

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2012-0215

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
DARIUS CLARK	:	Cuyahoga County Court
Appellee	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 96207

MEMORANDUM IN OPPOSITION TO JURISDICTION

ROBERT L. TOBIK, ESQ.
 Cuyahoga County Public Defender
 BY: NATHANIEL J. MCDONALD, ESQ. (COUNSEL OF RECORD)
 # 0080867
 Assistant Public Defender
 310 Lakeside Avenue
 Suite 200
 Cleveland, OH 44113
 (216) 443-7583
 (216) 443-3632 FAX

COUNSEL FOR APPELLEE,

WILLIAM MASON, ESQ.
 Cuyahoga County Prosecutor
 By: Mark Mahoney
 The Justice Center – 9th Floor
 1200 Ontario Street
 Cleveland, OH 44113
 (216) 443-7800

FILED
 MAR 07 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

COUNSEL FOR APPELLANT, THE STATE OF OHIO

TABLE OF CONTENTS

	PAGES
APPELLEE’S MEMORANDUM IN RESPONSE TO THE GOVERNMENT’S MEMORANDUM IN SUPPORT OF JURISDICTION	1
WHY THIS CASE DOES NOT INVOLVE AN ISSUE OF GREAT PUBLIC CONCERN OR INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
APPLICABLE LAW AND DISCUSSION.....	4
<u>In Response to Proposition of Law I (as Formulated by the Government):</u> <i>Statements made to teachers by children during an interview to identify suspected child abuse and protect the future safety and welfare of that child, are non- testimonial and thus are admissible without offending the Confrontation Clause.</i>	4
CONCLUSION.....	7
SERVICE.....	8

**APPELLEE'S MEMORANDUM IN RESPONSE TO THE STATE'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

The State is appealing the Eight District Court of Appeals' decision in *State v. Clark*, 8th Dist. No. 96207, 2011-Ohio-6623 ("Opinion Below"). This Court settled the issue the State raises in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775. Accordingly, this is not a matter of great public concern, nor does it involve a substantial constitutional question.

**WHY THIS CASE DOES NOT INVOLVE AN ISSUE OF GREAT PUBLIC CONCERN
OR INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The State's proposition of law fails to identify an issue of great public concern or a substantial constitutional question. The Opinion Below simply: (1) relied on well-established U.S. Supreme Court precedent as it applies to the Sixth Amendment's Confrontation Clause, and (2) applied this Court's holding and reasoning in *Arnold* to the facts of Mr. Clark's case. See *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775.

In sum, the facts pertinent to the State's proposition are as follows: Pre-school teachers noticed marks on three year old "L.P.'s" body, and suspected child abuse. The teachers asked L.P. "Who did this?" Although the child seemed somewhat bewildered by the questioning and said several things, L.P. eventually said "Dee did it," an undisputed reference to Mr. Clark. After conducting a competency hearing, the trial court declared L.P. incompetent to testify. The trial court then ruled that L.P.'s out-of-court statements to his pre-school teachers were admissible, denying defense counsel's motion in limine premised upon the Confrontation Clause.

Mr. Clark was convicted of multiple charges of felonious assault, child endangering, and domestic violence. He was sentenced to twenty-eight years in prison.

The Eighth District Court of Appeals reversed, and held that L.P.'s statements to his teachers were testimonial under this Court's opinion in *Arnold*.¹ (Opinion Below ¶ 25.) Before discussing *Arnold*, however, the Eighth District explained the fundamental principles of any Confrontation Clause analysis. The analysis begins with the assumption that "out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the defendant was given a prior opportunity for cross-examination." (Opinion Below ¶ 11, citing *Crawford* at 52.) Thus, whether an out-of-court statement is testimonial is the threshold issue. (*Id.* ¶ 12, citing *Crawford* at 51-52.) Statements are "testimonial when the circumstances objectively indicate that there is [an ongoing emergency], and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, at 822. After *Davis*, the "primary purpose" test governs the threshold question of whether the statement at issue is testimonial. In *Arnold*, this Court discussed the Confrontation Clause analysis applicable to out-of-court statements by child-victims. *Arnold* applied the primary purpose test to statements made to social workers at a child advocacy center. *Arnold* at 298. Consistent with *Crawford* and *Davis*, this Court held in *Arnold* that "[s]tatements made for the purpose of medical diagnosis and treatment are nontestimonial . . . **statements made to agents of the police for the primary purpose of forensic investigation are testimonial.**" *Id.* (emphasis added).

