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 Appellate District Case No. 96207
vs.	:	
DARIUS CLARK,	:	
Defendant-Appellee.	:	

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE DARIUS CLARK

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STATEMENT OF THE CASE AND OF THE FACTS

Darius Clark lived with his girlfriend and her two children, L.P. and A.T. *State v. Clark*, 8th Dist. No. 96207, 2011-Ohio-6623, ¶ 2. On March 17, 2010, L.P.'s preschool teachers noticed bruises on him and reported possible abuse to the authorities as statutory mandated reporters. *Clark* at ¶ 3. Acting upon that report, a social worker later found the children at Mr. Clark's mother's house and took them to the hospital. According to the doctor who examined the children, L.P. had bruises in various stages of development and abrasions consistent with being whipped with a belt. A.T. also had multiple injuries.

In response to questions from several adults about his injuries, beginning with his teachers, L.P. stated that "Dee did it." Mr. Clark's nickname is "Dee." *Clark* at ¶ 3. Mr. Clark was charged with five counts of felonious assault in violation of R.C. 2903.11(A)(1), two counts of endangering children in violation of R.C. 2919.22(B)(1), and two counts of domestic violence in violation of R.C. 2919.25(A). *Clark* at ¶ 4.

The trial court found four-year-old L.P. incompetent to testify. The court also denied Mr. Clark's motion in limine requesting that evidence of L.P.'s out-of-court statements identifying him be excluded from trial. *Clark* at ¶ 5. A jury found Mr. Clark guilty of all counts except one of the felonious assault charges concerning A.T. The court sentenced Mr. Clark to an aggregate of twenty-eight years in prison. *Clark* at ¶ 5.

Mr. Clark appealed his convictions. The court of appeals held that L.P.'s out-of-court statements regarding the cause of his injuries were inadmissible because those statements were testimonial in nature and Mr. Clark was not afforded an opportunity to cross-examine L.P. regarding those statements. Five witnesses testified about L.P.'s statements: Cleveland police detective Jody Remington, Cuyahoga County Department of Children and Family Services social

workers Sarah Bolog and Howard Little, L.P.'s assistant preschool teacher Ramona Whitley, and L.P.'s lead preschool teacher Debra Jones. *Clark* at ¶ 9.

The court of appeals held that the trial court had erred in admitting L.P.'s statements made to his teachers, social workers, and law enforcement personnel. *Clark* at ¶ 26, 31-32. L.P's statements to law enforcement were testimonial because they were not made during an ongoing emergency. *Clark* at ¶ 19. L.P.'s statements to the social workers were not for purposes of medical diagnosis or treatment and were not made during an ongoing emergency. Rather, those statements were solicited for forensic purposes to further the investigation of potential abuse or neglect. *Clark* at ¶ 26, 31-32. Finding those statements to be testimonial and therefore inadmissible, the court then turned to L.P's statements to his teachers, which had triggered the investigation:

> Ramona Whitley, who was L.P.'s assistant preschool teacher at the time the abuse was discovered, testified that on March 17, 2010, she noticed that L.P.'s eye was bloodshot and he had "welt marks" on his face. Whitley testified that as part of her job, she is "supposed to always observe [the children], look for different things, what's going on with them." Whitley brought L.P.'s injuries to the attention of a co-worker. Whitley was instructed to make "the 696 call," which she explained is "a number that you call if a child is in need for some sort of service, if the child is hurt, being physically abused, sexually abused, there's a number that we call to make sure everything's okay." Whitley testified that she is a "mandatory reporter," meaning that "by law I have to report what is going on when it comes to the safety of a child." Whitley testified that when she asked L.P. what happened, he gave three different answers: that he fell; that he did not know; and that "Dee did it." Additionally, Whitley made a statement to the Cleveland police two to three days later.
>
> Debra Jones, who was L.P.'s lead preschool teacher, testified that on March 17, 2010, Whitley brought L.P.'s injuries to her attention. Jones took L.P. out of the classroom and asked him what happened. L.P. looked "bewildered * * * he almost looked uncertain, but he said, Dee did it." Jones testified that she took L.P. to her supervisor's office and Whitley called 696-KIDS because "we saw enough to make the call." Jones testified that two days later she met with and gave a statement to a detective from the Cleveland Police Department.

