No. 07-886

IN THE
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

JAMES HOWARD BENTLEY,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Iowa

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

JAMES P. FOX
PRESIDENT
NATIONAL DISTRICT
ATTORNEYS ASSOCIATION

MARY SAWICKI
Counsel of Record
NATIONAL DISTRICT
ATTORNEYS ASSOCIATION
NATIONAL CENTER
FOR PROSECUTION
OF CHILD ABUSE
99 Canal Center Plaza
Alexandria, VA 22314
(703) 519-1653

MOTION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the National District Attorneys Association respectfully requests leave to file the accompanying brief as amicus curiae in support of petition for writ of certiorari in the matter of State of Iowa vs., Howard Bentley. Petitioner Iowa Attorney General's Office has consented to the filing of this brief, but Respondent, James Howard Bentley, through his Attorney Thomas O'Flaherty has withheld consent, necessitating this motion.

As described in the statement of interest in the attached proposed amicus curiae brief, the National District Attorneys Association is the largest and primary professional association of prosecuting attorneys in the United States. The Association presently has approximately 6, 500 members, including most of the nation's local prosecutors, plus assistant prosecutors, investigators, victim witness advocates and paralegals. The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

As amicus curiae, the National District Attorneys Association is uniquely positioned to witness the impact that the recent United States Supreme Court decision in *Crawford* and *Davis* has had on child abuse prosecutions in this country. The National District Attorneys Association conducts national trainings on the impact of the *Crawford*

decision and answers a multitude of technical assistance questions from child abuse prosecutors about the impact the *Crawford* and *Davis* decisions have had on child abuse investigation and prosecution. As a result it has become apparent to the National District Attorneys Association, due to the present legal uncertainty in Iowa and nationally of statements of child victims, that prosecutors across this country are eager for a resolution of the precise analysis to be utilized to determine the legal status of children's statements.

In addition, the National District Attorneys Association is well positioned to provide relevant studies in child development that can shed light on the cognitive capabilities of children the age of the child in the present case in an effort to urge this Honorable Court to adopt a "reasonable child" standard.

For these reasons, the National District Attorneys Association respectfully requests that its motion for leave to file the accompanying brief as amicus curiae be granted.

Respectfully submitted,

JAMES P. FOX
PRESIDENT
NATIONAL DISTRICT
ATTORNEYS ASSOCIATION

MARY SAWICKI
SENIOR ATTORNEY
Counsel of record
National District Attorneys Association
National Center for Prosecution of Child Abuse
99 Canal Center Plaza
Alexandria, VA 22314
(703) 519-1653

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The National District Attorneys Association is the largest and primary professional association of prosecuting attorneys in the United States.[1] The association presently has approximately 6,500 members, including most of the nation's local prosecutors, plus assistant prosecutors, investigators, victim advocates and paralegals. The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people. In doing so, the National District Attorneys Association provides professional guidance and support to its members, serves as an education and resource center, follows public policy issues involving criminal justice and law enforcement and produces a number of publications. As amicus curiae, the National District Attorneys Association is exceptionally positioned to witness the impact that the recent United States Supreme Court decisions in *Crawford* and *Davis* have had on child abuse prosecutions in this country.

The American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, a division of the National District Attorneys Association, has received a multitude of technical