¹ In reversing and remanding for a new trial, the Eighth District also rejected the State's harmless error argument, ultimately finding "that the only direct evidence that defendant was the perpetrator was L.P.'s statements identifying him." (Opinion Below ¶ 53.)

Here, the teachers' primary purpose in asking L.P. "who did this?" was to determine who to investigate. In other words, the teachers were acting as agents of the police with the primary purpose of forensic investigation. First, the teachers testified that, as teachers, they have a mandatory duty to report suspected child abuse. *See* R.C. 2151.421 (requiring teachers to report suspect child abuse). Thus, the teachers were agents of law enforcement at the time the statements were made. *Arnold*, 126 Ohio St.3d 290, 300, 2010-Ohio-2742, 933 N.E.2d 775; *see also State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 29. Second, the primary purpose of their interviews with L.P. was "to establish or prove past events potentially relevant to later criminal prosecution." *Arnold*, at ¶ 62 (quoting *Davis*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224) (Pfeiffer, J., dissenting). The teachers testified that they noticed marks on L.P. that indicated possible child abuse. They determined that they had a duty to call the Department of Child & Family Services. Their primary purpose in asking "Who did this?" was to inquire about past events – i.e., abuse and the perpetrator – potentially relevant to a future criminal prosecution – i.e., this case. Thus, his statement "Dee did it" is testimonial under *Arnold* and the Opinion Below correctly concludes that its admission violated state and federal confrontation rights.

For these reasons, and those discussed in further detail herein, the State's proposition of law does not raise an issue of great public concern or involve a substantial constitutional question. As such, Mr. Clark prays that this Honorable Court will reject the State's plea for jurisdiction and not accept the instant appeal.

APPLICABLE LAW AND DISCUSSION

In Response to Proposition of Law I (as Formulated by the Government):

Statements made to teachers by children during an interview to identify suspected child abuse and protect the future safety and welfare of that child, are non-testimonial and thus are admissible without offending the Confrontation Clause.

This case does not present a novel Confrontation Clause question in light of this Court's decision in *Arnold*. This Court has articulated a straight-forward rule that can be (and has been) applied to the various circumstances where the admissibility of out-of-court statements by children must be determined. *Arnold*'s reasoning was properly applied in this case; jurisdiction should be denied.

A. Applicable Law: the Confrontation Clause & Child Victim Hearsay Statements

The U.S. Supreme Court has held that the Sixth Amendment's Confrontation Clause bars out-of-court, testimonial statements by a witness, notwithstanding their reliability, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him. *Crawford*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177. As the Supreme Court stated, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 69.

The U.S. Supreme Court then addressed the definition of "testimonial" in connection with questioning by law enforcement officers. *Davis*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224. The Supreme Court explained that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* at 821. The *Davis* Court held:

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 822.

This Court has analyzed whether out-of-court statements by child victims are testimonial under *Crawford* and *Davis*, most recently in *Arnold*. See *Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775; see also *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944 (2007); *Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534. In *Arnold*, this Court addressed whether statements made to social workers at a child-advocacy center were testimonial and, consistent with *Davis*, established a “primary purpose” test for such statements. *Arnold*, at 298. Specifically:

[W]e must identify the primary purpose of the statements. Statements made for the purpose of medical diagnosis and treatment are nontestimonial. *Muttart*, 116 Ohio St.3d 5 . . . ¶ 63. However, statements made to agents of the police for the primary purpose of forensic investigation are testimonial. *Siler*, 116 Ohio St.3d 39 . . . ¶ 2.

Accordingly, this Court has instructed the lower courts to ascertain whether the child declarant’s statements were “made to agents of the police for the primary purpose of forensic investigation.” *Id.* If so, then the declarant’s statements are testimonial, the Confrontation Clause applies, and the statements are inadmissible.

B. Analysis of L.P.’s Statements under Applicable Law

Based on *Crawford*, *Davis*, and *Arnold*, admission of L.P.’s out-of-court statements violated the Confrontation Clause.

