ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2012-0215

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

APPELLEE'S MERIT BRIEF

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SUMMARY OF APPELLEE'S ARGUMENT

This appeal should be dismissed as improvidently allowed. Although the issue the State has put before this Court is one of significance, Mr. Clark's case is not the proper vehicle for addressing it. In fact, this case is more notable for what the State has not asked this Court to address than the issue raised.

When the Eighth District reversed Mr. Clark's convictions and remanded his case for a new trial, it did so because it found that the introduction of hearsay statements the child declarant made to a police officer, two child protection workers, two teachers, and two family members were inadmissible.[1] In its appeal to this Court, the State only challenges the Eighth District's conclusion that the two statements the child made to his teachers were barred under the Confrontation Clause.[2] On this point, the state argues that the Eighth District was wrong to find that those statements were testimonial hearsay. The State has not challenged the balance of the Eighth District's ruling.

Importantly, the State posits no quarrel with the Eighth District's determination that the child's out of court statements were erroneously admitted under Evid.R. 807, because they lacked the "particularized guarantees of trustworthiness" the rule requires. The Eighth District reached that decision in part because the trial court had found that the then-four-year-old declarant was incompetent to testify at trial. The Eighth District never explicitly applied its Evid. R. 807 analysis to statements the child made during interviews with his teachers (having already

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[1] Specifically, the Court ruled that the statements the child declarant made to police, social workers and teachers violated the Confrontation Clause, while the statements to the child's grandmother and great aunt failed to meet the criteria for admission under Evid.R. 807.

[2] The State has also not taken issue with the Eighth District's finding that the child's statements to police and social workers were testimonial hearsay admitted in violation of the Confrontation Clause.

barred their introduction under the Confrontation Clause). Nonetheless, those statements were also made by the same incompetent child and thus, under the Eighth District's holding and rationale, also lacked the particularized guarantees of trustworthiness required under Evid.R. 807.

Accordingly, whatever decision this Court ultimately reaches with respect to the Confrontation Clause issue the State has raised, that decision will have no bearing on the outcome of Mr. Clark's prosecution. On remand, regardless of whether the child's statements to his teachers violated the Confrontation Clause, they are still inadmissible under Evid.R. 807. That strictly evidentiary issue is distinct from any Confrontation Clause analysis this Court might undertake.

By most any measure, then, what the State seeks from this Court is an advisory opinion. As we noted initially, the question at issue in the State's appeal – whether the Confrontation Clause bars hearsay statements made to mandatory reporters – is an important one. It is one that finds proponents on both sides and warrants full airing and argument. It should be considered, however, in a matter where the constitutional decision will ultimately determine the admissibility of the statements. That is not the case here.

This Court has been generally loath to indulge in advisory opinions. *See, accord, Armco, Inc. v. Public Utilities Commission*, 69 Ohio St.2d 401, 405, 433 N.E.2d 923 (1982); *State ex rel. Court Index Press, Inc. v. Deters*, 56 Ohio St.3d 140, 565 N.E.2d 532, fn.2 (1990). Consistent with that practice, this Court should dismiss the State's appeal.

STATEMENT OF THE CASE AND FACTS

On April 15, 2010, a Cuyahoga County grand jury returned an eleven-count indictment charging Defendant-Appellant Darius Clark and his girlfriend Taheim Traywick with multiple counts of felonious assault, child endangering and domestic violence. The charges stem from injuries to Taheim's two young children – L.P. and A.T.[3] – likely sustained between February 28, 2010 and March 17, 2010. Taheim was named in all eleven counts, while Mr. Clark was charged in the first nine.

Mr. Clark pleaded not guilty and the matter proceeded to a jury trial. Shortly beforehand, Taheim entered a guilty plea and agreed to testify against Mr. Clark. Although there was no dispute that the youngsters had been injured, more than one caregiver had access to them. The principal issue at trial, therefore, was the identity of the perpetrator. The only evidence that Mr. Clark was the abuser derived from a series of hearsay statements L.P. made during interviews – first with his teachers at daycare, then with DCFS social workers, later to his grandmother and great aunt, and finally, with police – purporting to identify "Dee" as the perpetrator. Specifically, in response to persistent, and sometimes leading, questions concerning the identity of the alleged abuser, the child eventually said "Dee did it." "Dee" is the name the child gave to Mr. Clark. Before trial, the court found that L.P. was incompetent to testify. A.T., who was just over two by the time of trial, was not contemplated as a witness.

