No. 13-1352

In The
Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Ohio

BRIEF OF RICHARD D. FRIEDMAN AND STEPHEN J. CECI AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-1078
Facsimile: (734) 647-7349
E-mail: rdfrdman@umich.edu

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

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INTEREST OF *AMICI CURIAE*[1]

Amicus Richard D. Friedman is the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Much of his academic work has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. He successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia,* 130 S.Ct. 1316 (2010).

In five previous cases in this Court, he has submitted *amicus* briefs on behalf of himself only, so that he could express his own thoughts, entirely in his own voice. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this case,

[1] Each party has filed with the clerk a global consent to the filing of any *amicus* brief on the merits of this case. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* Friedman and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than Friedman. Except as just noted, no persons or entities other than the *amici* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

because elaboration of his views requires a rounding in developmental psychology, he has sought the collaboration of *amicus* Stephen J. Ceci, a renowned leader in the field and one with special expertise on the issues related to this case.

Amicus Ceci is the Helen L. Carr Professor of Developmental Psychology at the College of Human Ecology of Cornell University. Most of his work studies the development of intelligence and memory in preschool-aged children, and he has focused particularly on issues related to the testimony of children. His book JEOPARDY IN THE COURTROOM: THE SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995; with Maggie Bruck) [hereinafter "JEOPARDY IN THE COURTROOM"], won the 2000 William James Book Award of the American Psychological Association (APA). Among the many other awards he has won are lifetime achievement awards from the APA (2003) and the Association for Psychological Science (2005), the APA's E. L. Thorndike Career Achievement Award for substantial career achievements in educational psychology (2014), and the 2013 Distinguished Scientific Contributions to Child Development Award, from the Society for Research in Child Development.

Amici have co-authored an article, *The Child Quasi Witness* [hereinafter *Quasi Witness*], forthcoming in volume 82, issue 1, of the University of Chicago Law Review (2015), that elaborates on the views presented in this brief. A pre-publication draft of this article is available at http://confrontationright.blogspot/2014/10/the-child-quasi-witness.html (posted Oct. 27, 2014).

SUMMARY OF ARGUMENT

Statements made by very young children and offered against an accused pose a particularly difficult conundrum, because of the conjunction of three facts. First, such statements are often highly probative evidence of criminal activity; the criminal justice system is significantly impaired if the trier of fact is not able to learn what the child has said. Second, though such statements may be probative, they are far from certainly accurate; to allow them to be presented to the trier without giving the accused an adequate opportunity to challenge the truthfulness of the child is a denial of fundamental fairness. Third, testimony in open court, subject to cross-examination, is not only often a traumatic ordeal for a very young child but a disastrously poor method for determining the truthfulness of the child.

Amici offer a principled way out of the conundrum. Its key depends on recognition that very young children are not just little versions of adults. They are fundamentally different in ways that call for very different treatment of their statements.

To be a witness within the meaning of the Confrontation Clause requires that the speaker have some understanding of the potential consequences of his statement and the gravity of those consequences. Some very young children lack this capacity. Therefore, their statements should not be deemed to be testimonial for purposes of the Confrontation Clause.

Though the child is not a witness within the meaning of the Confrontation Clause, she may nevertheless be the source of evidence of substantial

probative value. But such evidence is far from conclusive. Accordingly, if the State wishes to present a statement by the child, fundamental fairness requires that, to the extent reasonably possible, he have an opportunity to examine the child. The Constitution does not require that this opportunity be to cross-examine the child through an attorney during trial; indeed, cross-examination is a notoriously poor method for assessing the truthfulness of the testimony of very young children. Rather, the State may accord the accused an opportunity akin to that which the Constitution requires in appropriate cases with respect to physical evidence—to examine the evidence out of court through a qualified expert acting under procedures prescribed by the court. In this context, the expert would have an opportunity to assess and offer an opinion as to the truth-telling capacity of the child and its operation in the particular case.

This procedure not only is proper as a matter of constitutional principle, but it offers important practical advantages. Among others, it avoids the loss of crucial evidence; it minimizes trauma to the child; and it offers the accused a better opportunity for exploring and exposing probative weaknesses of the child's account. It also avoids the undue narrowing of Confrontation Clause jurisprudence that may be created by applying a "one-size-fits-all" approach to the statements of very young children. For similar reasons, this case is a poor vehicle for making general determinations of issues going beyond the realm of statements by children, such as the circumstances in which statements not made to law enforcement officers may be deemed testimonial or the scope of the "primary purpose" test.

ARGUMENT

I. VERY YOUNG CHILDREN LACK THE CAPACITY TO BE WITNESSES WITHIN THE MEANING OF THE CONFRONTATION CLAUSE.

The Sixth Amendment accords the accused "[i]n all prosecutions" the right "to be confronted with the witnesses against him." The essence of the confrontation right is to ensure that witnesses give testimony under the prescribed system (under oath, subject to cross-examination, in the presence of the accused, and, if reasonably possible, in open court), rather than in other ways; absent the right, a State could develop a system by which a prosecution witness could give her testimony, say, by speaking to a police officer in the station-house, *Crawford v. Washington*, 541 U.S. 36 (2004), or in her living room, *Hammon, supra*. The right is categorical; it cannot be defeated by a judicial determination that the particular testimony at issue is reliable. *Crawford*. The right is also limited: It states a principle not applicable to hearsay in general, but rather only to testimonial statements—that is, to statements offered by persons who are acting (whether in or out of court) as witnesses. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis*, *supra*, 547 U.S. at 823-26.