---

[1] Counsel of Record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

assistance questions and training requests from child abuse prosecutors on the admissibility of child victim and witness statements since the decision in *Crawford v. Washington*, 541 U.S. 36 (2004). To respond to such requests, the National District Attorneys Association provides both nationwide trainings as well as staff designated to answer *Crawford* related technical assistance questions. Since the *Crawford* decision was announced in 2004, the National Center for Prosecution of Child Abuse has conducted approximately 58 trainings concerning the impact of the *Crawford* decision on child abuse prosecutions in 26 states and the United States Territory of Guam, reaching approximately 8,000 prosecutors, law enforcement and allied professionals. In addition, the National Center for Prosecution of Child Abuse has produced an outline of post-*Crawford* cases that now has blossomed to approximately 400 pages with over 140 subsections. Approximately 1,000 state and federal prosecutors have registered to utilize this outline and have received a username and password. In the last nine months of 2007, the National District Attorneys Association website received over 1,000 hits and downloads of the *Crawford* outline that was developed to assist front-line prosecutors. It is not unusual, as prosecutors attend a *Crawford* training sponsored by the National District Attorneys Association or contact the association with technical assistance questions, to ponder whether per *Crawford* and *Davis*, a child's statements are to be analyzed like that of an adults. Furthermore, child abuse prosecutors are seeking guidance on the issue of whether or not their established child abuse investigation and prosecution protocols warrant

modification per the *Crawford* and *Davis* rulings. A major query from child abuse prosecutors nationally is the role that law enforcement may now play in the multidisciplinary forensic interview of a child victim in light of the *Crawford* and *Davis* rulings. Since lower Courts are divided on admissibility of child statements, amicus curiae urges this Honorable Court to clarify the analysis necessary to determine the testimonial nature of a statement of a child victim or witness. It is apparent to amicus curiae that prosecutors across this country are hungry for a workable legal analysis of the admissibility of various forms of children's out of court statements.

Due to the present legal uncertainty in Iowa and nationally of the admissible statements of child victims, the National District Attorneys Association urges this Honorable Court to grant Writ of Certiorari to Petitioner State of Iowa and to adopt a reasonable child standard for children's statements. To further this request, amicus curiae is well positioned to provide relevant studies in child development that can shed light on the cognitive capabilities of children the age of the child witness in this case. Since the United States Supreme Court has yet to examine a child abuse case in light of the *Crawford* and *Davis* rulings, amicus curiae has a public interest in supporting the Petitioner's request for Writ of Certiorari and the Petitioner's position that the decision by the Supreme Court of Iowa be reversed and the statements of the minor child be allowed into evidence.

SUMMARY OF ARGUMENT

The Supreme Court of Iowa erred in ruling that statements made by a ten year-old sexual assault victim to a hospital counselor were "testimonial statements" within the meaning of *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S. Ct. 1354 (2004) and, therefore, inadmissible at trial. Lower courts are divided nationally on the precise standard to be utilized in analyzing statements of child victims and witnesses. For these reasons, the United States Supreme Court should grant State of Iowa's petition for Writ of Certiorari and adopt a reasonable child standard in determining the testimonial nature of children's statements.

ARGUMENT

I. A ten-year old child victim, functioning at the level of a seven year old, cannot reasonably expect or anticipate that statements she made to a hospital counselor, immediately preceding a physical medical exam, would later be used prosecutorially, therefore, this Honorable Court should adopt a "reasonable child" standard when evaluating children's statements pursuant to *Crawford*.

Since the United States Supreme Court has yet to review a child abuse case on the issue of the admissibility of child victim's statements, prosecutors and judges are left with conflicting standards for determining whether or not these statements are testimonial.

In the instant case, the Iowa Supreme Court, utilizing a "primary purpose" analysis ruled that though police were present and did not actually interview the ten- year old child victim, that the statements of the child were testimonial and violated the defendant's right of confrontation afforded by the Sixth Amendment of the United States Constitution. See *State v. Bentley*, 739 N.W. 2d 296 (Iowa 2007) – child interviewed by a hospital counselor preceding a medical examination. This ruling is in sharp contrast to a case which possesses similar facts to the *Bentley* case. In the case of *State v. Krasky*, 736 N.W. 2d 636 (2007) also utilizing a "primary purpose" analysis, the Minnesota Court of Appeals ruled that the statements made by a child victim to a nurse in conjunction with a medical examination were non-testimonial. The fact that such factually similar cases were decided differently in separate jurisdictions is illustrative of the urgent need for this Honorable Court to clarify the standard to be utilized in the analysis of the statements of a child victim. The Iowa Supreme Court is but one of many of the nation's highest state courts to utilize the primary purpose test in determining the nature of a child's statement during a forensic interview. See *People v. Cage*, 56 Cal. Rptr. 3d 789 (Cal. 2007). See *In re S.R.*, 920 A. 2d. 1262 (PA. Super. 2007) The primary purpose test, as indicated by *Davis v. Washington*, 543 U.S. ___, 126 S. Ct. 2266 (2006) and in footnote two and five of the decision is not applicable in the instant case as a proper analysis since the facts of the instant case did not involve an interrogation by law enforcement and did not involve facts similar to those in *Davis*, (not involving adult victim or emergency in progress).

