ORIGINAL

In the
Supreme Court of Ohio

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

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

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INTRODUCTION

A child's statements to a teacher do not implicate the Confrontation Clause and are therefore admissible at trial, even absent an opportunity for prior cross-examination. Clark and the Ohio Public Defender (OPD) urge this Court to conclude otherwise, but their arguments misunderstand the current state of confrontation jurisprudence, mischaracterize the State's and Attorney General's arguments, and ultimately reach the wrong conclusion.

The State and Ohio Attorney General are not asking this Court to expand existing "exceptions" to a defendant's confrontation rights. *See* Merit Br. of Amicus Ohio Public Defender ("OPD Br."), pp. 9-11 (claiming that the State and Attorney General want to "stretch" the "exceptions" for statements made during an ongoing emergency or for purposes of medical diagnosis or treatment). The language of exceptions is relevant to evidentiary rules of hearsay, which generally bar the admission of out-of-court statements, only to admit statements that later qualify for certain limited exceptions. But confrontation jurisprudence is not about exceptions. Instead, the Sixth Amendment divides out-of-court statements into two categories: nontestimonial statements and testimonial statements. The Confrontation Clause permits the admission of nontestimonial statements, but prohibits the admission of testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

Whether a statement is testimonial or not turns entirely on its primary purpose. A statement is testimonial only if it was made "'for the primary purpose of creating an out-of-court substitute for trial testimony,'" *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011)), meaning that it was made primarily to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). Other evidentiary considerations—like reliability—are

irrelevant to this inquiry. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the Framers did not "mean[] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'"); *but see* OPD Br. p. 12 (incorrectly suggesting that reliability is a concern of the Confrontation Clause).

In keeping with this framework, the Court should hold that a child's statements to a teacher are nontestimonial. A child's statements to a teacher about potential abuse—particularly when it is unknown whether the abuse is ongoing—are not made for the primary purpose of substituting for in-court testimony. Instead, these statements are analogous to others that courts like this one have found nontestimonial, such as statements for medical treatment or diagnosis and statements made during an ongoing emergency. Like medical professionals, teachers have an interest in protecting children who are committed to their care. And, like victims in emergency situations, a child who is being abused faces a threat of future abuse. But statements to teachers are nontestimonial because they satisfy the primary purpose test, not because they can be shoehorned into some preexisting "exception" to the Confrontation Clause.

The success of Clark's entire Confrontation Clause argument depends on persuading this Court that teachers' mandatory reporting obligations under R.C. 2151.421 changes the primary purpose analysis, which he cannot do. *See* Appellee's Merit Brief ("Clark Br."), pp. 13-14; *see also* OPD Br. pp. 12-14. As this Court has recognized, if a statement's primary purpose is nontestimonial, then it is irrelevant whether the statement may also be of some use to law enforcement. *See State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742, ¶¶ 26, 43; *State v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, ¶ 62.

For these and the reasons explained in the Attorney General's opening brief, the Court should hold that the admission of L.P.'s statements did not violate Clark's confrontation rights.

Further, because that holding may have a bearing on the outcome of Clark's prosecution, the Court should not dismiss the appeal as improvidently allowed. *See* Clark Br., pp. 3-4, 9-11.

ARGUMENT

A. Under the primary purpose test, L.P.'s statements to his teachers are nontestimonial and their admission did not violate Clark's confrontation rights.

1. A statement's admissibility under the Confrontation Clause depends entirely on its primary purpose, not its reliability..

The United States Supreme Court's decision in *Crawford* upended long-established law regarding the admissibility of out-of-court statements. Before *Crawford*, Sixth Amendment Confrontation Clause jurisprudence largely tracked evidentiary hearsay rules, allowing the admission of statements by out-of-court declarants when they bore sufficient indicia of reliability. *See Crawford*, 541 U.S. at 60-61 (discussing the Court's previous confrontation decisions).