Amici submit that, with respect to statements by very young children, the threshold question is not whether the particular statement is testimonial but whether the child is capable of being a witness at all for purposes of the Confrontation Clause. (As will be explained below, although a negative answer to either of those two questions renders the Clause inapplicable, the consequences are very different. If an adult makes

a non-testimonial statement that (under one of the many exemptions from the rule against hearsay) is admitted for its truth against the accused, the accused may, if he wishes, exercise his Compulsory Process right to make the speaker his own witness. But that is not a viable alternative if a child speaker is not capable of being a witness; an alternative protection for the accused is necessary.)

Because a witness is a person who (whether under constitutionally acceptable conditions or not) gives testimony, a person cannot be a witness within the meaning of the Confrontation Clause if he is incapable of speaking testimonially. This Court has defined testimony in this context as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Michigan v. Bryant,* 562 U.S. 344, 131 S.Ct. 1143, 1153 (2011), *quoting Crawford*, 541 U.S. at 51 (brackets, internal quotation marks deleted). *Amici* submit that in this context solemnity is best understood to refer not to the manner in which the statement is made—the Confrontation Clause is not rendered inapplicable if the witness speaks jovially—but to an appreciation of the gravity of the declaration. In particular, the speaker must have some understanding of the potential consequences of the declaration and of the significance of those consequences.[2]

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[2] *Bryant* also said that the Confrontation Clause "requires a combined inquiry that accounts for both the declarant and the interrogator," 131 S.Ct. at 1160. The Court also adhered to the principle that "it is the statements, and not the questions, that must be evaluated under the Sixth Amendment," *id*. at 1160-61, n. 11; *see also Davis*, 547 U.S. at 822-23 n.1 ("is in the final analysis the declarant's

In other words, to be capable of being a witness, a person must be able to recognize and understand the truth of the propositions in the following causal chain:

> As a result of my statement, my listeners may believe that what I say happened did in fact happen; as a result of that belief they may take action; and as an ultimate result of that action, the person whose conduct I am describing may suffer serious adverse consequences. Accordingly, my listeners, or others, regard it as important that I speak truthfully.

Recognizing this chain of causation involves comprehending the perceptions, understandings, desires, and reactions of others, including people not part of the immediate conversation. Adults of ordinary intelligence have the capacity to do this. Very young children do not.[3]

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statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate"). We believe the proper resolution is to determine the reasonable expectations of a person in the position of the declarant, taking into account the impact on those expectations that would be created by such a person's understanding of the purpose of the interrogator, if there is an interrogator.

[3] See *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007) (endorsing the statement in Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 251-52 (2002), that "[e]ven statements by very young children may be highly probative[, b]ut very young children are not yet at a stage where they can be expected to take the responsibility of being a witness"). In addition to the cognitive argument presented here, there is a moral argument—which we will not analyze further but which we think deserves serious consideration—that society should

Researchers have amply demonstrated that young children, particularly before first grade, are fundamentally unlike older persons in social cognitions—that is, in the inferences they draw from social encounters. There is a biological basis for this deficit: The prefrontal cortex of the developing brain, which controls so-called "executive functions" such as monitoring, planning, and control of impulses,[4] is not mature until late adolescence.[5] Numerous studies reveal the deficits that result in young children's cognitions as a result of this neural immaturity.[6]

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not impose on young children, perhaps not even until adolescence, the ordeal and responsibility of being witnesses. *See* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb. L. Rev. 1258, 1280-85 (2003).

[4] Marilyn C. Welsh et al., *A normative-developmental study of executive function*, 7 DEVELOPMENTAL NEUROPSYCH. 131 (1991) [hereinafter "*Executive Function*"]; Hiroki R. Hayama & Michael D. Rugg, *Right dorsolateral prefrontal cortex is engaged during post-retrieval processing of both episodic and semantic information*, 47 NEUROPSYCHOLOGIA 2409 (2009).

[5] *See, e.g.,* Monica Luciana & Charles A. Nelson, *The functional emergence of prefrontally-guided working memory systems in four- to eight-year-old children*, 36 NEUROPSYCHOLOGIA 273 (1998); Dima Amso & B. J. Casey, *Beyond what develops when: neuroimaging may inform how cognition changes with development*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 24 (2006); John R. Best et al., *Executive functions after age 5: changes and correlates*, 29 DEVELOPMENTAL REV. 180 (2009).

[6] See Stephen J. Ceci, et al., *Representational Constraints on the Development of Memory and Metamemory: A Developmental-Representational-Theory*, 117 PSYCH. REV.

These deficits affect a web of interrelated psychological abilities that are involved in understanding the mental states of others—beliefs, intentions, motives, and desires—as well as the effects that one's own actions and statements have on others.

Most adults can simulate the mental states of other people—put themselves in others' shoes, in the colloquial phrase—so that they can predict others' future behavior and how variations in contexts and external forces will affect that behavior.[7] Doing so requires that the person understand that others have thoughts, feelings, and beliefs that may differ from her own and that may motivate others' behavior. Without this understanding—often referred to as "theory of mind" ("ToM")—people would be unable to make sense of the social world and would be ill-suited for social encounters.[8] The term "social understanding" is sometimes used within the framework of ToM to refer to "the ability to conceptualise mental states such as

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464 (2010).

