

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2008-1693
Plaintiff-Appellee, :
v. : On Appeal from the
MICHAEL S. ARNOLD, : Tenth Appellate District, Franklin County
Case No. 07AP-789
Defendant-Appellant. :

**BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT MICHAEL S. ARNOLD**

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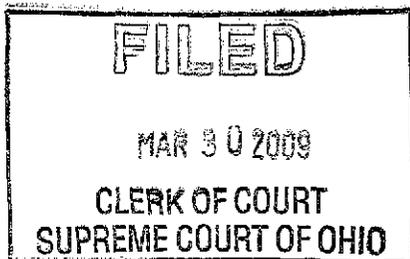


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STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and facts set forth by Appellant Michael Arnold.

INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender (“OPD”) is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As *amicus curiae*, the OPD offers the Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. OPD has an interest in this case insofar as it will determine the scope and effect of the Confrontation Clause as it relates to out-of-court statements by child victims to non-governmental agents working in concert with law enforcement. Such practices are commonplace across the state and we believe that it is imperative to the protection of our clients’ rights that this Court recognize the egregious constitutional error inherent in the admission of such statements. Moreover, adopting the sole proposition of law presented in this case will bring Ohio law into harmony with controlling case law from the United States Supreme Court.

FIRST PROPOSITION OF LAW

In a criminal prosecution, the admission of out-of-court statements made by a child to an interviewer employed by a child advocacy center violates the constitutional right to confront witnesses provided by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." Amend. VI, U.S. Constitution. In *Crawford v. Washington* (2004), 541 U.S. 36, the United States Supreme Court radically revised its understanding of the confrontation right, discarding a jurisprudential stance that had largely conflated the Confrontation Clause with evidentiary hearsay rules. The Court's prior approach, based on its decision in *Ohio v. Roberts* (1980), 448 U.S. 56, viewed the Confrontation Clause primarily as a guarantor of the "reliability" of criminal evidence. *Crawford*, 541 U.S. at 62. In *Crawford*, the Supreme Court abandoned *Roberts*' focus on reliability in favor of a theory of confrontation that turns on the testimonial quality of an out-of-court statement offered against a criminal defendant. *Id.* at 68-69.

According to the Supreme Court's earlier decision in *Roberts*, an out-of-court statement could be admitted over a Sixth Amendment challenge if the declarant was unavailable to testify and the statement was "reliable" in terms of trustworthiness. *Roberts*, 448 U.S. 56, 65. *Roberts* noted that "hearsay rules and the Confrontation Clause are generally designed to protect similar values." *Id.* Therefore, the *Roberts* Court concluded that an unavailable witness's out-of-court statement would not be barred by the Confrontation Clause if it fell "within a firmly rooted hearsay exception." *Id.* *Roberts*' conception of the Confrontation Clause as a device designed to aid in the truth-seeking process at trial drew sharp criticism from constitutional scholars who opined that hearsay rules, unlike the Confrontation Clause, were not developed with the primary

purpose of protecting the rights of criminal defendants. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011 (1998).

Tracing the historical development of the confrontation right, the *Crawford* Court rejected *Roberts*' view that "the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the law of Evidence for the time being." *Crawford*, 541 U.S. at 51. According to the *Crawford* Court, "we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61. The Supreme Court further explained that the "unpardonable vice" of *Roberts* was "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 64.

After abandoning the test set out in *Roberts*, which had guided Sixth Amendment analysis for nearly a quarter-century, *Crawford* announced a new rule that "the prosecution may not introduce 'testimonial' hearsay against a criminal defendant unless the declarant is unavailable and the defendant had an opportunity for cross-examination." *Id.* at 54, 68. The *Crawford* Court "left for another day any effort to spell out a comprehensive definition of testimonial." *Id.* at 68.

Nonetheless, the Supreme Court did provide some guidance concerning the testimonial nature of statements when it emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure," including "its use of ex parte examinations" and "sworn ex parte affidavits" as evidence against the accused. *Id.* at 50, 52, n.3. Accordingly, "formal statements to government officers" and other statements produced with

“the involvement of government officers . . . with an eye toward trial” are paradigmatically testimonial statements. *Id.* at 51, 56, n.7.