Mr. Clark's co-defendant, Taheim Traywick, is the children's mother. When the injuries were discovered, L.P. was 3 ½ years old and his sister was not yet two-years-old. Although Taheim had lost custody of three other children, L.P. and A.T. remained in her care. (Tr. 451) In

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[3] The Court of Appeals used these initials when referring to the two children, and we continue that practice here.

2010, when the abuse was discovered, Mr. Clark was romantically involved and living with Taheim. (Tr. 451, 533-34) To some extent, Mr. Clark shared responsibility for the children. Occasionally, he took L.P. to preschool and he cared for the children when Taheim left town. (Tr. 239-40, 254, 628)

Taheim worked as a prostitute in Washington, D.C. and left town with some regularity. (Tr. 534-35; 452-53) The first time she went to Washington, D.C., she left the kids with her grandmother, Hazel Traywick, for two or three weeks. (Tr. 536) Grandma Hazel had been given custody of Taheim's three older children. According to Hazel, Taheim asked her to watch the children while she attended school. Hazel eventually learned that Taheim was actually prostituting herself in D.C. and demanded that Taheim stop. (Tr. 537.) Other members of Taheim's family, including her mother, Schoen Traywick, testified that Taheim is a habitual liar. (Tr. 418, 462) Specifically, Schoen told a social worker that Taheim is "nothing but a big liar and not to trust a word that she says[.]" (Tr. 462, 526)

Family members recalled first noticing bruises on the younger child at a party on February 28, 2010. When Taheim's mother asked her about them, Taheim told her that A.T. had fallen down the steps. (Tr. 458, 572.) At trial, Taheim testified that although she had never seen Mr. Clark hit her children, she believed Mr. Clark had hurt the child. (Tr. 542, 585) The next time Taheim's mother saw the children, on March 18, 2010, they were receiving treatment for more serious injuries at the hospital. (Tr. 425) An emergency room doctor noted that L.P. had numerous linear bruises and welts on his face, arms, and body, and the sclera of one eye had a large red spot. (Tr. 424-25) A.T. had multiple burn marks, in various stages of acuity, two black eyes, pigtails had apparently been pulled out of her head at her hairline, and she looked malnourished. (Tr. 424)

Taheim testified that between the February 28, 2010 party and their March 18th hospital treatment, the children were with Mr. Clark exclusively for several days. Taheim testified that on March 12th, she observed burn marks on A.T. (Tr. 545) According to Taheim, she asked Mr. Clark how A.T. had been burned and he told her that it had been an accident with a hot comb. (Tr. 545.) Taheim said that she did not believe Mr. Clark's explanation, but did not take the child to the hospital because she was afraid the authorities would take her away. (Tr. 547)

Taheim testified that she was home with the children from March 13-16th. (Tr. 576-77) On the afternoon of March 16, 2010, Taheim picked up L.P. at preschool. (Tr. 254) L.P.'s preschool teachers specifically recalled seeing a mark on L.P.'s head. When one of them asked Taheim about it, she told them it was chalk, and moved to brush it off. (Tr. 254, 280-81, 549) Taheim left for Washington, D.C. about five or six hours later, and she denied beating or whipping the child that day. (Tr. 548-50; 262)

L.P.'s preschool teachers testified that, on March 17, 2010, Mr. Clark dropped L.P. off at preschool, and picked him up. (Tr. 247, 255) One of the teachers there, Ms. Whitley, noticed that the child had sustained injuries. (Tr. 243-44) After discussing the situation with the head teacher, Ms. Jones, and their supervisor, they called the Department of Child & Family Services (DCFS) to report suspected child abuse. (Tr. 243, 270-71, 279) When Mr. Clark returned for the L.P. that afternoon, social worker Howard Little was questioning him in a room at the preschool. (Tr. 555) Although Mr. Little asked Mr. Clark to stay and discuss L.P.'s injuries further, Mr. Clark told Little to talk to Taheim and left with the child. (Tr. 627-32)