[7] See Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOLOGY 861, 872 (2000); Emily Balcetis & David Dunning, *Considering the Situation: Why People are Better Social Psychologists than Self-Psychologists*, 12 SELF & IDENTITY 1, 2 (2013); Richard E. Nisbett & Ziva Kunda, *Perception of Social Distributions*, 48 J. PERSONALITY & SOC. PSYCHOLOGY 297, 309 (1985).

[8] *See* Sandra Bosacki & Janet Wilde Astington, *Theory of Mind in Preadolescence: Relations between Social Understanding and Social Competence*, 8 SOC. DEVELOPMENT 237, 237 (1999) (finding a positive correlation between ToM skills and social competence).

beliefs, desires, and intentions and to use these constructs to interpret and predict the actions of others."[9] The various aspects of these abilities have different developmental trajectories.[10] But before age four, very few children exhibit even rudimentary forms of ToM; by age six, nearly all normally developing children have acquired these rudiments.[11]

Thus, below the age of four, most children are unaware that other people might have false beliefs.[12] Indeed, below this age, most children do not recognize that the information that is available to them and based on their observations is not known by other people; therefore, the basic concept of *informing* another person, and adding to that other person's state of knowledge, is foreign to them. Even well after they gain this recognition, most children lack the ability that adults have to use readily available information to draw an inference about the mental state of another person.[13] Lacking well-developed executive functions,

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[9] *Id*. at 237–38.

[10] *See id*. at 238; Welsh, et al., *Executive* Function, *supra,* 7 DEVEL. PSYCH. at 138.

[11] *See* Heinz Wimmer & Josef Perner, *Beliefs about Beliefs: Representation and Constraining Function of Wrong Beliefs in Young Children's Understanding of Deception*, 13 COGNITION 103, 104 (1983) [hereinafter "*Beliefs about Beliefs*"].

[12] *See* JEREMY CARPENDALE & CHARLIE LEWIS, HOW CHILDREN DEVELOP SOCIAL UNDERSTANDING 24 (2006).

[13] Numerous experiments demonstrate this. *See, e.g.*, *id*. at 30, *citing* Wimmer & Perner, *supra*, *Beliefs about Beliefs*; Francesca G.E. Happé, *An Advanced Test of Theory of Mind: Understanding of Story Characters' Thoughts and Feelings*

preschool-aged children are unlikely to be capable of the solemnity of recognizing that giving a false account of a past event may cause their listeners and others to take action that will lead to unjustified consequences for another person; these children are likely to say what they believe will please their listeners.[14]

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by Able Autistic, Mentally Handicapped, and Normal Children and Adults, 24 J. AUTISM & DEVELOPMENTAL DISORDERS 129, 137–38 (1994) (describing the differences between adults and children in performance of ToM tasks); T. Aboulafia-Brakha, et al., *Theory of Mind Tasks and Executive Functions: A Systematic Review of Group Studies in Neurology*, 5 J. NEUROPSYCHOLOGY 39, 40 (2011) (discussing studies that "support[ ] the view that [executive function] is necessary for [ToM] development"). These studies suggest that before ages three to six, children have difficulty recognizing that others operate on a base of information different from their own. *See* CARPENDALE & LEWIS, SOCIAL UNDERSTANDING, *supra,* at 53–59.

[14] *See* Amelia Courtney Hritz, *Lie to Me: Compliant False Accusations by Children* (2014), available at http://www.human.cornell.edu/hd/ceci/upload/Hritz_Master_Thesis_20140617.pdf, at 5-6 (indicating that social pressures cause children to make statements consistent with the desire of an interviewer; 15 of 16 young children asked to knowingly make a false accusation complied, and many maintained the false accusation during a later neutral interview, even after being told the first interviewer had made a mistake); Rhona H. Flin, et al., *Children's Knowledge of Court Proceedings*, 80 BRIT. J. PSYCHOLOGY 285, 294 (1989) [hereinafter "*Children;s Knowledge"*] (indicating that of the children studied, few of the eight-year-olds but most of the ten-year-olds thought that honesty in court is important "because of the risks of convicting the innocent or releasing the guilty").

The many experiments that test limitations on young children's ToM are not, of course, set in the forensic context. But they show in strong terms an inability on the part of very young children to appreciate the mental states of other persons and to predict the consequent behavior of those others—and these studies do so with respect to relatively simple matters. These experiments therefore provide strong evidence that a very young child speaking to an adult about an incident in the past will fail to have the sophisticated understanding necessary to recognize that the adult's purpose in conducting the conversation is to gather information that may be used against the person whose conduct the child has described, and that as a result the person may suffer punishment.

This is especially true because the contemplated punishment involves an intricate series of events—well in the future and involving many other people not part of the conversation—that a very young child is not likely to contemplate or understand. Even through age ten, children's very rudimentary comprehension of the legal system is unlikely to include familiarity with the concept of evidence or understanding of why it is needed in court.[15]

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[15] *See* Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball"*, in STEPHEN J. CECI, et al., eds, PERSPECTIVES ON CHILDREN'S TESTIMONY 131, 135 (1989) (reviewing studies that describe children's lack of familiarity with the courtroom); Flin, et al., *Children's Knowledge*, *supra*, 80 BRIT. J. PSYCHOLOGY at 291, 295 (meaning of "evidence" and "witness," among other terms, not understood at all by six-year-olds studied); Amye Warren-Leubecker, et al., *What Do Children Know about the*

We emphasize that we are not arguing that very young children make *bad* witnesses; as we will emphasize below, they are often sources of good evidence.[16] Rather, we are arguing that very young children, even though capable of describing criminal conduct, should be deemed *outside the category of witnesses altogether*.[17] There is no need in this case to

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Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, in CECI, et al., eds, PERSPECTIVES 158, 165–67 (18% of three-year-olds in study knew what a courtroom was; few children under eight knew about witnesses).