Two years after *Crawford*, the Supreme Court revisited the Confrontation Clause and further delineated the distinction between testimonial and non-testimonial statements in two consolidated cases: *Davis v. Washington* (2006), 547 U.S. 813 and *Hammon v. Indiana* (2006), 547 U.S. 813. In *Davis*, the trial court admitted, over the defendant’s Confrontation Clause objection, an audio tape of a domestic violence victim’s 911 call to police. *Id.* at 819. The Supreme Court approved of the introduction of the 911 tape and, in doing so, articulated a new standard for determining whether a statement is testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 829. Thus, *Davis* lays out a bright-line rule that a statement made to government officials in the course of an ongoing emergency will be considered nontestimonial, while a statement made to establish past events, after an emergency is passed, will be considered testimonial. *Id.*

The circumstances surrounding the statements in *Davis* led the Court to conclude that the statements were non-testimonial.. And, in reaching its holding, the Court articulated certain factors that distinguished the non-testimonial statements in *Davis* from the testimonial statements in *Crawford*. First, the witness in *Davis* was speaking about events as they were actually happening, rather than describing past events. *Id.* at 827-28. Second, any reasonable listener would recognize that the witness in *Davis* was facing an ongoing emergency. *Id.* Third, the nature of what was asked, and answered in *Davis*, viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to

learn what happened in the past. *Id.* Fourth, the Court elaborated extensively on the different levels of formality between the two interviews. Finally, the Court noted that the *ex parte* statements in *Crawford* aligned perfectly with their courtroom analogues, but the statements in *Davis* did not. *Id.* at 828 (observing that “[n]o ‘witness’ goes to court to proclaim an emergency and seek help.”). Based on these factors, the Court held that the statements in *Davis* were non-testimonial.

The Court considered the same factors in *Hammon* and concluded that the statements were testimonial. At issue in *Hammon* were statements made to police officers responding to a domestic disturbance. *Id.* at 819-20. The statements were made by the victim to a police officer in a separate room and after any immediate danger had passed. *Id.* In addition, the statements were deliberately recounted in response to structured police questioning relating to how past criminal conduct progressed. *Id.* The Court observed that “[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.” *Id.* at 828.

A. This Court should adopt a two-part test for determining whether a child’s statements are testimonial when such statements are made to non government personnel working with law enforcement.

Despite the extensive discussion of what constitutes a testimonial statement in both *Crawford* and *Davis*, the Supreme Court has not provided clear guidance on the appropriate standard to determine whether statements made to persons not employed by the government are testimonial. However, the two cases taken together indicate that courts should primarily consider two factors in order to determine whether a statement to non-governmental medical personnel is testimonial. First, the court should determine whether the statement was made in connection with a government investigation with specific attention to the level of law

enforcement involvement. Second, the court should assess the formality of the statement by looking at the totality of the circumstances surrounding the making of the statement, including whether the interviewer used structured questions specifically designed to elicit information about past criminal conduct, and whether the statement was memorialized on video or audio tape for use in a future judicial proceeding.

Only if both factors are satisfied—if the statement is made in response to formal questioning by a person working closely with law enforcement—will the statement be deemed testimonial for confrontation purposes. Support for this rule can be found in the pronouncements of the Supreme Court in both *Crawford* and *Davis* and is consistent with the approach adopted by the majority of other jurisdictions to consider this issue.

The Supreme Court has never limited the class of testimonial statements to those statements made specifically to law enforcement. Significantly, the Court has taken great pains to reiterate that its definitions of testimonial and non-testimonial hearsay were not all-encompassing, but rather were tailored to their specific facts. In addition, in *Davis*, the Court indicated that a statement made outside of interrogation or to a private party could be testimonial depending on the particular circumstances surrounding the making of the statement. *Davis*, 547 U.S. at 828. This Court should recognize that the reasoning in *Davis* reasonably extends to nominally private actors working closely with law enforcement to perform investigative or evidence-gathering functions.

In addition, the Supreme Court has unequivocally held that statements made in response to “police interrogation” are testimonial. *Crawford*, 541 U.S. at 53. Unfortunately, the Court has declined to define the term “interrogation.” In *Crawford*, the Court indicated only that it was using the term “in its colloquial, rather than any technical legal, sense.” *Id.* at 53, n.4. At a

minimum, both *Crawford* and *Davis* make plain that the most important factor in determining what constitutes a “testimonial” statement is the official and formal quality of such a statement. That the formal nature of the questioning, and the resulting statement, is central to the “testimonial vs. non-testimonial” inquiry is buttressed by the most commonly understood definition of the verb “interrogate”: “to examine by questions; question formally and systematically.” American Heritage Dictionary (4th ed. 2006).

The most natural reading of *Crawford* and *Davis* is that courts must evaluate both the level of government involvement and the formality of the statement in determining whether statements to nominally private actors are testimonial. Such a test is fully consistent with this Court’s prior decisions in *State v. Siler* (2007), 116 Ohio St.3d 39 and *State v. Stahl* (2006), 111 Ohio St.3d 186, and is consistent with the weight of authority from other jurisdictions. Therefore, amicus urges this Court to adopt this simple two-part test and hold that the statements made to the child-advocacy-center worker in this case were testimonial and should have been excluded under the Confrontation Clause.