When DCFS called Taheim that same day, she was actually in D.C. prostituting. (Tr. 548, 560) The next morning, March 18th, social worker Sarah Bolog called Taheim to arrange a meeting so they could discuss her children's injuries. (Tr. 469-73) Taheim told her, falsely, that

the children were with her and that she was taking L.P. to Metro hospital for pinkeye. (Tr. 471-73, 557-58) After three conversations with Taheim, Ms. Bolog became convinced that she was lying. She eventually located the children at Mr. Clark's mother's house on West 100th Street in Cleveland. (Tr. 473, 476, 559) She noted that both children appeared to be injured and, after questioning L.P., Ms. Bolog had them transported to the hospital. The children's grandmother, Hazel and Great Aunt, Jackie, met them there. (Tr. 478-482, 487-88, 495-98)

Taheim remained in Washington, D.C. for nearly five months. (Tr. 582) Taheim testified that she delayed returning because a bus ticket was $66 dollars, and she could not afford the fare. (Tr. 582) When she did return, she pled guilty to one count of child endangering and one count of permitting child abuse and agreed to testify against Mr. Clark. (Tr. 570) As part of her plea, the State dismissed five counts of felonious assault, one count each of child endangering and permitting child abuse. (Tr. 570) Although Taheim testified that she did not hurt her children, at least one witness, Dorcus Willis, testified that she had observed Taheim hitting her children with a belt or purse strap. (Tr. 669-71) More specifically, this witness testified that: "I only seen her whip the little boy about three times, but she always whooped that little girl." (Tr. 670) After testifying, Taheim received a sentence of eight-years imprisonment.

The jury found Mr. Clark guilty of all but one count. (Tr. 770-73) The trial court sentenced Mr. Clark to an aggregate prison term of twenty-eight years, imposing maximum consecutive prison terms on three of the four F2 felonious assault convictions, and a consecutive four-year term on one of the F2 endangering convictions.

As noted in the introductory section above, Mr. Clark appealed to the Eighth District Court of Appeals, which reversed his conviction, concluding that the hearsay evidence identifying Mr. Clark as the abuser was barred under the Confrontation Clause, which prohibits

the introduction of testimonial hearsay, or was otherwise inadmissible under the Rules of Evidence. We set forth additional facts where they pertain to the arguments leveled herein.

LAW AND ARGUMENT

A. Whatever decision this Court reaches with respect to the State's Proposition of Law, that decision will have no bearing on the outcome of Mr. Clark's case. As a consequence this Court should dismiss the State's appeal as improvidently allowed.

It is not, nor has it ever been, this Court's practice to gratuitously decide constitutional issues. When a case can be resolved on a non-constitutional basis the constitutional issue should be left for another day. In the absence of L.P.'s live testimony, the admissibility of L.P.'s statements is dependent on two factors – 1) they must meet state evidentiary rules; and 2) they must be consistent with governing constitutional provisions. An examination of the Eighth District's decision makes it clear that the evidence at issue here is inadmissible under both hurdles. Accordingly, even if this Court ascertains that the evidence was not barred under the Confrontation Clause, its introduction will still be precluded under the Rules of Evidence.

The statements to which the State directs this Court derive from interviews between L.P., who was then 3 ½ years-old, and his daycare teachers. In response to repeated questioning from these teachers and other adults, including DCFS social workers, police, and later his grandmother and great aunt, L.P. made several general statements to the effect that "Dee did it." It is undisputed that "Dee" is the name the child used to call Mr. Clark.

The Eighth District concluded that the contents of all the interviews were barred, either under the Confrontation Clause or the rules barring hearsay evidence. The State has only appealed the Eighth District's ruling with respect to the statements L.P. made to his teachers. The balance of that decision remains unchallenged, essentially conceded, and, therefore, the law

of the case.[4] The State's Memorandum in Support of Jurisdiction and its Appellate brief neglects to inform this Court that whatever ruling on the Confrontation Clause it makes, that ruling will have no bearing on this prosecution or the outcome of Mr. Clark's case.