[16] There is therefore no incompatibility whatsoever between a child being incapable of being a witness for Confrontation Clause purposes and the child's statement being sufficiently good evidence to satisfy a reliability-based hearsay exception.

[17] This view is entirely consonant with the confrontation right as it was understood at the time of the Framing. *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779), held that even a young child may not *testify* unsworn. *Brasier*, which operated under the assumption that the child's statement in that case should be deemed testimony, did not prevent courts from admitting hearsay statements made by young children, and the courts continued to do so routinely: "*Brasier* clearly does not stand for the proposition that incompetent children's hearsay was inadmissible; indeed, it preserved the opposite proposition, which was that if a child could not testify, his or her hearsay statements could be heard." Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 IND. L.J. 1029, 1031 (2007).

Nor do any decisions of this Court foreclose this view. Decisions from the pre-*Crawford* era—when, though the Confrontation Clause was highly defeasible, its scope

define precisely the bounds of the set of children who should be treated in this way. The set is certainly not an empty one.[18] And we believe it is clear that L.P. should be deemed incapable of being a witness for purposes of Confrontation Clause purposes. He was not yet three-and-a-half at the time of the statements at issue. His "bewildered" manner and appearance when he was questioned, J.A. 59, 61, his incommunicativeness, J.A. 27, 62, and the fact that in rapid succession he gave three inconsistent answers—"I fell," "Dee did it," and "I don't know," J.A. 47—strongly indicate that, as would be expected of a child of his age, he did not understand the situation or the significance of his words. The determination of the trial court that L.P. was incompetent to testify at trial lends force to the conclusion that he was incapable of being a witness for Confrontation Clause purposes.

Contrast Sylvia Crawford, who gave her rendition of a knife fight to the police, or Amy Hammon, who gave the police a description of an assault by her husband, or the lab analysts in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), who certified that a substance about which police had inquired was cocaine. Each of these people understood the solemnity

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included all hearsay by out-of-court declarants, *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)—are inapposite. And this is the first case in this Court since *Crawford* involving the applicability of the Clause to a statement by a child.

[18] Statements of children as young as 18 months old have been offered as proof of abuse. *State v. Webb*, 779 P.2d 1108, 1109 (Utah 1989) (concerning a statement by a child, made to her mother after a bath taken shortly after a visit with her father,"Ow bum daddy").

of the occasion and the potential consequences of her statement. Allowing their statements to be part of the proof against an accused would create a system in which a witness could knowingly testify against an accused without confrontation, in a station-house or a living room or a laboratory. L.P. was not just a littler, less able, version of these adults. He was not capable of being a witness.

II. THE STATEMENTS OF VERY YOUNG CHILDREN MAY BE HIGHLY PROBATIVE EVIDENCE, BUT THEY ARE FAR FROM INFALLIBLE.

In arguing that very young children are incapable of being witnesses for purposes of the Confrontation Clause, we do not contend that their statements cannot be useful evidence. On the contrary, statements of children may be highly probative and crucial to a case. But, like the statements of any observer, they do not constitute conclusive proof of a proposition they assert.

The probative value of evidence with respect to a given proposition depends on the relative magnitude of two probabilities: (1) the probability that the evidence would arise if the proposition were true, and (2) the probability that the evidence would arise if the proposition were false. If those two probabilities are equal, the evidence is worthless. Only if the second probability is zero—that is, it would be impossible for the evidence to arise if the proposition were false—would the evidence be conclusive proof of the proposition.

As a general matter, when a person makes a

statement describing a disputed event, the first probability is much greater than the second, so the evidence has significant probative value with respect to that event. But in most cases the second probability is not trivial; the statement is not conclusive, or nearly conclusive, proof of the event. And these two general propositions are no less true of children.

Ordinarily, to report accurately on an event, an observer must perceive it accurately, retain and recall an accurate memory of the perception, sincerely intend to report the truth about it, and accurately communicate the intended message. Flaws in any of these capacities—perception, memory, sincerity, or communication—can lead any observer to make an inaccurate statement.[19] But these capacities usually operate reasonably well even in young children. Children's perception of events within their understanding is good.[20] Their memory is reasonably good, even over an extended period;[21] despite childhood

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[19] *See* 2 KENNETH S. BROUN, ed., MCCORMICK ON EVIDENCE 178 (2013) (referring to perception, memory, narration, and sincerity).

[20] *See* Alan Slater & Scott P. Johnson, *Visual Sensory and Perceptual Abilities of the Newborn: Beyond the Blooming, Buzzing Confusion*, in FRANCESCA SIMION & GEORGE BUTTERWORTH, eds., THE DEVELOPMENT OF SENSORY, MOTOR AND COGNITIVE CAPACITIES IN EARLY INFANCY: FROM PERCEPTION TO COGNITION 121, 138 (1998); Elizabeth Spelke, *Infants' Intermodal Perception of Events*, 8 COGNITIVE PSYCHOLOGY 553, 554 (1976).