> Upon review, we find that the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement. Both teachers testified that their obligation to report is mandatory. We additionally find that it is reasonable for an objective witness to expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial. Therefore, we conclude that L.P.'s statements to Whitley and Jones were testimonial and improperly admitted at defendant's trial.

Clark at ¶ 33-35.

The court of appeals reversed Mr. Clark's convictions, and remanded to the trial court for further proceedings. The State filed a Memorandum in Support of Jurisdiction, and this Court accepted the present case for review to address whether L.P.'s statements to his teachers were testimonial in nature.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the post-trial phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect 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 this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court may address the admissibility of out-of-court

statements, not subject to cross-examination, which are used to secure criminal defendants' convictions.

ARGUMENT

THE STATE'S PROPOSITION OF LAW

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.

A. The Confrontation Clause

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. *Crawford v. Washington*, 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, those requirements do not apply to nontestimonial statements. Therefore, courts must determine whether challenged statements are testimonial before subjecting them to analysis under *Crawford*.

The categorization of statements as testimonial or nontestimonial was further explained in *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The Supreme Court of the United States explained that "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." *Davis* at 822.

In *Davis*, the victim's statements to a 911 operator were found to be nontestimonial, as their primary purpose was "to enable police assistance to meet an ongoing emergency." *Davis* at

828. However, in the companion case, *Hammon v. Indiana,* the victim's statements to police officers who responded to a 911 call were held to be testimonial, because "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Davis* at 830.

And most recently, in *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143, 1156, 179 L.Ed.2d 93 (2011), the Court held that "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Id.* at 1162. The Court also explained that "the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public." *Id.* When the "primary purpose of the interrogation is to establish or prove past events relevant to later criminal prosecution," the resulting statements are testimonial. *Id.* at 1154.

B. This Court's Previous Confrontation Clause Decisions

This Court considered the Confrontation Clause in the context of statements made to medical professionals in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834. In *Stahl,* this Court distinguished *Davis*, and held that a rape victim's statements to a nurse practitioner during a medical examination were nontestimonial, because those statements were solicited for the purpose of medical diagnosis or treatment. *Stahl* at ¶ 25. This Court again addressed the issue, holding that "to determine whether a child declarant's statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test" enunciated in *Davis.* *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶ 30. This Court also stated that the objective-witness test found in *Stahl* applies when the interrogator is not in law enforcement. *Siler* at ¶ 28.

This Court addressed the issue of child victim statements in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, and considered whether the admission of out-of-court statements made by a child to an interviewer employed by a child-advocacy center violated the Confrontation Cause. This Court recognized that the child advocate who interviewed the victim worked in a dual capacity, such that the questioning "might produce both testimonial and nontestimonial statements." *Arnold* at ¶ 41. This Court explained that the child advocate was both a forensic interviewer collecting information for use by the police and a medical interviewer eliciting information necessary for diagnosis and treatment. *Arnold* at ¶ 44.

This Court explained that statements regarding "medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause . . . . We further hold that statements . . . that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination at trial." *Arnold* at ¶ 44.

C. Nontestimonial Statements

This Court has described the rationales underlying the holdings that statements made for the purpose of medical diagnosis or treatment, or made during an ongoing emergency, are nontestimonial and therefore admissible regardless of witness availability or cross-examination. Regarding statements made for the purpose of medical diagnosis or treatment, this Court explained:

> [A] fundamental assumption underlying the medical-treatment exception is that that particular hearsay is reliable. "[The] exception is premised on the theory that a patient's statements to her physician are likely to be particularly reliable," and "carr[y] special guarantees of credibility."
>
> But the presumption of reliability in the medical hearsay exception is not based exclusively on the selfish-motive doctrine. It is also premised on the professional-reliance factor.