It is the contention of amicus curiae that many state courts throughout the country have properly sought to examine the state of mind of the child declarant in evaluating whether a statement is testimonial. The Minnesota Court of Appeals in *State v. Scacchetti*, 690 N.W.2d 393 (2005) held that a three year old child victim's videotaped statements to a nurse were non-testimonial. The Court in *Scacchetti* emphasized the importance of the child victim's cognitive awareness of the consequences of their statements at the time they are being made. The Court stated that "in order for *Scacchetti* to succeed on this argument he must show, under *Crawford*, that the circumstances surrounding the contested statements led the three year old to reasonably believe her disclosures would be available at a later trial, or that circumstances would lead a reasonable child of her age to have that expectation. See *Crawford*, 124 S.Ct. at 1364, *Scacchetti's* arguments fail to show this". *Id at* 396. In another case involving a three year old child abuse victim, State *v. Bobadilla*, 709 N.W. 2d 243, (2006), the Minnesota Court declared that a three-year-old child could not understand the legal processes and consequences of their statements made during a forensic interview.

In a recent Texas Appeals Court child abuse case, *Lollis v. State*, 232 S.W.3d 803 (Tex. Ct. App. Texarkana - Aug. 10, 2007), the Court indicated that "there is no evidence that, from the perspective of the children, the ongoing relationship with Clark was anything but counseling. And that is the proper perspective from which we view the context of the statements". *Id. at* 12. In addition, in the Minnesota

case of *State v. Krasky*, 736 N.W. 2d 636 (Minn. 2007), the Court indicated that "In both *Bobadilla* and *Scacchetti* we noted that it was unlikely that the child complainant knew that the statements could be used at trial against an abuser". *Id. at* 642.

In the Kansas case of *State v. Henderson*, 160 P. 3d 776 (2007) the Court declared that "a young victim's awareness, or lack thereof, that her statements would be used to prosecute, is not dispositive of whether her statement is testimonial. Rather, it is but one factor to consider in light of *Davis* guidance after *Crawford*." *Id. at* 785. The Illinois Court has also spoken to the age of the child in their testimonial analysis in the child abuse case of *People v. Stechly*, 225, Ill. 2d 246, 870 N.E. 2d 333, (Ill. 2007). *Stechly* indicated that

> In accordance with the weight of authority, as well as Professor Friedman's analysis, we believe that the better view is to treat a child's age as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statements would be available for use at later trial. *Id. at* 296.

Clearly, the state of mind of the child declarant at the time the statements are being made is essential to the Court's analysis.

A line of cases involving a child's statements to a medical professional have indicated the importance of analyzing these cases from the perspective of the child. See *State v. Johnson,* 2006 Ohio 5195 (nine year old's statement to medical professional non-

testimonial); *McDonald v. State*, 2006 Tex App. LEXIS 7416 (two year old's statement to a medical professional non-testimonial). The Massachusetts case of *Commonwealth v. DeOliveira*, 447 Mass. 56 (2006) further developed the importance of focusing on the age of the child in the testimonial analysis. The *DeOliveira* Court declared that in the case of a six-year-old's statement to a doctor "a reasonable person, armed with her knowledge could not have anticipated her statements would be used prosecutorially." *Id. at* 56 In the Colorado case of *People v. Vigil*, 127 P.3d 916 (Colo. 2006) the Court declared that a seven-year-old child's statement to a physician should be analyzed using "an objective reasonable person standard." *Id. at* 923.

