ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2012-0215
	:	
Plaintiff-Appellant	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth District
DARIUS CLARK,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. 96207
	:	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

"Child abuse is a pervasive and devastating force in our society." *Yates v. Mansfield Bd. of Educ.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, ¶ 12. Children are among the most vulnerable members of society and when they are being abused they "lack the ability to ameliorate their own plight." *Id.* ¶ 30. It is therefore crucial that individuals who have special relationships with children, such as teachers and doctors, are vigilant in watching for signs of abuse and neglect.

Teachers are often the first to see evidence of possible child abuse or neglect. And when a teacher sees these signs, he must act promptly. Indeed, if a teacher does not act quickly, he may be returning the child to the person who is abusing him. In this sense, a teacher is the equivalent of a first responder addressing an ongoing emergency. Thus, when a teacher asks a child about suspected abuse, his primary purpose in inquiring is to protect the child, not to prosecute a potential offender.

In light of this relationship between teachers and children, teachers are legally required to watch for and report any signs of abuse or neglect. R.C. 2151.421. The General Assembly enacted the child-abuse reporting law to ensure that child abuse is detected at the earliest possible stage, and to prevent future abuse. The law unites teachers (and certain other professionals) with law enforcement in the shared fight against child abuse. But the law's primary purpose is still to protect abused and neglected children, *not* to punish offenders. *Yates*, 2004-Ohio-2491, ¶ 25.

Because a teacher's primary purpose in questioning a child about suspected abuse is to ensure the child's safety and to eliminate the threat of future harm, *id.* ¶ 21, a child's statements to the teacher may be admitted at a criminal trial without running afoul of a defendant's confrontation rights. That is just what this Court held as to a child's statements to medical professionals in *State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742, ¶41, and the same result

is compelled here. A child's statements to teachers are like a child's responses to medical professionals because, like doctors, teachers are tasked with ensuring the wellbeing of children in their care. Accordingly, even if a prosecution ultimately flows from the teachers' mandatory-reporting requirement, the primary purpose of these teacher inquiries is to help a child get treatment and prevent future harm.

STATEMENT OF AMICUS INTEREST

The Ohio Attorney General is Ohio's chief law officer. R.C. 109.02. In that role, he is responsible for protecting Ohio families and children by enforcing Ohio's laws. R.C. 2151.421. To fulfill his responsibilities, the Attorney General takes an active role in investigating and coordinating responses to allegations of child abuse.

In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), courts have been faced with uncertainty about the proper application of the Sixth Amendment's Confrontation Clause. Questions frequently arise in the context of child-abuse prosecutions. The Attorney General has a strong interest in ensuring that these questions are answered in a way that preserves the Sixth Amendment rights of defendants while also ensuring the safety and welfare of children.

STATEMENT OF THE CASE AND FACTS

Appellee Darius Clark was charged with multiple counts of felonious assault, child endangerment, and domestic violence stemming in part from the physical abuse of L.P., one of his girlfriend's two small children. *State v. Clark*, 2011-Ohio-6623, ¶ 1 (8th Dist.). At his trial, the prosecution called as witnesses Ramona Whitley and Debra Jones, two of L.P.'s preschool teachers. (Tr. 235-65, 265-303). Both teachers testified that they observed injuries on L.P.'s face, head, and neck. (Tr. 236-37, 270-71). They also both testified that when they questioned him, L.P. told them that "Dee" was the source of his injuries. (Tr. 258-59, 273).

Whitley testified that when she first noticed L.P.'s injuries she asked him "what happened." (Tr. 236-37). She testified that she first asked L.P. about his injuries while he was sitting at lunch, and again asked him "what happened" in her classroom after noticing more severe injuries. (Tr. 237-38, 257). Although L.P. gave several explanations for his injuries, Whitley testified that he eventually told her that "Dee did it." (Tr. 258-59).

Jones, another teacher, testified that she too questioned L.P. about the source of his injuries. Rather than question L.P. in front of other children, Jones took L.P. to a supervisor's office so as to not frighten anyone or embarrass him in front of his classmates. (Tr. 271). Like Whitley, Jones asked L.P. "what happened" to cause his injuries. (Tr. 272). In response to Jones's questions, L.P. again stated that "Dee did it." (Tr. 273). Jones testified that she was not sure what L.P. meant when he said "Dee did it." She did not know if "Dee" was an adult or another child, so she tried to get L.P. to provide more details about who "Dee" was. (Tr. 273-74). According to Jones, the purpose of her questioning was to "get a better understanding of who it was [that caused L.P.'s injuries]." (Tr. 274).