[21] *See* CECI & BRUCK, JEOPARDY IN THE COURTROOM, *supra*,at x, 235. For example, children who went to Disney World when they were 2½ to 4 years old and tested for their memory 18 months later gave highly accurate descriptions

limitations, the memory system functions in at least rudimentary form from birth, and it is well developed long before ToM, which usually does not develop before age four.[22] A child, like an adult, might have a motive that deflects her from a sincere desire to tell the truth. But young children are less likely to have such insincere motives than are older persons and tend to have a less well-developed ability to lie;[23] in any event, like adults, young children are far more likely to intend to communicate a given proposition if it is true than if it is false. And, although their communicative ability is limited as compared to that of adults, young children are usually able to communicate reasonably well important aspects of events that they understand;[24] they are certainly more likely to communicate that a given event happened if it is their intent to do so than if it is not.

Thus, children's statements are often highly probative; rendering them inadmissible may deprive the truth-determining process of information of critical

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of their experiences; see Nancy R. Hamond & Robyn Fivush, *Memories of Mickey Mouse: Young children recount their trip to Disney World*, 6 COGNITIVE DEVELOPMENT 433 (1990).

[22] *See* DAVID F. BJORKLUND, CHILDREN'S THINKING: COGNITIVE DEVELOPMENT AND INDIVIDUAL DIFFERENCES 250–51, 267 (4th ed. 2005).

[23] *See* Michael Lewis, *The Development of Deception*, in MICHAEL LEWIS & CAROLYN SAARNI, eds., LYING AND DECEPTION IN EVERYDAY LIFE 90, 92 (1993).

[24] Hilary Horn Ratner, et al., *Children's Organization of Events and Event Memories*, in ROBYN FIVUSH & JUDITH A. HUDSON, eds., KNOWING AND REMEMBERING IN YOUNG CHILDREN 65, 66 (1990).

value. This is especially true if the child's statement describes an event – such as ejaculation – with which the child is presumably unfamiliar; in such a case one might conclude that, even if the child is not a particularly accurate reporter, it would be unlikely, if the event did not occur, that the child would happen to come up with the description.[25]

But of course children, like adults, are far from infallible. Like adults, they may report inaccurately for any number of reasons. Perhaps most significantly, very young children are often more vulnerable to suggestion than are adults.[26]

When a child's statement is offered against an accused, therefore, the accused has a critical

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[25] *See, e.g.,* Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 681-85 (1987) (analyzing a case in which a child presents the description of a stranger's apartment, where she was allegedly molested).

[26] *See generally* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000); Stephen J. Ceci, et al., *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. EXPERIMENTAL PSYCHOLOGY: GENERAL 38 (1987). *See also* CECI & BRUCK, JEOPARDY IN THE COURTROOM, *supra*, at 233. In most forensic contexts, suggestibility tends to diminish with age, because of older children's stronger memory traces, better monitoring ability, and lesser likelihood of incorporating interviewers' suggestions into their accounts. *See* Stephen J. Ceci & Maggie Bruck, *Children's Suggestibility: Characteristics and Mechanisms*, 34 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 247 (2006).

interest—as he would with respect to the statement of an adult—in impeaching the statement. The accused may wish to demonstrate that it is far from certain that the child would have made the statement even if the event described in the incident did in fact occur. Usually more saliently, the accused has a critical interest in showing that there is a substantial probability that the child would have made the statement even if the event did *not* occur. That probability may be attributable in part to facts that hold true in general with respect to children of the particular child's age and developmental level. But the probability may also be attributable in significant part to specific facts concerning the particular child, and to even more specific facts concerning the subject matter of the particular statement.

III. THE ACCUSED HAS A CONSTITUTIONAL RIGHT TO EXAMINE A YOUNG CHILD WHOSE STATEMENT IS INTRODUCED AGAINST HIM—BUT NOT BY CROSS-EXAMINATION AT TRIAL.

If an adult's statement is introduced for its truth against an accused, the principal method of impeaching the statement—that is, undercutting the inference that the making of the statement proves the truth of what it asserts—is cross-examination. If the statement is testimonial, the Confrontation Clause ensures that the statement cannot be introduced against the accused unless he has an opportunity for cross-examination. Even if it is not testimonial, the rule against hearsay presumptively excludes the statement if the speaker does not testify live at trial.

And even if the statement fits within an exemption to the hearsay rule, if the speaker is available the accused can exercise his Compulsory Process rights to make her a witness and examine her by leading questions as if on cross-examination; *see, e.g.,* Fed. R. Evid. 611(c). Underlying this system is the basic principle, repeatedly endorsed by this Court, that cross-examination is "the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE ON EVIDENCE § 1367; *see, e.g., Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion); *California v. Green*, 399 U.S. 149, 158 (1970).

In the context of young children, we submit that this cross-examination-based model is neither constitutionally required nor satisfactory. It is not constitutionally required because, as we have argued, young children are not capable of being witnesses for purposes of the Confrontation Clause. And it is not satisfactory because, in the context of young children, it simply ignores reality—and a great deal of empirical research[27]—to act on the basis that cross-examination is a great "engine . . . for the discovery of truth." For several reasons, a system dependent on examination by attorneys in open court—direct as well as cross—is in fact a disastrously poor method for generating and discerning truthful statements by young children.