But that approach is no more. *Crawford* made a complete break with the reliability standard. *Id.* at 50-51, 61. Despite that fundamental change, the OPD's arguments remain fixed on the question of reliability. *See* OPD Br. p. 12 (arguing that certain types of statements are admissible only because of their "inherent reliability"). These reliability arguments are relevant to the separate question of whether L.P.'s statements are admissible under evidentiary hearsay rules, but they have no place in modern Confrontation Clause jurisprudence.[1]

Since *Crawford*, the United States Supreme Court and this Court have embraced the primary purpose test for determining whether a statement made to law enforcement (or

[1] Even if the Court agrees that children's statements to teachers are nontestimonial, such that their admission does not violate Confrontation Clause, those statements will not always be admissible at trial. A trial court's work does not end after conducting a confrontation analysis. Instead, the court also has to decide whether each hearsay statement is admissible under the Rules of Evidence. Reliability continues to be an essential component of that hearsay analysis—but that analysis is not before the Court in this case.

individuals who are arguably agents of law enforcement) is inadmissible absent an opportunity for prior cross-examination. *See, e.g., Davis*, 547 U.S. at 822; *Arnold*, 2010-Ohio-2742, ¶¶ 34-36; *State v. Siler*, 116 Ohio St. 3d 39, 2007-Ohio-5637, syl. ¶ 1. Under this test, statements are testimonial—and inadmissible—if their purpose "was to establish past events potentially relevant to a later criminal prosecution." *Siler*, 2007-Ohio-5637, ¶ 2. Statements with a different purpose are nontestimonial and do not trigger a defendant's confrontation rights.

In keeping with the goals of a primary purpose analysis, the United States Supreme Court has declined to adopt a categorical system for determining whether a statement is testimonial. *See Bryant*, 131 S. Ct. at 1155 (rejecting a category-based application of the Confrontation Clause by holding that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (emphasis in original)). In that respect, confrontation analysis differs dramatically from hearsay analysis—which generally requires courts to exclude all hearsay, subject to certain exceptions. A statement's admissibility under the Confrontation Clause does not turn on whether it qualifies for some narrow exception. Instead courts must decide whether each statement is testimonial or nontestimonial by objectively "examining the statements and actions of all participants" to "ascertain[]the primary purpose of [an] interrogation." *Id.* at 1162.

Ignoring this standard, the OPD selectively reads precedent to say that all statements relating to past events are testimonial. OPD Br. p. 10 (arguing, in part, that L.P.'s statements were testimonial simply because "L.P.'s teachers literally asked 'what happened'"). But that is only part of the primary purpose test: Statements must be made to "establish or prove past events *potentially relevant to later criminal prosecution*," *Davis*, 547 U.S. at 822 (emphasis added), and they are testimonial only if they are "procured with a primary purpose of creating an

out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. In other words, to be testimonial, a statement must both relate to past events *and* be intended when elicited for eventual use at trial. A statement is not necessarily testimonial just because it is about the past or because it answers the question, "what happened"? *See, e.g., id.* (applying the primary purpose test and concluding that statements made to police in response to the question "what happened?" were nontestimonial); *Arnold*, 2010-Ohio-2742, ¶¶ 32, 44 (holding that many statements about the past, including statements identifying a child's abuser, were nontestimonial).

2. L.P.'s statements to his teachers were nontestimonial.

In light of the proper Confrontation Clause analysis above, this Court must consider the specific context of L.P.'s statements to properly apply the primary purpose test. The OPD would disregard the importance of context in this analysis, and therefore claims mistakenly that the Attorney General wants otherwise inadmissible statements to be admitted solely because of the "nature of the offense or the victim involved." OPD Br. p. 15. But the Attorney General is not pointing to the nature of the offense and the victim as a reason to admit otherwise inadmissible statements. Instead, the Attorney General correctly emphasizes that these factors are important to determine the primary purpose of L.P.'s statements, and thus whether they are testimonial or not.