In the instant case, the ten year old declarant (who presented with a developmental age of seven) could not at the time, due to her tender age, recognize the consequences of any statements that she made to the hospital counselor. The reasonableness of the child's awareness as to the consequences of their statements must be used to evaluate their statements in light of *Crawford*.

This Court should adopt a "reasonable child" standard as the standard utilized in determining whether children's reports of abuse are testimonial.

II. Child development research studies demonstrate that young children do not understand judicial players and processes and, therefore, supports the

adoption of a "reasonable child" standard.[2]

> Research has shown that young children do not understand what court is and, therefore, are unable to understand that statements made in a forensic interview could be used in that forum.
>
> Testifying is anxiety-producing for most adult witnesses. Adults, however, are sufficiently knowledgeable about the legal system to place their testimony in context. Adults understand-at least in general terms-what happens in court and what is expected of them. This knowledge helps adults manage the stress of testifying. By contrast, many children have little idea of what to expect in court. Some young children believe that they will go to jail if they give the 'wrong answer,' or that the defendant will yell at them.

Symposium, Child Abuse: *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 23 Pacific Law Journal 3 (1996).

---

[2] Argument II- child development studies and discussion reproduced from American Prosecutors Research Institute's amicus curiae brief filed with the Supreme Court of Iowa in the matter of *State of Iowa v. James Howard Bentley*, No. 06-1000. Argument II reproduced with permission from author Alice Anna Phillips, former Senior Attorney, American Prosecutors Research Institute.

Below are six of the leading studies evaluating what children understand about court and when they understand certain court-related concepts.

1989 Saywitz Study: "*Children's Conceptions of the Legal System"*

Dr. Karen Saywitz published a study in 1989 that focused on developmental differences in children's understanding of the legal system and what contributes to that understanding. Karen Saywitz, *Children's Conceptions of the Legal System: Court is a Place to Play Basketball, Perspectives on Children's Testimony*, 131-157 (S.J. Ceci, D.F. Ross & M.P Toglia eds., 1989). Forty-eight children (ages four to fourteen) were divided into age groups. Half of the children were actively involved in court cases. The study focused on eight court-related concepts: "court," "jury," "judge," "witness," "lawyer," "bailiff," "court clerk," and "court reporter." All the children were asked questions and shown illustrations of these eight concepts and asked to tell what they knew about the concept. The terms "bailiff," "court clerk" and "court reporter" were removed from the final results as the children in all age groups did not understand those concepts. Surprisingly, children with more actual court experience demonstrated less accurate and less complete knowledge than children with no court experience. The researchers surmised this could be for two reasons. First, children who were involved in court cases may have emotional difficulties that interfere with cognitive abilities because they were from dysfunctional families; and second, actual court experience for children may be confusing and chaotic, thus making accurate knowledge of the system more difficult. The chart

below demonstrates the percentage of children in each age group that showed accurate understanding of each of the eight concepts:

Concept	Age Group 4-7 Years	Age Group 8-11 Years	Age Group 12-14 Years
Court	0.06% accurate	74% accurate	100% accurate
Jury	0% accurate	21% accurate	73% accurate
Judge	0.06% accurate	93% accurate	91% accurate
Witness	0.11% accurate	86% accurate	100% accurate
Lawyer	0% accurate	93% accurate	100% accurate
Bailiff	0.06% accurate	0% accurate	0.09% accurate
Court Clerk	0% accurate	0% accurate	0.18% accurate
Court Reporter	0% accurate	50% accurate	64% accurate

Children between the ages of eight and eleven begin to have a more accurate understanding of the court system and the primary people involved (jury, judge, witness and lawyer), yet are still confused by details and duties. Children age seven-years-old and younger, (testimony in this case this minor child involved in this case though ten years of age chronologically, functioned developmentally as a seven year old), have little to no understanding of the court system's players much less the actual processes contemplated at the time of a forensic

interview. Therefore, under the formulation set forth in *Crawford*, a child functioning at the level of a seven-year-old could not reasonably expect that statements made to an interviewer prior to a medical examination could later be used prosecutorially.