First, even if the child is deemed competent to be a trial witness, she may not be able to give a coherent rendition of the episode at issue. A combination of

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[27] For a useful review of the research, see Rachel Zajac, et al., *Disorder in the courtroom? Child witnesses under cross-examination.*, 32 DEVELOPMENTAL REV. 181 (2012).

various factors—including the passage of time, the stress caused by the initial event, and the ordeal of the proceeding (even if that ordeal is reduced pursuant to *Maryland v. Craig*,, 497 U.S. 836 (1990))—may make her essentially non-communicative.

Second, a cross-examiner is often unable to secure useful responses to questions from a young child. The syllogistic logic so often central to cross-examination – "You've testified that X is true, but you've also said that Y is true, and they can't both be true, so you must not be telling the truth one time or the other." – is not likely to be useful with young children.[28] When the child essentially fails to answer questions on cross, the trier probably does not assume that the reason is flaws in the child's original account; the far more natural inference is that, while the original account may have been true, the child is simply unable or unwilling to answer the cross-examiner's questions.[29]

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[28] *See, e.g.,* Lucy Berliner & Mary Kay Barbieri, *The testimony of the child victim of sexual assault*, 40 J. OF SOC. ISSUES, 125, 132 (2010). For a sadly representative example of the difficulties defense lawyers often face in trying to gain any traction on cross-examination, see *Commonwealth v. Kirouac*, 542 N.E.2d 270, 272 n.4 (Mass. 1989) (beginning with a negative answer to the question, "[D]o you remember yesterday you talked about some things that happened to you?").

[29] The problem is compounded by the tendency of lawyers to ask questions in ways that children are unlikely to understand. Rachel Zajac & Harlene Hayne, *I Don't Think That's What* Really *Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. EXP. PSYCH.: APPLIED 187, 187 (2003) [hereinafter "*What* Really *Happened"*] ("cross-examination often includes leading

Third, when cross-examination does succeed in getting the child to change her account, it is as likely to cause a young child to change an accurate statement as to cause her to correct an inaccurate one. The net effect is to diminish accuracy.[30]

Finally, and the determinative factor in this case, the child is often, as here, deemed incompetent to be a witness at the time of trial. In a model based on examination at trial, that leaves two highly unsatisfactory choices. One is to exclude the child's statement, thus depriving the truth-determining process of potentially critical evidence. The other, the

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questions, complex vocabulary, and complex syntax"); Rachel Zajac, et al., *Asked and Answered: Questioning Children in the Courtroom*, 19 PSYCHIATRY, PSYCHOLOGY AND LAW 199 (2003); MARK BRENNAN & ROSLIN E. BRENNAN, STRANGE LANGUAGE: CHILD VICTIMS UNDER CROSS EXAMINATION (1988).

[30] See Zajac and Hayne, *What* Really *Happened*, *supra*, 9 J. EXP. PSYCH.: APPLIED at 187, 191 (2003) (concluding, on the basis of experiment involving 5- and 6-year-olds in which "cross-examination not only proved to be unsuccessful in discrediting inaccurate children (i.e., misled children questioned about false events), it also decreased the accuracy of children who were initially correct," that "cross-examination style questioning is inappropriate for young children"); Rachel Zajac and Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Older Children Are Not Immune*, 20 Applied Cognitive Psychology 3, 4, 11 (2006) (finding that cross-examination reduced accuracy, "to a point where accuracy did not differ significantly from chance" with 5- and 6-year-olds, and significantly even in 9- and 10-year-olds).

resolution adopted by the trial court in this case, is to admit the statement and offer the accused no opportunity whatsoever to examine the source of evidence that might condemn him.

That cannot be a constitutionally acceptable outcome. The essential point is that the child, even though not capable of being a witness at trial, is still a source of crucial prosecution evidence. In evaluating that evidence, the trier of fact must assess, in particular, how probable it is that the evidence would arise if the proposition that it is offered to prove were not true. *See* p. 15 *supra*. And that assessment will depend in turn on assessments of alternative possibilities as to how the child may have come to make the statement. The situation therefore invokes what this Court has called "the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*,458 U. S. 858, 867 (1982).

The situation is essentially the same as if the prosecution presented physical trace evidence to prove its version of an event—say, the markings on a bullet, offered to prove that it was fired by a given gun. The defense would want to demonstrate that (1) it is far from certain that the markings would be produced if the gun did fire that bullet, and, usually of greater significance, (2) it is plausible that the markings would be produced if the gun did not fire the bullet. The basic principle, as articulated in one leading case, is that "[f]undamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to

varying expert opinion." *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). *Accord, e.g, White v. Maggio*, 556 F.2d 1352 (5th Cir. 1977) (holding that evidence is critical if testimony by a skilled expert after examination "could induce a reasonable doubt in the minds of enough jurors to avoid a conviction"); 6 WAYNE R. LAFAVE, et al., CRIMINAL PROCEDURE § 24.3(a), at 340 (3d ed. 2007) ("Fundamental fairness in an adversarial system requires that the defense be given the tools with which it can obtain existing evidence that challenges the prosecution case, either by tending to establish affirmatively the defendant's innocence or by simply casting doubt upon the persuasiveness of the prosecution's evidence.") *id.*, vol. 5, §20.3(g) n. 120.1 (2013-14 pocket part) ("the right to 'inspect' generally is viewed as encompassing defense access for the purpose of conducting scientific testing where such testing will not interfere with the prosecution's use of the evidence or further prosecution testing"; listing cases).[31]

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[31] For older state cases in the same line, see, e.g., *People v. Backus* (1979) 590 P.2d 837, 851 (Cal. 1979) ("Due process requires that criminal defendants have an opportunity to examine, and in appropriate cases have chemical tests performed on, evidence to be offered against them."); *Ex parte Baker*, 144 So.3d 1285, 1290 (Ala. 2013) (*quoting with approval Warren v. State*, 288 So. 2d 826, 830 (Ala. 1973): due process requires that the defendant "be furnished a sample of the allegedly prohibited substance that will be offered against him in the trial so that he can have its qualities researched by scientists of his choosing").