A jury convicted Clark on multiple counts of felonious assault, child endangerment, and domestic violence stemming from the physical abuse of L.P. and another of his girlfriend's children. *Clark*, 2011-Ohio-6623, ¶ 1.

Clark appealed to the Eighth District Court of Appeals, arguing (among other things) that the trial court's admission of L.P.'s statements to Whitley and Jones violated Clark's rights to confrontation under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. *Id.* ¶ 7. The appeals court concluded that L.P.'s statements to his teachers were testimonial because Ohio law requires teachers to report suspicions of child

abuse to law enforcement. *Id.* ¶ 35. As a result, the court found a confrontation violation, reversed Clark's convictions, and remanded for further proceedings. *Id.* ¶ 72.

The State has now appealed, arguing that the admission of a child's statements to his teachers does not violate the Confrontation Clause because the statements are nontestimonial statements for the purpose of protecting the child's future safety and welfare.

ARGUMENT

***Amicus Curiae* Attorney General's Proposition of Law:**

> *Statements made by a child in response to questions asked by a teacher, without participation by law enforcement, for the purposes of ensuring the child's health and safety and eliminating the threat of future harm, are nontestimonial for purposes of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.*

The Sixth Amendment guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him." U.S. Const., amend. 6; *see also* Ohio Const., art. I, § 10. However, the Confrontation Clause bars only the "admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54 (emphasis added). It does not bar the admission of nontestimonial statements, including a child's statements to a teacher.

A. The admissibility of a child's statements to his teachers turns on the primary purpose of the questioning by those teachers.

The United States Supreme Court has not provided clear guidance about what it means for a statement to be "testimonial." *See id.* at 68 ("leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial'"); *Davis v. Washington,* 547 U.S. 813, 822 (2006) (noting that *Crawford* did not define the term "testimonial"). Instead, the Court examines statements on a case-by-case basis in an attempt to identify the "primary purpose" of those

statements. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *Davis*, 547 U.S. at 822. This Court also applies the *Davis* primary-purpose test to evaluate the constitutional admissibility of statements made to the police and statements made to individuals who are arguably acting as agents of the police. *See State v. Siler*, 116 Ohio St. 3d 39, 2007-Ohio-2588, syl. ¶ 1; *see also Arnold*, 2010-Ohio-2742, ¶¶ 34, 37 (analyzing child's conversations with a social worker to determine whether the social worker's inquiries were for the primary purpose of forensic investigation, on the one hand, or for ameliorative purposes, on the other).

Under the primary purpose test, a court must objectively determine "the primary purpose of the interrogation by examining the statements and actions of all participants."[1] *Bryant*, 131 S. Ct. at 1162. A statement is testimonial if it is made for the purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822; *see also Arnold*, 2010-Ohio-2742, syl. ¶ 1. By contrast, statements made for the purpose of diagnosis and treatment are nontestimonial and their admission is not barred by Confrontation Clause. *State v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, ¶ 63; *Arnold*, 2010-Ohio-2742, syl. ¶ 2. Likewise, statements that are necessary to respond to an ongoing emergency are nontestimonial and are also admissible pursuant to the Sixth Amendment. *Bryant*, 131 S. Ct. at 1150.

The Eighth District properly identified the primary purpose test as the controlling test for evaluating the admissibility of L.P.'s statements to his teachers, *Clark*, 2011-Ohio-6623, ¶ 35.

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[1] This Court recently applied the primary purpose test to analyze statements by potential victims of child abuse in *Arnold*, 2010-Ohio-2742. In doing so, the Court declined to analyze the *child's* understanding of the purpose of his statements or to ask whether a child in the same position would reasonably think a statement was serving forensic or treatment purposes. Instead, the Court considered each of the child's statements and decided whether it served a primarily forensic or diagnostic purpose. *Id.* ¶¶ 33, 41.