L.P.'s age, the duties owed to him by his teachers, and the teachers' lack of knowledge about how L.P. became injured all indicate that the primary purpose of his statements was nontestimonial. The statements were made by a three-and-a-half year-old child about injuries he had sustained from an unknown source. He made the statements to two preschool teachers who had no relationship to or involvement with law enforcement before inquiring about L.P.'s injuries. (Tr. 240, 270 (teachers testifying that they did not speak with police until several days after questioning L.P.)). Neither teacher even knew whether L.P. had been abused when she

questioned him (Tr. 273-74), much less intended that his answers would serve as a substitute for trial testimony during the prosecution of L.P.'s abuser.

These are appropriate—and highly relevant—considerations for determining the primary purpose of L.P.'s statements. In analyzing whether statements were made during an ongoing emergency, the United States Supreme Court has emphasized that the existence of an emergency depends on context. *See Bryant*, 131 S. Ct. at 1148 (holding that "whether an emergency exists and is ongoing is a highly context-dependent inquiry" and discussing the Court's past focus on the potential threat to a victim). In doing so, the Court has considered factors like a victim's identity and circumstances when determining whether an emergency exists. *Id.* And, as this Court has recognized, circumstances that may not pose a serious threat to an adult victim take on a different character when the victim is a small child who "lack[s] the ability to ameliorate [his] own plight."[2] *See Yates v. Mansfield Bd. of Educ.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, ¶ 30.

The duty of L.P.'s teachers to ensure his wellbeing also confirms that the primary purpose of his statements was nontestimonial. Teachers are caretakers who "have a special responsibility to protect those children committed to their care and control." *Id.* ¶ 45. In this respect, teachers are similar to medical professionals and others who have a special concern for the welfare of children under their care. *See Muttart*, 2007-Ohio-5267, ¶ 62 (holding that a

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[2] The OPD relies heavily on *Hammon v. Indiana*, 547 U.S. 813 (2006), as proof that there is no ongoing emergency when a child responds to a teacher's inquiries about potential abuse. *See* OPD Br., pp. 9-11. But L.P.'s statements are nontestimonial even if there was not an "ongoing emergency" in the *Hammon* sense. In addition, the facts here arguably do establish an ongoing emergency. L.P., unlike the adult victim in *Hammon*, was a child with little control over his circumstances. He could have been returning to an abusive situation as soon as his teachers released him from school. And L.P.'s teachers, unlike the police who questioned the victim in *Hammon*, had no idea who might have caused his injuries or where that person was. *Compare* Tr. 273-74 (Jones testifying that she did not know if L.P.'s injuries were caused by an adult or a child)) *with Hammon*, 547 U.S. at 829-32; *see also Williams*, 132 S. Ct. at 2243 (emergency existed when "a dangerous rapist . . . was still at large").

child's statements to his mother were nontestimonial and observing that the mother's "initial and primary concern was the physical well-being of her children"). When someone who cares for a child (whether a parent, a doctor, or a teacher) asks the child for information out of concern for the child's wellbeing—and gives no thought to the preservation of testimony for later use at trial—the resulting statements are nontestimonial.

B. Nontestimonial statements do not become testimonial simply because they may have an ancillary benefit to law enforcement.

Contrary to Clark's claims, *see* Clark Br. pp. 13-14, a teacher's duty to report suspicions of child abuse does not transform a nontestimonial statement into a testimonial one. Teachers are mandatory reporters, *see* R.C. 2151.421, but their duty to report is secondary to their obligation to protect the children under their care. Therefore, when a teacher's questions to a child are motivated by the *primary* purpose of ensuring that child's welfare, it does not matter if the child's answers may later benefit law enforcement. *See Arnold*, 2010-Ohio-2742, ¶ 43 ("[T]he fact that information gathered for medical purposes is subsequently used by the state does not change the fact that the statements were made for medical diagnosis and treatment."); *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."). And the fact that a statement may have a dual purpose is irrelevant; what matters is the statement's *primary* purpose.[3]

In *Arnold*, 2010-Ohio-2742, this Court declined to base the outcome of its Confrontation Clause analysis on the mandatory reporting duty imposed on social workers. There is no reason