White, like *Barnard*, was decided on *habeas*. Most often federal courts need not reach the constitutional issue because Fed. R. Crim. P. 16 provides the defendant a right

Similarly, if the prosecution presents the statement of a child to prove its version of an event, that evidence may be critical, as in this case. When it is, the defense will need to demonstrate, as best it can, that (1) it is far from certain that if the events occurred as the prosecution contends, the child would make the statement, and most particularly (2) it is plausible that the child would make the statement even if the event did *not* occur as the prosecution contends. If presenting the child as a trial witness is not feasible or, as in this case, altogether foreclosed, fundamental fairness requires that, if the child is available, the accused have "the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court," examine the child out of court. The expert, a qualified psychologist, might then be able to offer at trial not mere generalities about the vulnerabilities of children but an assessment of the capacities of *the particular* child in making a statement on *the particular* subject, and of whether there are plausible explanations accounting for the child's making of the statement other than that the event occurred as the prosecution contends.[32] In some cases, such evidence

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of access to the evidence in similar situations. And the overall volume of constitutional litigation in this area is limited by the fact that almost all of the states have similar rules that allow the defendant to inspect tangible items that the prosecution will use at trial or that are material to preparation of the defendant's defense. 5 LAFAVE, CRIMINAL PROCEDURE, *supra* § 20.3(g), at 405-06.

[32] For similar reasons, courts hold that in some circumstances of compelling need, the accused has a right, based on due process, to take a psychological, psychiatric, or physical examination of an alleged crime victim, often by an

may indeed "induce a reasonable doubt in the minds of enough jurors to avoid a conviction." *White v. Maggio*,

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expert selected by the defense. *See, e.g., People v. Wheeler*, 602 N.E.2d 826 (1992); *People v. Chard*, 808 P.2d 351, 353, 355 (Col. 1991) ("In deciding whether to grant a defendant's motion for the involuntary psychological examination of a child sexual-abuse victim, the court must weigh the defendant's right to a fair trial against the invasion of the victim's privacy interests. . . . The majority of courts considering the issue of whether a trial court has the power to order a compelled physical examination of a child victim in the absence of statutory authority have sought to balance a defendant's right to discover possible exculpatory evidence against the victim's privacy interests."); *Hamill v. Powers*, 164 P.3d 1083 (Ct. Crim. Apps. Okla. 2007) (collecting cases). With respect to adults, the purpose of such an examination is typically to assess a condition or capacity of the victim bearing on whether a crime was committed—such as whether she suffers from rape trauma syndrome or has the capacity to consent to sexual contact—and *not* to assess the victim's credibility, *Wheeler, supra,* at 831; *State v. Doremus*, 514 N.W.2d 649, 651-52 (Neb. Ct. Apps. 1994), which would ordinarily be left to cross-examination at trial.

With respect to children, however, concerns about veracity are sometimes a significant factor in determining whether the accused should be accorded a psychological examination of the complainant, *e.g., Griego v. State*, 893 P.2d 995, 999-1000 (Nev. 1995)—suggesting that the courts are concerned about the adequacy of trial testimony to provide a basis for assessing the child's credibility. And if the child will not testify live at trial, thus preventing the jury from being "able to assess credibility firsthand," that is a significant factor weighing in favor of ordering the examination. *State v. Osgood,* 667 N.W.2d 687, 693-94 (S.Dak. 2003).

supra.

We have outlined elsewhere the type of guidelines that might be incorporated into a protocol that, under court supervision, would govern the govern the conduct of such an examination. *Quasi Witness*, *supra*, at 13-14. In brief, the interviewer should be qualified by training to conduct the examination; the interviewer should usually be the only person in the room with the child; the interview ought to be video-recorded; the interview should be conducted in a way that minimizes trauma to the child and possible taint of the child's memory; a prosecutor and a defense lawyer ought to be able to observe the interview as it occurs, either through a one-way mirror or by video transmission, and a judicial officer should be available at least by telephone; neither side should be allowed to intervene except with the consent of the other side or approval of the court, and even then only for exigent reasons; and the interviewer should be able to seek consultation outside of the examination room. We do not, of course, claim that these precise guidelines are necessarily optimal for every case; there is no doubt, however, that suitable guidelines can be developed and refined with experience.

We have presented this approach as a matter of principle: Very young children should not be deemed witnesses for purposes of the Confrontation Clause; they nevertheless may be the sources of critical evidence that should not be lost to the fact-finding process; if that evidence is to be admitted, then the accused should, as a matter of fundamental fairness under the Confrontation Clause, have an opportunity to have a qualified expert of his choosing examine the

child out of court and testify at trial about the probative value of the child's statement. We also wish to emphasize that adoption of this approach offers the adjudicative system several practical advantages of great importance.