First, the preschool teachers were acting as agents of law enforcement at the time they elicited the statements. *Arnold*, at 300; see also *Siler*, at ¶ 29. Indeed, the law imposes a mandatory reporting duty on teachers who suspect child abuse. R.C. 2151.421. Thus, the

teachers decided L.P.'s marks and bruises required them (1) to ask, "Who did this?"; and (2) to call the Department of Child & Family Services. Under these circumstances, the teachers were an extension of law enforcement agents when they questioned L.P.

Second, the primary purpose of their interview with L.P. was "to establish or prove past events potentially relevant to later criminal prosecution." *Arnold*, 126 Ohio St.3d at ¶ 62 (quoting *Davis*, 547 U.S. at 822) (Pfeiffer, J., dissenting). Put another way, as mandatory reporters, the teachers understood that reporting suspected child abuse would trigger a certain result—institution of the investigative process leading to potential criminal charges. Furthermore, it is significant that L.P. made the statements at issue in response to a specific question: "Who did this?" The primary purpose of this question was to identify the perpetrator, information clearly "relevant to later criminal prosecution"—namely, this case.

Moreover, this question makes it clear that the teachers' primary purpose was not medical diagnosis or treatment. The purpose, on the other hand, was purely investigative: to find out the identity of a suspect. For example, in *Arnold*, this Court held that some of the statements at issue were elicited for the medical purpose (and, therefore, non-testimonial), while the primary purpose of other statements was investigative (and, therefore, testimonial). *Arnold*, ¶¶ 33-37. *Arnold* involved sexual abuse, and this Court held that statements describing the location the conduct took place, describing the defendant's genitalia, and describing removal of clothing served a primarily investigative purpose and were, therefore, testimonial. *Id.* at ¶ 34-36. On the other hand, this Court held that statements describing sexual conduct were elicited for a primarily medical purpose and were, therefore, non-testimonial. *Id.* at ¶ 38. Here, L.P.'s statement ("Dee did it.") does not serve a medical purpose. Instead, the teachers' questions and L.P.'s answers relate specifically to identifying a suspect in a law enforcement investigation.

Finally, Ohio appellate courts have had no trouble applying *Arnold* consistently, nor did the Eighth District struggle to apply the primary purpose test to the facts and circumstances of this case. *See, e.g., State v. Malone*, 4th Dist. Nos. 11CA2, 11CA3, 2012-Ohio-449, ¶¶ 7,9 (applying the primary purpose test from *Arnold* and relying on the trial court's finding with respect to the primary purpose); *State v. Hill*, 2d Dist. No. 24410, 2012-Ohio-5810, at ¶ 43 (applying the primary purpose test to statements elicited by medical social worker for the purpose of diagnosis and treatment); *In re J.M.*, 4th Dist. No. 08CA782, 2011-Ohio-3377, at ¶¶ 28-42 (applying *Arnold* and finding certain statements testimonial and others non-testimonial); *In re T.L.*, 9th Dist. No. 09CA0018-M, 2011-Ohio-4709, ¶¶ 10-18 (same).

Accordingly, based on the analysis set forth in *Arnold*, L.P.'s out-of-court statements to the teachers were testimonial in nature because they served a primarily investigative purpose. *Arnold*, at ¶ 44. In addition, to complete the Confrontation Clause analysis, L.P. was clearly unavailable for cross-examination because the trial court held that he was not competent to testify. Therefore, the Opinion Below correctly held that the trial court violated Mr. Clark's Sixth Amendment right to confront witnesses when, over Mr. Clark's objection, it admitted L.P.'s prejudicial out-of-court statements to his preschool teachers.

Mr. Clark respectfully requests that this Court decline jurisdiction over this case.

CONCLUSION

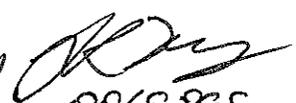
WHEREFORE, based on the foregoing, Mr. Darius Clark prays that this Honorable Court will reject the State's appeal and not accept the proposition of law for review.

Respectfully submitted,

Nate McDonald by *JK King*
 NATHANIEL J. McDONALD, ESQ. 0069895
 Assistant Cuyahoga County Public Defender
 per
 subscription
 3/7/12

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition was served via ordinary U.S. Mail
this 7th day of March, 2012 upon William D. Mason, 1200 Ontario Street, 9th floor, Cleveland,
Ohio 44112.

 by 
NATHANIEL J. MCDONALD, ESQ.

0069895
per authorization
3/7/12