[3] Clark mischaracterizes Ohio law in suggesting that dual purpose statements are testimonial. Clark Br. pp. 14-15. To the contrary, in *Arnold* this Court considered—and expressly declined to rely on—every case that Clark cites in support of this claim. *See* 2010-Ohio 2742, ¶ 21. Clark further disregards *Arnold* by citing a single Justice's dissent as if it were the majority opinion in that case. Clark Br. p. 15 (citing *Arnold*, 2010-Ohio-2742, ¶ 58 (Pfeifer, J., dissenting).

to depart from that precedent now. In addition, this Court has expressly held that the purpose of Ohio's mandatory reporting law is to provide "a mechanism for identifying and protecting abused and neglected children at the earliest possible time." *Yates*, 2004-Ohio-2491, ¶ 24; *see also id.* ¶ 56 (Lundberg Stratton, J., dissenting) ("The intent of this statute is the protection of the child, not the punishment of the abuser."); *Brodie v. Summit County Children Servs. Bd.*, 51 Ohio St. 3d 112, 117 (1990) (purpose of mandatory reporting statute is to "protect children from abuse and neglect and eliminate the source of any such abuse"). The prosecution of abusers is "adjunct" to that purpose, , meaning that, at most, it is a secondary purpose of R.C. 2151.421. *Yates*, 2004-Ohio-2491, ¶ 25; *see also* Webster's New World Dictionary (3d College Ed. 1998) (defining "adjunct" as "a thing added to something else, but *secondary not essential to it*" (emphasis added)). But that secondary purpose does not automatically make testimonial all statements made to mandatory reporters. *See Arnold*, 2010-Ohio-2742, ¶ 26. Together, these holdings show that the Eighth District erred in finding that statements to teachers are testimonial because teachers must report suspected child abuse.

The Eighth District never even discussed the primary purpose of L.P.'s statements to his teachers. It did not consider whether L.P.'s statements had features in common with statements made in an ongoing emergency or whether L.P. may have needed medical attention. It did not consider that teachers, like doctors and parents, are responsible for the wellbeing of children committed to their care. Instead, the court focused exclusively on the teachers' role as mandatory reporters and concluded that the mandatory reporting obligation rendered L.P.'s statements testimonial. *State v. Clark*, 2011-Ohio-6623, ¶¶ 32-35 (8th Dist.). That focus, and the resulting decision, was wrong.

C. This appeal should not be dismissed as improvidently allowed.

This Court also should reject Clark's request to dismiss this appeal as improvidently allowed because the Court's resolution of the confrontation challenge may have a "bearing on the outcome of Mr. Clark's prosecution." Clark Br. p. 4 (claiming the Court's opinion would be purely advisory). Clark argues that L.P.'s statements are inadmissible, regardless of how this Court resolves the Confrontation Clause challenge. According to Clark, that conclusion is inevitable because the appeals court found L.P.'s statements to *others* were inadmissible under Evid. R. 807 and the trial court found L.P. incompetent to testify. *Id.* at pp. 10-11. But neither of those findings means that L.P.'s statements to his teachers are inadmissible under Rule 807.

If the State prevails, then the lower court will have to analyze the admissibility of L.P.'s statements to his teachers under Rule 807 for the first time on remand. Rule 807 delineates the hearsay exceptions for admitting child statements in abuse cases and it requires courts to examine the characteristics of each individual statement. The admissibility of one statement under this rule does not affect the admissibility of a different statement by the same declarant. And competency does not dictate the outcome of a Rule 807 analysis. *See Muttart*, 2007-Ohio-5267, syl. (holding that regardless of whether a child has been determined to be competent to testify, the child's statements may be admitted at trial under an exception to the hearsay rule). The result of this Rule 807 analysis is therefore anything but a foregone conclusion.

As a result, the Court's resolution of the confrontation issues still matters. If the State prevails, then the Eighth District will have to analyze each of L.P.'s statements and decide, for the first time, whether it is admissible under Rule 807.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eighth District and remand for further proceedings consistent with that holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served by U.S. mail this 1st day of October, 2012 upon the following counsel:

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