B. The majority of other jurisdictions to consider the application of *Crawford* and *Davis* to child victim hearsay statements made during the course of a sexual abuse investigation have followed the two-part test outlined above.

In the wake of *Crawford* and *Davis*, courts across the country have been called upon to apply the Supreme Court’s new Confrontation Clause doctrine to a variety of situations, including domestic violence, child abuse, and sexual assault cases in which the victims made statements to medical personnel regarding the alleged crime. With respect to statements from child sexual abuse victims, the decisions from other jurisdictions can be summarized as follows: (1) states without any post-*Crawford* decisions on point; (2) states with appellate decisions on point, but without supreme court decisions on point; (3) states with supreme court decisions

finding such statements to be testimonial under *Crawford*; and (4) states with supreme court decisions finding such statements to be non-testimonial under *Crawford*.¹

1. States without any relevant supreme court decisions addressing the issue presented in this case.

Amicus could not locate any post-*Crawford* appellate, or supreme court, decisions on point in the following twenty states: Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maine, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

The following nine states have intermediate appellate decisions on point, but Amicus could not locate any relevant supreme court decisions: Alabama, Alaska, Arizona, California, Delaware, Michigan, Pennsylvania, Texas, and Washington. See, e.g., *T.P. v. Alabama* (2004), 911 So.2d 1117 (statements by child victim to investigator and social worker testimonial); *Flores v. Arizona* (2005), 120 P.3d 1170 (statements to child abuse investigators testimonial); *California v. Sisavath* (2004), 118 Cal.App.4th 1396 (statements to forensic interviewer regarding sexual abuse testimonial); *In Re S.R.* (Penn. 2007), 920 A.2d 1262 (statements to forensic interview specialist regarding sexual abuse testimonial); but see *Clark v. Alaska* (2009), 199 P.3d 1203 (statements to nurse regarding abuse were for medical diagnosis and not testimonial); *Delaware v. Monroe*, 2008 Del. Super. App. Lexis 393 (statements to nurse regarding injury not testimonial); *Michigan v. Geno* (2004), 683 N.W.2d 687 (statements to child protective services investigator not testimonial); *Pennsylvania v. Allshouse* (2006), 924 A.2d 1215 (statements by child to caseworker not testimonial); *Lollis v. Texas* (2007), 232 S.W.3d 803 (statements by child to licensed counselor regarding abuse not testimonial); *Washington v.*

¹ For simplicity, Amicus uses the term “supreme court” generally to refer to the state’s highest court without consideration of the name specifically given to that court within a particular state.

Garnica, 2008 Wash. App. Lexis 1530 (discretionary appeal accepted) (statements to hospital social worker not testimonial).

2. States with relevant supreme court decisions addressing the issue presented in this case.

The supreme courts in the following states have determined that out-of-court statements by child sexual assault victims to “medical personnel” are non-testimonial: Arkansas, Colorado, Connecticut, Massachusetts, Minnesota, Mississippi, Montana, and Nebraska. See *Seely v. Arkansas* (2008), 373 Ark. 141 (statements to hospital social worker not testimonial); *Colorado v. Vigil* (2006), 127 P.3d 916 (statements to emergency room physician not testimonial); *Connecticut v. Arroyo* (2007), 935 A.2d 975 (statements to forensic interviewer not testimonial); *Massachusetts v. DeOliveira* (2006), 849 N.E.2d 218 (statements to emergency room physician not testimonial); *Minnesota v. Krasky* (2007), 736 N.W.2d 636 (statements to nurse not testimonial); *Hobgood v. Mississippi* (2006), 926 So.2d 847 (statements to social worker not testimonial); *Montana v. Spencer* (2007), 169 P.3d 384 (statements to licensed counselor not testimonial); *Nebraska v. Vaught* (2004), 682 N.W.2d 284 (statements to emergency room physician not testimonial).

By contrast, the supreme courts in the following states found out-of-court statements by child sexual assault victims to be testimonial: Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Missouri, North Dakota, Oregon.² See *Florida v. Contreras* (2008), 979 So.2d 896 (statements to child protection team coordinator testimonial); *Idaho v. Hooper* (2007), 176 P.3d 911

² Three additional states, Nevada, New Mexico, and Tennessee have found that statements by adult rape victims to a SANE nurse were testimonial. See *Medina v. Nevada* (2006), 143 P.3d 471; *New Mexico v. Romero* (2007), 156 P.3d 694; *Tennessee v. Cannon* (2008), 254 S.W.3d 287). It is likely that a similar result would obtain in a child sex abuse case. However, given this Court’s decision in *State v. Stahl* (2006), 111 Ohio St.3d 186, these cases will not assist in the resolution of the instant case and have been omitted.

