requirements may serve well for civil cases, they also greatly hinder the prosecution's ability to use a young child's statements in a criminal trial. To facilitate child testimony, states with competency restrictions should also create special provisions that allow for a child victim to testify in a criminal trial. As with adult testimony, the issue of credibility should be for the trier of fact to determine.

A. States With Rules Similar To Fed. R. Evid. 601

These twenty-four states have competency rules that are substantively the same as the federal rule. These states do not have additional rules that disqualify witnesses based on age or mental capacity.

ALABAMA: Ala. R. Evid. 601.
ARIZONA: Ariz. R. Evid. 601.
ARKANSAS: Ark. R. Evid. 601.

CONNECTICUT: Conn. Code Evid. § 6-1.
DELAWARE: Del. R. Evid. 601.
GEORGIA: Ga. Code Ann. § 24-6-601 (2013).
INDIANA: Ind. R. Evid. 601;
Ind. Code § 34-45-2-1 (LexisNexis 2008).
IOWA: Iowa R. Evid. 5. 601.
LOUISIANA: La. Code Evid. Ann. art. 601 (2006)
MARYLAND: Md. R. Evid. § 5-601.
MISSISSIPPI: Miss. R. Evid. 601.
NEBRASKA: Neb. Rev. Stat. § 27-601 (2008).
NEVADA: Nev. Rev. Stat. Ann. § 50.015
(LexisNexis 2008).
NEW MEXICO: N.M. R. Evid. 11-601 (2010).
NORTH DAKOTA: N.D. R. Evid. 601 (2011).
OKLAHOMA: Okla. Stat. tit. 12, § 2601 (2009).
OREGON: Or. Evid. Code 601
RHODE ISLAND: R.I. R. Evid. 601.
SOUTH DAKOTA: S.D. Codified Laws § 19-14-1
(R. 601) (2004).
TENNESSEE: Tenn. R. Evid. 601.
UTAH: Utah R. Evid. 601.
WEST VIRGINIA: W. Va. R. Evid. 601.
WISCONSIN: Wis. Stat. § 906.01
WYOMING: Wyo. R. Evid. 601.

B. Rules That Make Competency Conditional

These twenty-six states have rules that require a certain level of mental capacity for a witness to be competent, although three of them make exceptions for children in criminal trials: COLORADO, MISSOURI, and PENNSYLVANIA.

Every one of these states requires that the

witness understand the need to tell the truth or be able to relate facts truly. Five states require that the witness be generally able to remember the facts he or she will testify about: Kentucky, Massachusetts, Minnesota, New Hampshire, and Pennsylvania. Five states require that the witness be capable of receiving the just impressions of the facts: COLORADO, IDAHO, MISSOURI, OHIO, and WASHINGTON. These thresholds are cumulative; a witness must meet every requirement to be found competent. These requirements likely prove difficult for young children to meet.

ALASKA: Alaska R. of Evid. 601.
CALIFORNIA: Cal. Evid. Code §§ 700, 701.
COLORADO: Colo. Rev. Stat. § 13-90-106 (2014).
FLORIDA: West's F.S.A. § 90.603 (2011).
HAWAII: Haw. Rev. Stat. §626-1 R. 603.1 (1993).
IDAHO: Idaho Code Ann. § 9-202 (2010).
ILLINOIS: 725 Ill. Comp. Stat. 5/115-14 (2010).
KANSAS: Kan. Stat. Ann. §§ 60-407, 60-417 (2005).
KENTUCKY: Ky. R. Evid. 601.
MAINE: Me. R. Evid. 601.
MASSACHUSETTS: Ma. R. Evid. §601.
MICHIGAN: Mich. R. Evid. 601.
MINNESOTA: Minn. Stat. § 595.02 Sub. 1(f) (West Supp. 2015).
MISSOURI: Mo. Rev. Stat. § 491.060 (2011).
MONTANA: Mont. Code Ann. ch. 10, R. 601 (2013).
NEW HAMPSHIRE: N.H. R. Evid. 601.
NEW JERSEY: N.J. R. Evid. 601.
NEW YORK: N.Y. Crim. Proc. Law § 60.20 (2010).
NORTH CAROLINA:
N.C. Gen. Stat. § 8C-1, R. 601 (2013).

OHIO: Ohio R. Evid. 601; Ohio Rev. Code Ann. § 2317.01 (2004).
PENNSYLVANIA: Pa. R. Evid. 601.
SOUTH CAROLINA: S.C. R. Evid. 601.
TEXAS: Texas R. Evid. 601.
VERMONT: Vt. R. Evid. 601.
VIRGINIA: Va. Sup.Ct. R. 2:601
WASHINGTON: Wash. Rev. Code § 5.60.050 (2009).

C. Rules With Special Provisions For Child Victims

These states have statues that allow children victims to testify always, regardless of age or capacity.

ALABAMA: Ala. Code 1975 § 15-25-3(e) (2011)
ARIZONA: Ariz. Rev. Stat. § 13-4061
COLORADO: C.R.S.A. § 13-90-106
GEORGIA: Ga. Code Ann. § 24-8-20 (2013).
MISSOURI: Mo. Rev. Stat. § 491.060 (2011).
PENNSYLVANIA: 42 Pa. Cons. Stat. § 5911 (2008).
UTAH: Utah Code Ann. § 76-5-410 (2010)
WEST VIRGINIA: W. Va. Child Abuse And Neglect Proc., Rule 8 (2009).