> "The general reliance upon 'subjective' facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms. Within the medical profession, the analysis of the rule appears to be that facts reliable enough to be relied on in reaching a diagnosis have sufficient trustworthiness to satisfy hearsay concerns." Other appellate courts also recognize the inherent reliability of a statement that is reliable enough to serve as a basis for medical diagnosis, finding that "physicians, by virtue of their training and experience, are quite competent to determine whether particular information given to them in the course of a professional evaluation is 'reasonably pertinent to diagnosis or treatment,' and are not prone to rely upon inaccurate or false data in making a diagnosis or in prescribing a course of treatment." We believe that the secondary rationale of professional reliance is of great import in abuse cases.
>
> We are aware, of course, of the possibility that parents of abused children may give false information to a physician, including denials or deliberate misidentifications, and that a victim might deny abuse to the physician, particularly when in the company of the abuser. Such falsehoods may be a survival strategy or may reflect a complex psychodynamic or phenomena that untrained persons may not understand fully. Although physicians and psychotherapists are not infallible when diagnosing abuse, we believe that their education, training, experience, and expertise make them at least as well equipped as judges to detect and consider those possibilities. (Internal citations omitted.)

State v. Muttart, 116 Ohio St. 3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 39-42.

With regard to statements made during the course of an ongoing emergency, this Court discussed the relevant Supreme Court of the United States decisions, explaining:

> In *Davis*, the court held that a 911 telephone call made to seek protection from immediate danger did not constitute a testimonial statement for Sixth Amendment purposes. In contrast, the court in *Hammon* held as testimonial a victim's statement to a police officer after the officer arrived at the home in response to a report of domestic disturbance. In its analysis, the court explained that "[s]tatements 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." Conversely, the court stated, statements "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." With respect to Davis, the court reasoned that "the nature of what was asked and answered [during the 911 call] * * * , again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." Moreover, the call "was plainly a call

> for help against bona fide physical threat" and involved "frantic answers" given "in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."
>
> Unlike the officers in *Davis*, the interrogating police officer in *Hammon* elicited the victim's statements at the scene *following* the alleged crime. At the time of the interrogation, any emergency had ceased, and "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime -- which is, of course, precisely what the officer *should* have done." The Court also noted the similarity between *Crawford* and *Hammon*, stating, "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct * * * ." (Emphasis sic.) (Internal citations omitted.)

Stahl at ¶ 23-24.

D. The Present Case

L.P.'s statements to his teachers were not made for purposes of medical diagnosis or treatment. Ms. Whitley and Ms. Jones are not medical professionals, nor did they convey L.P's statements to medical professionals for purposes of diagnosis or treatment. The teachers contacted the relevant authorities to report suspected child abuse, are required by statute. R.C. 2151.421. The court of appeals held that L.P.'s statements to the police and to the social workers, which were precipitated by the teachers' mandatory reporting, were not made during an ongoing emergency, were not for the purposes of medical diagnosis or treatment, and were therefore testimonial and inadmissible. *Clark* at ¶ 19, 26, 31-32. After reviewing the admissibility of those statements, the court of appeals returned to L.P.'s initial statements to his teachers:

> Upon review, we find that the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement. Both teachers testified that their obligation to report is mandatory. We additionally find that it is reasonable for an objective witness to expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial. Therefore, we conclude that L.P.'s statements to Whitley and Jones were testimonial and improperly admitted at defendant's trial.

Clark at ¶ 35.

E. Argument of the State and the Attorney General

Both the State and the Attorney General have asked this Court to expand the reasoning underlying the "ongoing emergency" and "medical diagnosis or treatment" exceptions categorizing certain statements as nontestimonial. However, both have asked this Court to stretch those exceptions beyond their respective limits. In addition, the State and the Attorney General have argued that Ohio's mandatory reporting statute should not be considered in determining whether L.P.'s statements in response to being questioned by his teachers were testimonial in nature. As explained below, both the State and the Attorney General are incorrect.