Instead, any further litigation of Mr. Clark's case will turn on the operation of Evid.R. 807. The Eighth District has concluded that the statements L.P. made to his grandmother and great aunt, while not prohibited under the Confrontation Clause, failed to meet the criteria set forth for admissibility under this evidentiary rule. In relevant part, Evid. R. 807 provides that:

> An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any . . . act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if [each of four requirements are met]

Evid. R. 807(A). Those requirements are that 1) the totality of the circumstances surrounding the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804; 2) the child's testimony is not reasonably obtainable by the proponent of the statement; 3) there is independent evidence of act of physical violence; and 4) the parties were timely notified in writing concerning the statement's contents, the identity of the witness testifying about the statement; and the circumstances surrounding that statement. See, *State v. Clark*, Cuyahoga App. No. 96207, 2011 Ohio 6623.

The Eighth District concluded that the statements L.P. made to his grandmother and great aunt should have been ruled inadmissible under this Rule. The Court held that L.P.'s statements were not reliable, and that there was no independent evidence that Mr. Clark was one who perpetrated the abuse. Specifically, the Eighth District opined –

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[4] The law of the case doctrine provides that a decision from a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings at both the

> [W]e find that L.P.'s statements lacked the "particularized guarantees of trustworthiness" outlined in Evid.R. 807. Although Ohio Law is not clear on this precise point, we are concerned with reconciling the court's finding that L.P. was incompetent to testify in November of 2010 with the court's finding that statements L.P. made eight months prior were reliable enough to be admitted at trial.

Given this reasoning, L.P.'s statements to his teachers, whether they are prohibited under the Confrontation Clause or not, are equally deficient – and, therefore, barred under Evid.R. 807. The State did not challenge the Evid. R. 807 holding, and, by implication, concedes its validity.

Accordingly, regardless of how this Court resolves the proposition of law before it, the outcome of this case will not change. This Court should delay addressing this issue until such time as it is appropriately presented. Now is not that time.

B. The State has asked this Court to hold as a Proposition of Law that –

> *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 Court should reject that proposition. The interviews the teachers conducted in this case were required by law to be reported to police, and the statements obtained from these interviews are indistinguishable from the ones subsequently generated during interrogations by social workers and police. Since those later statements were deemed to be testimonial, the teacher interview statements must also be testimonial. Consequently, this Court should find that their admission violated the Confrontation Clause.

The Confrontation Clause & Child 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 <u>and</u> the defendant had a prior opportunity to cross-examine him.

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trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1462 N.E.2d 410 (1984).

Crawford v. Washington, (2004) 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 v. Washington*, (2006) 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 non-testimonial 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 *State v. 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); *State v. 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. 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.

Arnold, at 298. This Court has also acknowledged that, under *Davis*, the primary purpose test does not focus on the expectations of the declarant to determine whether statements are testimonial; rather, the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation. *Siler*, 116 Ohio St.3d 39 at 46, citing, *Davis*, 547 U.S. at 822, 126 S.Ct. 2266, 165 L.Ed.2d 224.

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." *Arnold*, at 298. If so, then the declarant's statements are testimonial, the Confrontation Clause applies, and the statements are inadmissible.

Analysis of L.P.'s Statements in light of this Confrontation Clause Jurisprudence

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. 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 DCFS. L.P. was not sent to the hospital for treatment of his injuries until the next day, after the social workers interviewed him. Under these circumstances, the teachers, like the social workers, were an extension of law enforcement 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). In *Davis* the Court advised that the

primary purpose of an interrogation should focus on the statements themselves and the surrounding objective circumstances. 547 U.S. 822, 126 S.Ct. 2266, 165 L.Ed. 2d 224. L.P.'s teachers are 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, the question that spurred the child to say "Dee did it." makes it clear that the teachers' primary purpose was not medical diagnosis or treatment. Rather, the purpose was purely investigative: to determine 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.