Additional concepts were tested in this study that further demonstrate when children understand court-related concepts. First, all children were asked: "What makes a jury/judge believe a witness?" The children in the older age group were able to identify factors used by judges and juries to determine credibility of witnesses, whereas the four to seven-year-old group assumed witnesses always tell the truth and are believed. Whether the children were in the experienced or non-experienced court group did not affect this result. Second, all children were asked: "How do they [judge/jury] decide who wins the case in court?" The majority of eight to fourteen-year-olds were inaccurate in their overall understanding. They generally believed that judge and jury decision-making are dependent on each other. Some children in this age group believed that the judge and jury discuss the case together and that the judge can change the jury's verdict. Only three children (in the twelve to fourteen age group) understood that the judge and jury were independent from each other. Third, all children were asked the following questions: "What happens when people tell the truth in court? What happens when people tell a lie in court? Why is it important that people tell the truth in court?" Here, awareness was significantly different across age groups, but not across levels of court experience. A majority of the four to seven-year-olds could not demonstrate any

awareness of the court processes of gathering and determining the truth of evidence. Many of these children believed that the court's goal was to "punish the criminal or give the child to one of his parents," rather than understanding the actual goals of collecting, presenting, and evaluating evidence. Further, these children held the naïve view that evidence would magically present itself and be automatically believed. This study demonstrates that the child victim in this matter could not reasonably understand or expect that her statements might later be used in a court proceeding.

Overall, this study demonstrated the following for each age group:

(1) Four to Seven Years Olds: As a result of their egocentric view of the world, this group of children understood some features of the legal system, but not any definable features. For instance, some children understood that a judge is there to talk and listen, but did not understand that a judge is in charge of the courtroom or determines a sentence. This group was unable to meet the criteria of accuracy for any of the concepts listed above. These children could describe court-related personnel as sitting, talking, and helping but could not say how these people perform their roles nor differentiate between these varied roles. For example, the children interchanged the roles of court, police, and prison and were confused as to whether judges remain judges when they go home at night. This group also understood that witnesses had to tell the truth, but only thought that witnesses did so

to avoid being punished. Additionally, these children believed that all evidence was necessarily true. The children had blind faith that witnesses tell the truth and, if witnesses themselves, would be surprised by a confrontational cross-examination or repeated interviews which are not consistent with that blind faith. These children further believed that the court process ultimately led to jail and the children could only describe court from the point of view of someone who was in trouble. Since the deceased child in this case was functioning at the level of a seven-year-old, when applying the study to the child victim in the present case, this court can objectively determine that the child victim did not have the cognitive development to know that her statements could be used in court.

(2) Eight to Eleven Year Olds: Children of this group were able to view court as a place to work out disagreements, but still struggled with defining features between juries and judges. However, these children were better able to understand that judges determine guilt or innocence and decide punishment. They also viewed court similar to church ("You have to be quiet and serious"), and that lawyers help people, are on your side (which shows some understanding of the adversarial process), and stand up for you in court (which shows representational awareness). This group of children showed increased understanding of the differing roles of court-related people, the court process and its

function. These children were less likely to confuse the roles of the court and the police. Under the age of ten, children do not understand what a jury does and they still confuse the word with similar sounding words. Between ages eight and eleven, the children studied did not understand that impartial people sit as jurors and instead believed that victims, witnesses, and defendant's friends are on the jury. This group did not understand that the jury decides the outcome of the case.

(3) Twelve to Fourteen Year Olds: This group was able to understand the court process and place it in context with the overall government. At this age, these children became aware of the function of juries, but are still confused about the role of the jury in making decisions. Some children believe that the judge and jury work together to make a decision. This demonstrates that children do not understand the need to communicate to the jury rather than the judge. The children in this group could understand factors that would be considered when determining credibility (such as facial expressions, reputation, personality, comparison with corroborating evidence, etc.).