F. Not an Ongoing Emergency

The Attorney General has argued that abused children are in a perpetual state of emergency for purposes of determining whether their statements are testimonial or nontestimonial. (Attorney General's Brief, pp. 1, 6-7, 11, 13). That argument is undercut by the text of Ohio's mandatory reporting statute, which envisions both "emergency and nonemergency cases of abuse and neglect." R.C. 2151.421(J)(3)(a). The Attorney General's assertion of an ongoing emergency is also controverted by the fact that L.P. and A.T. were allowed to leave school after L.P. was questioned by his teachers. The children were located at Mr. Clark's mother's house the next day. *Clark* at ¶ 3. Nevertheless, the Attorney General has asked this Court to hold that the *speculative, future threat* of additional abuse to L.P. rendered his statements analogous to those made during an ongoing emergency, similar enough to the 911 calls in *Stahl* and *Davis* to make L.P.'s statements nontestimonial. (Ohio Attorney General's Brief, pp. 1, 6-7).

Furthermore, the Attorney General's argument contradicts the express delineation, discussed by this Court in *Stahl,* between *Davis* and *Hammon.* The pivotal fact in *Davis* was that

the 911 call was made to seek protection from an immediate danger. "In *Davis,* [the victim] was speaking about events *as they were actually happening*, rather than "describ[ing] past events." (Emphasis sic.) *Davis* at 827. In *Hammon,* the statements were made after officers responded to a 911 call. There was no emergency in progress. *Davis* at 829-830. The Supreme Court held that the primary purpose of the questioning was to establish or prove past events. *Id.* Like the officers in *Hammon,* the teachers in the present case were not trying to intervene in an ongoing emergency. As the Supreme Court of the United State explained, the questions in *Hammon* were intended to determine "what happened," and not "what is happening." And as in *Hammon*, the questions asked of L.P. by his teachers were intended to discern what happened in the past. As noted by the State, in the present case L.P.'s teachers literally asked "what happened." (State's Brief, p. 13).

The Attorney General has asked this Court to stretch the concept of an ongoing emergency, which was described in *Davis* as a situation involving a "bona fide physical threat," "frantic answers," and an environment that was not "tranquil" "or even safe," to the events of the present case. This Court should not do so. While the goal of protecting children from harm is laudable, to allow the facts of the present case to be categorized as an ongoing emergency would ignore the careful distinction between *Davis* and *Hammon.*

Hammon involved police responding to a domestic disturbance call. When the police arrived Mrs. Hammon and Mr. Hammon were present in the home. Mr. Hammon remained in the home during police questioning of Mrs. Hammon. The police also observed signs of a struggle. Mrs. Hammon initially stated that nothing was wrong, but soon completed a written statement detailing her assault that evening at the hands of her husband. *Davis* at pp. 819-820. Despite those facts, the court held that at the time that the police questioned Ms. Hammon

"[t]here was no emergency in progress." *Davis* at 819. Further, in *Michigan v. Bryant*, the United States Supreme Court clarified that "the duration and scope of an emergency may depend in part on the type of weapon employed," and indicated that armed suspects will be deemed to create ongoing emergencies in numerous scenarios where an unarmed suspect would not. *Bryant* at 1158

In the present case, L.P. was at school. Mr. Clark was not nearby. There was no threat of danger to L.P. at the time that his teachers questioned him, nor was a firearm involved. L.P. left school at the end of the day, returned to Mr. Clark's mother's house, and was not contacted by regarding his statements until the next day. *Clark* at ¶ 3. As in *Hammon,* there was no emergency in progress at the time those statements were made. Nevertheless, the Attorney General have suggested that the *potential, future threat* of further harm to L.P. rendered the teachers' questioning akin to that in *Davis,* meant to meet an ongoing, immediate threat. (Attorney General's Brief, pp. 1, 6-7, 11, 13). Were that the case, the questioning in *Hammon* would also have involve a current threat, as Mrs. Hammon's assailant was in the next room during her questioning, and she could have faced future harm after the police left.

In the present case, the position of the State and the Attorney General would eliminate any distinction between the circumstances of *Davis* and *Hammon.* The United States Supreme Court declined to accept that argument. *Davis* at 831. This Court should similarly decline, and affirm the court of appeals's decision in the present case.