First, this approach prevents a significant lacuna that arises under the usual practice if, as in this case, the child is not competent to testify at trial or cannot feasibly be made a trial witness: Either her prior statement is excluded, denying the trier of fact potentially valuable information, or as in this case it is admitted but the accused has no opportunity to examine her. Under the approach presented here, the lacuna disappears: The Confrontation Clause would pose no barrier to presentation of secondary proof of the child's statement, and the accused would have a right to examine the child—not through cross-examination by an attorney in open court, but through a pretrial videotaped interview conducted by a qualified forensic interviewer.

Second, the availability of this approach would make it feasible to maintain a rather high threshold for determining when a child is competent to testify at trial. If the child falls below such a threshold, the consequence need be neither a loss of crucial evidence to the prosecution nor a vacuum of rights for the accused; rather, it simply means that the child is treated under a *different* model, for purposes both of presenting her account and of the accused examining her.[33]

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[33] As a related matter, this approach offers a possible solution to the dilemma of whether, in determining if a

Third, the potential trauma for the child, which is very substantial,[34] would be significantly reduced. Even under the procedure tolerated by *Maryland v. Craig* the child must testify formally in response to lawyers' questions in a room with several strangers. Under the procedure advocated here, one person, a qualified interviewer, would be with the child in a private, comfortable room.

Fourth, as compared to cross-examination by an attorney in some form of a courtroom, perhaps with the accused present, an interview by a qualified developmental-forensic child interviewer operating in a comfortable setting, outside the gaze of the defendant, has a much better chance of eliciting information that may raise doubts about the child's

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statement is testimonial, a court should assume that the posited hypothetical reasonable person whose anticipation is assessed is the same age as the speaker. If only children above a given level of development may be considered witnesses, and if that threshold is set rather high, it becomes less odd, in the context of asking whether a particular statement is testimonial, to ask what the expectations of a reasonable adult would be. In other words, it becomes more plausible to treat all children in either of two ways, as ordinary witnesses, judged by the same standards as all adults not severely limited, or as not sufficiently developed to be treated as witnesses at all.

[34] *See, e.g.,* Rhona H. Flin, *Hearing and testing children's evidence*, in GAIL S. GOODMAN & BETTE L. BOTTOMS, eds.,CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 279 (1993); Gail S. Goodman, et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, p. v (1992).

initial account.[35]

Fifth, under the practice prevailing in most states, the accused does not have a right to examine the child – if at all – until the time of trial, which may be very long after the events at issue. Under the approach presented here, examination would occur pre-trial, and usually there would be no reason why it could not occur when events are relatively fresh in the child's mind.

Finally, the approach presented here would prevent distortion of Confrontation Clause jurisprudence that could arise if a "one-size-fits-all" approach is extended to statements by young children. It is often true, as here, both that (1) a young child's statement is highly probative, making exclusion of it an extremely unappealing prospect, and (2) compelling the child to testify live at trial would also be an unappealing result or—as here, given the trial court's ruling that L.P. was incompetent as a witness—impossible. In such a case, if the child is deemed capable of being a witness for Confrontation Clause purposes, then the only way to avoid both these results is to hold the statement

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[35] It is not troublesome that, under our approach, the trier of fact would not see the child making a statement in its presence: (1) Even under a confrontation model, if a witness is not available at the time of trial but there was a prior opportunity for cross-examination, then a transcript of the earlier testimony may be admitted. *Crawford*, 541 U.S. at 53-54, 68. (2) The procedure allowed in *Craig*, *supra*, did not allow the jury to observe the demeanor of the child making the accusation. (3) Under the procedure we contemplate, the interview conducted by the acused's expert would presumably be videotaped.

nontestimonial. And this means that, if the same standards are applied to young children and to others, the likely consequence is that the Confrontation Clause will be unduly narrowed as a general matter. (For similar reasons, this case provides a particularly inappropriate vehicle to narrow the reach of the Clause by deciding general questions that apply beyond the context of young children. These include questions such as the scope of the "primary purpose" test and the extent to which statements made other than to law enforcement agents might be deemed testimonial for purposes of the Clause.[36])

The problem evaporates under the approach that we advocate: Statements of young children are addressed, and the rights of the accused are protected, outside the realm of the Confrontation Clause, and the jurisprudence of the Clause is allowed to develop within its proper realm, free of distortion that would be created by treating young children under the same rules as apply to older persons.

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[36] Lest there be any doubt: *Amicus* Friedman believes that the optimal test, briefly stated, for determining whether a statement is testimonial is whether a reasonable person in the position of the maker of the statement would anticipate likely prosecutorial use of the statement. *Melendez-Diaz*, *supra*, 557 U.S. at 310. And he believes that no artificial limits should be placed on this test. Thus, a statement even to a private person (such as a victims' counselor) may be testimonial in some circumstances, if a person in the position of the declarant would anticipate that the statement would be passed on and used prosecutorially; certainly a statement describing a crime and made to a teacher, especially one under a mandatory duty to report, can be testimonial.

CONCLUSION

The trial court committed constitutional error by admitting L.P.'s statement against Respondent without Respondent having had an opportunity of examination. Accordingly, this Court should affirm the judgment of the Ohio Supreme Court, which affirmed the decision of the Ohio Court of Appeals, reversing the judgment of conviction and remanding for a new trial. Further proceedings should be consistent with an opinion indicating that an examination of the type advocated in this brief is constitutionally acceptable.[37]

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

January 14, 2015

[37] *Cf. Hills v. Gautreaux*, 425 U.S. 284, 306 (1974) (affirming judgment of remand, and ordering that further proceedings of trial court should be consistent with opinion of this Court).