Based on this study, the child in this matter should not be held to an adult level of cognition that developmentally they are not able to attain. Thus, adopting a "reasonable child" standard in accordance with the research is appropriate when addressing the formulations set forth in *Crawford*.

1990 Saywitz Study: "*Children's Knowledge of Legal Terminology*"

Dr. Saywitz conducted another study, published in 1990, that analyzed whether age and grade-related patterns would be found when testing children on commonly used court terms. Karen Saywitz, Carol Jaenicke & Lorinda Camparo, *Children's Knowledge of Legal Terminology*, 14 L. & Hum. Behav. 523 (1990). Sixty children were grouped according to school grades, given a list of 35 legal terms and asked to tell everything they knew about each word. The study showed that some legal terms had significant grade-related trends. Some terms, which were accurately defined by the sixth graders, were largely inaccurate for the kindergartners, such as: "oath," "deny," "lawyer," "date," "sworn," "case," "jury," "witness," "judge," "attorney," "testify," and "evidence." On the other hand, some legal terms did not have grade-related trends because children in all three groups equally understood or misunderstood the term. Terms that were easy for all groups of children to describe accurately were: "lie," "police," "remember," "truth," "promise," and "seated." Terms that were difficult for all groups of children to describe accurately were: "charges," "defendant," "minor," "motion," "competence," "petition," "allegation," "hearing," and "strike."

The study also considered if the age of the children contributed to whether an unfamiliar word was mistaken for a similar sounding word (i.e., jury was mistaken for jewelry) or whether a word had another meaning outside the court system (i.e., "motion is like waving your arms"). These two types of errors were found to be grade-related insofar as the sixth graders made significantly fewer of these

errors than the third graders or kindergartners. For example, 19 of 20 kindergartners and 18 of 20 third graders erred with the word "hearing," whereas only 7 of 20 sixth graders made the same error. This demonstrated that the older children were able to understand that familiar words may have a different meaning in the court system.

This study demonstrated that "a majority of legal terms tested were not accurately defined until the age of 10." *Id. at* 531. Of interest is that younger children admitted lack of knowledge or unfamiliarity with a legal term more frequently than older children. Thus, older children may answer a question concerning a court term; yet not understand the term or the question. On the other hand, younger children may think that they understand the meaning of the term and may testify accordingly, when in fact they have a different meaning in their mind than the adult does. The study found that younger children (under eight years of age):

> fail to realize that they have insufficient information to correctly interpret the world. At times, they fail to identify and monitor their own limitations as communicators. The younger children's resistance to the prompt, "Could it mean anything else in a court of law?" suggests that they had limited metacognitive ability to foresee that a term would mean something else in a different, potentially unfamiliar, context. Moreover, it may be difficult for them to shift from one context to another or to continue to generate alternate solutions.

Id. at 532. However, by third grade, children may be able to fit familiar terms into a different context, such as a court setting.

This particular study demonstrates that even if a child within the age-frame of this study is informed during an interview that their statements may be used in a court proceeding, this does not necessarily mean that the child understands what court is or what the purpose of court is. On the other hand, if such information is not provided to a child during an interview, it is not fair to expect the child intuitively to understand the function of court or that the interview may be used in a criminal prosecution. In this case, the child was not informed that the interview may later be used in court, and no court-related subjects were discussed.

1989 Warren-Leubecker Study: "*What Do Children Know about the Legal System and When Do They Know It?"*

A study conducted in Australia, published in 1989, researched the developmental trends in children's perceptions of the legal system, court-related personnel, reasons for going to court, and how decisions are made. Amye Warren-Leubecker, Carol S. Tate, Ivora D. Hinton and Nicky Ozbek, *What Do Children Know about the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, Perspectives on Children's Testimony* 158-183 (S.J. Ceci, D.F. Ross & M.P Toglia eds., 1989). The study involved 563 children ranging in ages two years and nine months to fourteen years in age. The children were asked 23 questions, six of which are included below:

(1) Do you know what a courtroom is? 18% of three-year-olds, 40% of six-year-olds, 85% of seven-year-olds, and up to 100% of thirteen-year-olds answered "yes."