But it incorrectly applied that test. For the reasons explained below, the primary purpose of questions a teacher asks a student about potential abuse is not to establish or prove past events for the purpose of later criminal prosecution. Instead, the purpose is to identify the cause of a child's injuries, and, if necessary, to take steps to protect him from future injury. As a result, L.P.'s statements to his teachers were nontestimonial and the admission of the statements did not violate Clark's Sixth Amendment rights.

B. A child's statements to a teacher are nontestimonial and do not implicate the Confrontation Clause of the Sixth Amendment.

1. Statements to teachers are nontestimonial because teachers are caretakers responsible for ensuring the wellbeing of children and for protecting them from future harm.

When teachers inquire about the source of a child's injuries, their primary purpose is to ensure the child's wellbeing. Teachers see their students regularly, if not daily, and are "often directly responsible for the care, custody, or control of these children in one form or another." *Yates*, 2004-Ohio-2491, ¶ 30. They are obligated "to protect those children committed to their care and control." *Id.* ¶ 45. This caretaking role is consistent with the vocation of teaching, which is not just to impart knowledge but to advance the overall "training, morality and wellbeing of the children in [a teacher's] care." *McCartney v. Oblates of St. Francis deSales*, 80 Ohio App. 3d 345, 356 (6th Dist. 1992).

Even when a teacher inquires about the cause of an existing injury, the focus is not on punishing the offender. Instead, the teacher is concerned with protecting the child from further harm. "[A]bused and neglected children" are particularly vulnerable because they "lack the ability to ameliorate their own plight." *Yates,* 2004-Ohio-2491, ¶ 30. In other words, child abuse victims are in an emergency situation as long as the threat of abuse continues. *See Bryant*, 131 S. Ct. at 1158 (discussing past focus on threat to victims and whether that threat was

continuing); *see also Davis*, 547 U.S. at 831-32 (finding an emergency existed where the victim was "apparently in immediate danger."); *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (emergency existed when there was a "dangerous rapist who was still at large."). And that threat of future harm persists until a teacher (or someone else) takes steps to protect the child from further abuse.

Recognizing that abused children are in a state of emergency and the corresponding need for immediate action, the General Assembly enacted Ohio's child-abuse reporting law to ensure that the people closest to a child look for and report suspected abuse. The law provides "a mechanism for identifying and protecting abused and neglected children at the earliest possible time." *Yates*, 2004-Ohio-2491, ¶ 24. Teachers (and other individuals that have special relationships with children, like doctors) are identified as mandatory reporters. *Campbell v. Burton*, 92 Ohio St.3d 336, 342 (2001). The primary responsibility and concern of every mandatory reporter is the same: to act in the best interest of the children in their care.

Because teachers and doctors are both mandatory reporters, this Court's decisions regarding the admissibility of statements made to doctors are highly instructive about the admissibility of statements made to teachers. Statements to medical personnel about past abuse are nontestimonial if they are made for the purpose of medical diagnosis, and they may be admitted at trial even without an opportunity for prior cross-examination. *Muttart*, 2007-Ohio-5267, ¶ 63. The primary purpose of these statements is to "make an accurate diagnosis and to determine what evaluation and treatment are necessary." *Arnold*, 2010-Ohio-2742, ¶ 37. In other words, the statements are admissible because a doctor's primary obligation is to provide medical assistance to patients (including children) under their care and not to develop testimony for later use at trial.

In *Arnold*, this Court held that certain statements made by child-abuse victims to a social worker are likewise nontestimonial and may be admitted without running afoul of the Confrontation Clause. The Court explained that, in instances of child abuse, nontestimonial information includes the identity of the perpetrator and the type of abuse alleged. *Id.* ¶ 32. Doctors and nurses need to identify the source and nature of harm to a child to determine the necessary level of examination and treatment. *Id.* ¶¶ 32, 37. By contrast, forensic or investigative statements that had no relation to the actual harm caused to the child were testimonial. Those statements had no treatment value; they were testimonial (and therefore inadmissible) because they served only to further the state's forensic investigation. *Id.* ¶¶ 34-36.