Even if the teachers had an additional, or dual, purpose in questioning the child, that fact does not render the statements non-testimonial. The question is not whether one of the purposes was for safety, emergent or medical reasons. Rather, the question is whether a legal purpose

triggers the Confrontation Clause *despite* a concurrent arguably non-testimonial purpose. *See State v. Hooper*, 145 Idaho 139, 145, 176 P.3d 911 (2007) ("The purpose of such interviews can be two-fold—medical treatment and forensic use"); *State v. Contreras*, 979 So.2d 896, 905 (Fla. 2008), ("Moreover, the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred"); *State v. Bentley*, 739 N.W.2d 296, 302 (Iowa 2007) ("one of the significant purposes of the interrogation was surely to protect and advance the treatment"); *State v. Snowden*, 385 Md. 64, 91, 867 A.2d 314 (2005) ("Any therapeutic motive, or effect, of Wakeel's involvement with the children is secondary, in terms of proper Confrontation Clause analysis, to the overarching investigatory purpose, and therefore testimonial nature, of the statements elicited during the interviews"). As this Court acknowledged in *Arnold* at ¶ 58, the North Dakota Supreme Court ruled that "[s]tatements made to non-government questioners acting in concert with or as an agent of the government are likely testimonial statements under *Crawford*." *State v. Blue*, 2006 ND 134, 717 N.W.2d 558 (2006), ¶ 16. As mandatory reporters, then, the teachers interviewing L.P. were necessarily working in conjunction with law enforcement.

The State's Argument is Flawed

The State attempts to change the analysis and refocus the "primary purpose" test exclusively on L.P., who, at 3 ½ years old, could not have understood that he was providing evidence to assist law enforcement. But, as noted above, this Court resoundingly rejected precisely this argument in *Siler*. There, this Court concluded that a 3-year-old's statement to a plainclothes police officer concerning the circumstances of his mother's death was testimonial hearsay.

In the *Siler* decision, this Court also took note of the fact that other courts had applied the primary-purpose test in similar fashion to statements a child declarant made to police or those determined to be a police agent. See, e.g., *People v. Sharp* (Colo.App.2006), 155 P.3d 577 (five-year-old's statements to forensic interviewer during visit arranged by police); *People v. Stechly*, 225 Ill.2d 246, 312 Ill.Dec. 268, 870 N.E.2d 333 (2007) (five-year-old's statements to child-sex-abuse personnel); *State v. Henderson*, 160 P.3d 776 (Kan.2007) (three-year-old's statements to police and child-protective-services worker); *State v. Justus*, 205 S.W.3d 872 (Mo.2006) (three-year-old's statements to child-abuse investigators); *State v. Buda*, 389 N.J.Super. 241, 912 A.2d 735 (2006)(three-year-old's statements to youth-services worker); *State v. Blue*, 2006 N.D. 134, 717 N.W.2d 558 (four-year-old's statements to forensic interviewer with police observing); *In re S.R.*, 2007 Pa.Super. 79, 920 A.2d 1262 (four-year-old's statements to forensic interview specialist); *State v. Hooper*, Payette App. No. 31025, 2006 WL 2328233 (Idaho 2006) (six-year-old's statements to sexual trauma personnel during visit arranged and observed by police).

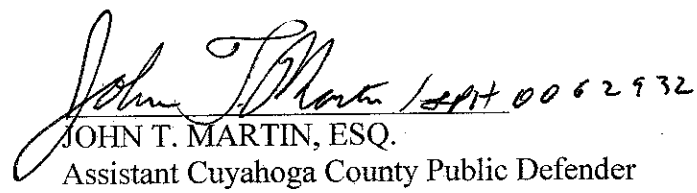
The State's interpretation is entirely inconsistent with this Court's reasoning.

Under the circumstances, L.P.'s out-of-court statements to his 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 Eighth District 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.

CONCLUSION

WHEREFORE, based on the foregoing, Appellee Darius Clark prays that this Honorable Court dismiss the State's Appeal as improvidently allowed or reject the State's proposition of law and affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Merit Brief was served via ordinary U.S. Mail this 10th day of September, 2012 upon William D. Mason, 1200 Ontario Street, 9th floor, Cleveland, Ohio 44112 and upon Mike Dewine, Attorney General of Ohio, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

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