(statements to forensic examiner testimonial); *In re Rolandis G.*, 2008 Ill. Lexis 1440 (statements to child advocate testimonial); *Iowa v. Bentley* (2007), 739 N.W.2d 296 (statements to licensed counselor testimonial); *Kansas v. Henderson* (2007), 163 P.3d 776 (statements to children's services caseworker testimonial); *Maryland v. Snowden* (2005), 867 A.2d 314 (statements to social worker testimonial); *Missouri v. Justus* (2006), 205 S.W. 3d 872 (statements to social worker/forensic interviewer testimonial); *North Dakota v. Blue* (2006), 717 N.W.2d 558 (statements to forensic interviewer testimonial); *Oregon v. Mack* (2004), 101 P.3d 349 (statements to Department of Human Services caseworker testimonial).

C. This Court should follow the rule adopted by the majority of jurisdictions presented with similar facts and conclude that statements made to forensic interviewers working in concert with law enforcement are testimonial for confrontation purposes.

Review of the extensive case law cited above demonstrates that a majority of other jurisdictions have held that statements made to child advocates, under circumstances similar to those in this case, are testimonial. Moreover, in most of the cases in which the statements were found to be non-testimonial, the circumstances differed substantially from the facts in this case. Therefore, Amicus urges this court to follow the decisions presenting similar factual scenarios to hold that statements made to a forensic interviewer are testimonial.

It should be noted that in a significant number of the cases in which the court found the statements to be testimonial, the contested statements were made to an emergency room physician or were made to a medical professional during the initial treatment following disclosure of possible abuse. See, e.g., *Seely*, *Vigil*, *DeOliveira*, and *Vaught*. Moreover, in the remaining cases the court specifically noted that police were not present at any point during the interview, and the interview took place before law enforcement was informed of a potential crime. See, e.g., *Krasky*, *Hobgood*, and *Spencer*. For this reason, these cases present distinct

factual scenarios, in which the child had already received acute medical care at the hospital the day before and the police were present and involved at all points during the interview. Therefore, these cases should not control this Court's resolution of the instant matter.

By contrast, the cases in which the court found the statements to be testimonial present nearly identical factual scenarios to the instant case. For example, in *Contreras*, *Hooper*, *Rolandis G.*, *Bentley*, *Snowden*, *Justus*, and *Blue*, the statements were elicited in response to direct formal questioning at a child advocacy center much like the CCFA in this case. Moreover, in *Contreras*, *Bentley*, and *Rolandis G.*, the court specifically notes that there was a statutory connection between the child advocacy center and law enforcement exactly like the statutory connection in this case.

Finally, in every case in which the court found the statements to be testimonial the court relied primarily on three factors: (1) that law enforcement was present during the interview, that the questioning was in a formal question-and-answer format specifically designed to elicit information about suspected criminal conduct, and (3) that the interview was memorialized on videotape and the tape was immediately turned over to police as evidence in an on-going criminal investigation. Again, each of these factors is also present in Mr. Arnold's case and this Court should employ a similar analysis to find the statements at issue to be testimonial.

Without question, the overwhelming majority of courts to consider the precise type of interview and statement at issue in this case have concluded that the confrontation clause was violated. Amicus urges this court to follow the weight of authority from other jurisdictions and find the same.

D. This Court should not permit the decision of the court of appeals to stand.

This case presents a pressing issue concerning the administration of justice across this state in a manner that complies with the demands of the Sixth Amendment as set forth in *Crawford* and *Davis*. Despite the U.S. Supreme Court's directive to engage in a more straightforward application of the Sixth Amendment, the court of appeals has substantially retreated from the core principles that *Crawford* and *Davis* sought to protect. Specifically, the decision of the court of appeals allows the government to interpose a nominally private actor between law enforcement and a specific set of crime victims. Such subterfuge can only be interpreted as a deliberate attempt by the State to avoid the clear commands of the Confrontation Clause. This Court should not permit such gamesmanship with respect to the most fundamental of constitutional rights.

Moreover, this case presents this Court with an opportunity to bring its own Sixth Amendment jurisprudence in line with U.S. Supreme Court precedent. By setting a new course with respect to the vindication of Sixth Amendment rights, this Court can provide redress for the egregious violations of Mr. Arnold's constitutional rights, while at the same time ensuring that all criminal defendants in Ohio are afforded the procedural protections which our Constitution demands.

CONCLUSION

Based upon the foregoing, this Court should reverse the decision of the Tenth District Court of Appeals and adopt Appellant's Proposition of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT MICHAEL S. ARNOLD** has been served upon Kimberly Bond, Assistant Franklin County Prosecutor, 14th Floor, Hall of Justice, 373 S. High Street, Columbus, Ohio 43215 and , this 30th day of March, 2009.



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