Like doctors and social workers, teachers are caretakers concerned with identifying the nature and cause of a child's injury. And the same diagnostic information that is useful in a clinical setting—how the injuries occurred, and who caused them—is equally important to teachers acting in their protective capacity. *See State v. Buda*, 949 A.2d 761, 778-79 (N.J. 2008) (social worker responding to an emergency by "seeking information from a victim to determine how best to remove the very real threat of continued bodily harm and even death from [the child abuse victim]"). Indeed, for teachers, determining who abused a child is especially important because, depending on the abuser's identity, the child may be returning to that person's custody at the end of the school day. *See United States v. Peneaux*, 432 F.3d 882, 894 (8th Cir. 2005) ("[I]dentification of the abuser is a matter of great concern because if the person who brought the child to the [health] clinic is the abuser, the child should not leave with that individual.").

In short, the same rationale that underlies this Court's decisions in *Arnold* and *Muttart* also means that a child's statements to teachers are nontestimonial. A teacher's concern when questioning a student is not to gather evidence to benefit the prosecution in some hypothetical

future trial. Instead, the teacher's concern is far more immediate: determining what caused a child's injuries and how to protect the child from future injury. Above all else, a teacher's duty is to protect his students. *See Yates*, 2004-Ohio-2491, ¶ 45 ("Schoolteachers . . . have a special responsibility to protect those children committed to their care and control.").

2. Statements made to teachers are not made for a forensic or prosecutorial purpose and do not become testimonial even if they are introduced at trial.

Not only is it plain that conversations with teachers are for ameliorative purposes, but these statements bear none of the characteristics traditionally associated with testimonial statements made for use in a later criminal prosecution.

Teachers are often the first to notice signs of child abuse and are likely to informally question a child about his injuries well before law enforcement becomes involved. Notably, this Court has found statements to be nontestimonial even when law enforcement is more intimately involved in the solicitation of the statements. *See, e.g., Arnold*, 2010-Ohio-2742, ¶ 43 ("[T]he fact that police officers watched" a social worker interview a child abuse victim from a separate room, and recorded the interview for future use, "does not change the fact that the [child's] statements were necessary for . . . medical diagnosis and treatment."). If statements can be nontestimonial under those circumstances, then certainly the absence of any law enforcement involvement at all is an even stronger indication of a statement's nontestimonial purpose.

The fact that teachers are mandatory reporters under Ohio's child-abuse reporting law does not convert otherwise nontestimonial statements into testimonial ones. The purpose of the reporting law is to protect abused children, *not* to prosecute or otherwise punish abusers. *Yates*, 2004-Ohio-2491, ¶¶ 25, 56, 58. And as this Court has already recognized, nontestimonial statements are not rendered testimonial merely because the statements might later be used by law enforcement. *Arnold*, 2010-Ohio-2742, ¶ 43; *Muttart*, 2007-Ohio-5267, ¶ 62 ("The fact that the

information gathered by the medical personnel . . . was subsequently used by the state does not change the fact that the statements were not made for the state's use."). Indeed, courts have repeatedly rejected the proposition that statements made to mandatory reporters lose their otherwise nontestimonial status. *See Arnold*, 2010-Ohio-2742, ¶ 26 (listing state courts that have found admissible statements made for medical purposes "even if they are used subsequently by the state in a prosecution"); *see also People v Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011) (doctor's duty to report does not transform diagnostic statements into prosecutorial ones); *Buda*, 949 A.2d at 778-79 (despite duty to report, social worker was not collecting information for prosecutorial purposes).

If the Eighth District is correct, and the legal obligation to report suspicions of child abuse means that every statement to a mandatory reporter is testimonial, *Clark*, 2011-Ohio-6623, ¶ 35, then this Court's decision in *Arnold* would have to be deemed incorrect and overruled. Like teachers, medical professionals and social workers are mandatory reporters. R.C. 2151.421(A)(1)(b). So if the appeals court is correct, this Court erred in *Arnold* by permitting the admission of *any* statements made to doctors or social workers, regardless of their purpose. But the Court held the exact opposite, allowing statements made for the purpose of medical diagnosis to be admitted at trial. *Arnold*, 2010-Ohio-2742, ¶ 28. Under *Arnold*, then, courts must examine the primary purpose of each statement; they cannot begin and end the analysis with the mere fact that the questioner was a mandatory reporter.

C. Like other nontestimonial statements made to teachers, L.P.'s statements were made in response to inquiries motivated by his teachers' desire to ensure his wellbeing and protect him from harm.