(2) Who is in charge of the courtroom? 82% of the three-year-olds indicated they did not know and the remaining 18% answering incorrectly (i.e., a doctor). Answering the Judge was in charge of a courtroom were 15% of four-year-olds, 25% of five-year-olds, 56% of six-year-olds, 73% of seven-year-olds, and 92% of eight-year-olds.

(3) Who else is in the courtroom (besides the judge)? The chart below demonstrates the percentage of correct answers according to age.

Age in years/Percentage Correct

	3	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**
Jury	0	0	3	4	8	13	19	28	38	38	40
Lawyer	0	0	3	0	8	15	31	44	36	40	20
Witness	0	11	3	0	0	28	23	20	16	19	30
Police	0	11	10	26	15	36	26	17	23	34	30
Defendant	0	7	0	0	8	15	19	28	27	21	20
Plaintiff	0	0	0	0	4	8	10	15	19	17	20
Audience	9	0	0	4	4	3	2	4	7	2	20
Bailiff	0	0	0	4	4	0	4	6	9	15	0
Court Clerk/ Reporter	0	0	0	0	0	3	3	14	15	9	0

(4) What does a lawyer do? Children under the age of seven did not know what a

lawyer does. When children reached age ten they began to distinguish between attorneys who prosecute or defend others.

(5) What is the jury and what do they do? A large number of children mistook the word jury for jewelry and were unable to answer this question. In general, it was not until age ten that a significant number of children could understand that a jury is involved in decision-making. However, at age twelve, 30% of these children still did not understand the role of a jury in court.

(6) Why do people go to court? A significant number of younger children did not know or were not able to provide a reason as shown by these percentages: 91% of three-year-olds; 75% of four-year-olds; 62% of five-year-olds; 43% of six-year-olds; 27% of seven-year-olds; 15% of eight-year-olds; and not until age thirteen were all children able to provide an answer.

Of interest with this particular study is that it includes children of the same age as the child victim in the present case. The results above clearly demonstrate that a majority of children age ten and younger do not understand court-related terms, the players involved in court proceedings, the purpose of court proceedings, nor the most basic level of the purpose of court. Again, this study is consistent with the abovementioned prior studies in showing that

until approximately the age of ten years old children do not understand the court process objectively and consequently cannot understand that their out-of-court statements may be used in court.

1989 Flin Study: *"Children's Knowledge of Court Proceedings"*

A study from the United Kingdom, published in 1989, replicated the findings in the studies above. Rhona H. Flin, Yvonne Stevenson, Graham M. Davies, *Children's Knowledge of Court Proceedings*, 80 British Journal of Psychology 285-297 (1989). Ninety children ages six, eight and ten were studied in this project. Twenty legal terms, as well as questions regarding court procedures were asked to the children. Consistent with other studies, the ten-year-old children understood more legal terms than the younger children. Only four terms ("policeman," "rule," "promise," and "truth") did not show a significant difference in accuracy between the age groups. However, terms like "going to court," "evidence," "jury," "lawyer," "prosecute," "trial," and "witness" were clearly not understood by the six and eight-year-old children and only nominally by the ten-year-olds. When asked what kind of people go to court, children ages six and eight did not know or believed that only bad people went to court. However by age ten, these children understood that all types of people could be involved in court proceedings.

1997 Aldridge Study: *"Children's Understanding of Legal Terminology"*

A study of British children ages five to ten, published in 1997, focused on child witnesses'

understanding of the legal system. Michelle Aldridge, Kathryn Timmins, Joanne Wood, *Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?* 6 Child Abuse Rev. 141-146 (1997). This study found that children do not begin to understand what a witness is or what a judge is/does until age ten; none of the children in the study had ever heard the word "prosecution," except for one child who said "prosecution's when you die. You get hanged or something awful like that." In defining what court is, the children studied had the following answers: one five-year-old stated "a court is a sort of jail;" one seven-year-old said that witnesses "whip people when they are naughty;" another seven-year-old said "the police think that witnesses have done something naughty;" and one seven-year-old described a judge as "someone who gets money, like at a pet show."