L.P.'s statements to his teachers are a paradigmatic example of nontestimonial statements made for the primary purpose of the care and protection of an abused student. L.P.'s teachers were confronted with an injured child, the source of whose injuries was unknown. (Tr. 236-37,

270-76). When they questioned L.P., the teachers did not know whether he had been abused, much less the identity of his abuser. (Tr. 273-76, L.P.'s teacher testifying that she was unsure whether another child might have caused L.P.'s injuries.). The teachers' questions were driven by their caretaking role and their concern for L.P.'s wellbeing. (Tr. 236, L.P.'s teacher stating that her duties are to "[c]are for children" and to "teach them different things.").

The primary statement at issue here—L.P.'s statement that "Dee did it"—identifies the individual who caused L.P.'s injuries. That statement served double duty; it enabled L.P.'s teachers to determine the extent and cause of his injuries and to assess whether L.P. might be at risk of additional harm.

Discovering the source of L.P.'s injures was particularly important because this case did not involve a "known and identified perpetrator" or a "neutralized threat." *See Bryant*, 131 S. Ct. at 1158 (discussing the circumstances in *Hammon v. Indiana*, 547 U.S. 813 (2006)). L.P. never indicated to his teachers that he was safe from future harm. *Compare Davis*, 547 U.S. at 830 (victim in *Hammon* stated that "things were fine."). The teachers' questions were therefore necessary to identify whether L.P. was in danger, and the nature of that danger. And L.P.'s responses were likewise necessary to enable his teachers to respond to the ongoing emergency posed by the very real threat of future abuse.

In addition, there is no indication that L.P.'s teachers were acting on behalf of, or even in cooperation with, law enforcement. When they questioned L.P., the teachers had not yet contacted police and police had not begun investigating the possible abuse. (Tr. 240, Whitley stating that she did not make her statement to the police until two or three days after questioning L.P.; Tr. 277, Jones identifying a statement she made to the police two days after she questioned

L.P.). The teachers did not consult with police prior to questioning L.P. and police were not present to observe the questioning.

Unlike the more formal statements traditionally barred by the Confrontation Clause, L.P.'s statements were elicited by his teachers' informal and unstructured questioning. *See Davis*, 547 U.S. at 825-27, 830; *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring) ("The Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions") (citation omitted); *Giles v. California*, 128 S. Ct. 2678, 2694 (2008) (Alito, J., concurring) (questioning whether statements made to a police officer responding to a domestic-violence report were "testimonial"). While not determinative, the presence of "formality suggests the absence of an emergency." *Bryant*, 131 S. Ct. at 1160.

Conversely, the lack of formality here confirms that the questions asked by L.P.'s teachers lacked any prosecutorial or forensic investigative purpose. Whitley testified that she was in "shock" when she saw his injuries. (Tr. 237). Her questioning could not have been preplanned or otherwise structured; it occurred immediately upon noticing the extent of L.P.'s injuries. (Tr. 237). Whitley also did not isolate L.P. when she questioned him. Other children were present both times that Whitley questioned L.P., first in the lunch room and later in the classroom. (Tr. 236-7, 257). Jones did remove L.P. from the classroom to ask him about his injuries, but she did so in part to avoid embarrassing him in front of his classmates. (Tr. 271). Both teachers reacted spontaneously to newly observed injuries, as someone does when responding to an ongoing emergency. *See Arnold*, 2010-Ohio-2742, ¶ 35 (describing the nontestimonial statements in *Davis* as the product of a "sequestered but spur-of-the moment"

interview). They asked simple questions—mostly "what happened?"—in an attempt to understand who or what had caused L.P.'s injuries. *Compare* Tr. 237-38, 257, 272 *with Bryant*, 131 S. Ct. at 1165-66.

The circumstances surrounding L.P.'s statements show that the teachers' primary purpose in questioning L.P. was to respond to his injures and to address an ongoing emergency. But the appeals court never examined these circumstances. Instead, the court concluded that L.P.'s statements must be testimonial because he made them to teachers who are mandatory reporters. *See Clark*, 2011-Ohio-6623, ¶ 35. That conclusion is wrong. *See Arnold*, 2010-Ohio-2742. For all the reasons above, L.P.'s statements were nontestimonial and their admission did not violate Clark's confrontation rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eighth District Court of Appeals.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served by U.S. mail this 23rd day of July, 2012 upon the following counsel:

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