1998 Berti Study: *"Developing Knowledge of the Judicial System"*

Similar results as the Saywitz (1989), Warren-Leubecker (1989), and Flin (1989) studies were found in an Italian study from 1998. Anna Emilia Berti & Elisa Ugolini, *Developing Knowledge of the Judicial System: A Domain-Specific Approach, The Journal of Genetic Psychology* 159(2), pp. 221-236 (1998). One hundred students from Verona, Italy participated in this study. Of particular interest were the student responses to the question about what court is: 75% of first graders (mean age 6.7) did not know; 45% of third graders (mean age 8.6) did not know; 15% of fifth graders (mean age 10.7) did not know; and 5% of eighth graders (mean age

13.8) did not know. In response to describing a public prosecutor, all first and third graders either did not know or had never heard of a prosecutor and only 1 of 20 fifth graders and 4 of 20 eighth graders accurately described a prosecutor. The younger children similarly had difficulty understanding or describing a judge, witness, lawyer, or jury. Of interest in this study is that none of the first and third graders understood that a judge must study law to be a judge, whereas 18% of fifth graders and 94% of eighth graders understood this concept. Therefore, young child witnesses or victims may not understand the role of a judge when testifying.

Overall, results of these six research studies are similar; each indicates that children under the age ten and under do not comprehend legal terms, the nature or process of court proceedings, or the individuals involved in court proceedings. As such, how could a child functioning at the level of a seven-year-old independently conclude that her statements made during an interview would later be introduced in a court proceeding. She could not.

When determining whether a young child under the age of ten understands that statements made during any interview may subsequently be used in court, these studies demonstrate that an objective person (i.e., adult) standard cannot be applied to young children, especially children as young as the child victim in this matter. Instead, the above research amply supports the creation of a "reasonable child" standard in determining whether out-of-court statements by children are testimonial in light of the *Crawford* decision.

In this particular case, the ten-year-old child, functioning at the age of seven, could not cognitively or developmentally understand that statements made to an interviewer, prior to a medical examination, would be used in court in lieu of her live testimony. Although no governmental agent (police or child protection investigator) was involved in interviewing the child and taking her statement, this Honorable Court must also take the next step, as required by *Crawford*, and address whether an objective person in the declarant's position as a child reasonably understood that the statements made to the interviewer would later be used prosecutorially. In this case, and with children age ten and under, the answer is clearly no. This factor cannot be satisfied since children of this tender age cannot cognitively or developmentally understand legal concepts or terminology.

The studies above demonstrate that children at this developmental infancy are only beginning to obtain characteristic understanding of the legal system and do not advance to an understanding of the defining features until they are older. Moreover, according to the Saywitz studies, the shift from a child's understanding of characteristic features (i.e. a judge is an older person in a black robe) to defining features (i.e. a judge is the person in charge of procedures and enforcing the rules of the court) occurs at varying points in time for different legal concepts. There is not a set age at which every child will understand the defining features of a single concept, nor is there a set age at which one child will understand the defining features of all concepts. As a result, the formulation in *Crawford*

that an objective declarant must reasonably expect her statement to be used prosecutorially in order for it to be deemed testimonial fails in this particular matter. Accordingly, the statements of the deceased child victim to the interviewer are non-testimonial under *Crawford* and should be allowed in at trial.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES P. FOX
PRESIDENT
NATIONAL DISTRICT
ATTORNEYS ASSOCIATION

MARY SAWICKI
Senior Attorney
Counsel of record
National District
Attorneys Association
National Center for
Prosecution of Child Abuse
99 Canal Center Plaza
Alexandria, VA 22314
(703) 519-1653

January 29, 2008