G. Not for Medical Diagnosis or Treatment

The State and the Attorney General have argued for a broad expansion of the concept that statements made for the purpose of medical diagnosis or treatment are nontestimonial. (State's Brief, pp. 1, 2, 13-14, Attorney General's Brief, pp. 2, 6-7, 9). The Attorney General has

suggested that statements made to medical professionals for the purpose of diagnosis or treatment are considered nontestimonial 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." (Attorney General's Brief, p. 7). And 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." (Attorney General's Brief, p. 7). The Attorney General is incorrect.

As discussed above, in *Muttart* this Court explained that statements made for the purpose of medical diagnosis or treatment are held to be nontestimonial based upon the assumption that such statements are inherently reliable. That reliability is premised upon patients' honesty with their health-care practitioners, and the ability of those practitioners to ferret out dishonesty. *Muttart* at ¶ 39-42. The statements at issue in the present case do not fall within the narrowly drawn reasoning regarding statements made for purposes of medical diagnosis or treatment. Contrary to the assertions of the State and the Attorney General, this Court should not expand that exception to include statements made to anyone who has an interest in protecting the wellbeing of children.

H. Mandatory Reporting Statute

The Attorney General has relied on this Court's decision in *Yates v. Mansfield Bd. of Educ.*,102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 86, for its discussion of the vulnerable position that children occupy in our society. (Attorney General's Brief, p. 1.) The Attorney General has also cited *Yates* for this Court's discussion of Ohio's mandatory reporting statute, R.C. 2151.421. *Yates* was not a criminal case. *Yates* involved a civil lawsuit for damages and the applicability of sovereign immunity. Nevertheless, as the Attorney General has noted, *Yates*

does discuss the role that R.C. 2151.421 plays in identifying and protecting abused children. (Attorney General's Brief, pp. 6-7, 9). But R.C. 2151.421 also discusses the role that mandatory reporters play in gathering evidence for purposes of criminal prosecutions stemming from a report of child abuse or neglect. As this Court explained:

> [I]t is clear that the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection, especially in the institutional setting. Thus, R.C. 2151.421(F)(1) and (2) provide that children services agencies shall investigate each report of known or suspected child abuse in cooperation with law enforcement to determine, among other things, "the cause of the injuries * * * and the person or persons responsible" and "make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention." In addition, R.C. 2151.421(M) provides that in cases involving allegations of institutional abuse, the agency must give special notice to the appropriate officer or authority of the out-of-home care entity regarding "the person named as the alleged perpetrator in the report." (Emphasis removed.)

Yates at ¶ 25.

Further discussing the required investigation that must result from a report made under R.C. 2151.421, the statute requires a "memorandum of understanding" that is signed by law enforcement, judges, and prosecutors, which sets forth the "normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section." R.C. 2151.421(J)(2). And the statute explains that "a failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person." R.C. 2151.421(J)(2). While other statutes contain the specific offenses and sentences that may ultimately arise as the result of an

investigation made under R.C. 2151.421, that statutes does describe its role in a criminal investigation and prosecution that may result from the actions of a mandatory reporter.

The Attorney General has also argued that because doctors are mandatory reporters under R.C. 2151.421, but statements made to doctors for purposes of medical diagnosis or treatment are nontestimonial, the court of appeals in the present case erred by considering the mandatory reporting statute in holding that the L.P's statement to his teachers were testimonial. (Attorney General's Brief, pp. 8-10). However, the court of appeals' discussion of the mandatory reporting statute must be placed in the context of its discussion of the "ongoing emergency" and "medical diagnosis or treatment" exceptions.

L.P.'s statements to his teachers were not deemed testimonial by the court of appeals solely because his teachers were mandated reporters. Those statements were testimonial because they were made in response to being questioned by mandated reporters and were not made during an ongoing emergency or for purposes of medical diagnosis or treatment. In light of those circumstances, the court of appeals correctly held that "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement . . . . We additionally find that it is reasonable for an objective witness to expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial. Therefore, we conclude that L.P.'s statements to Whitley and Jones were testimonial and improperly admitted at defendant's trial." *Clark* at ¶ 35.

I. Form of the Questions

Both the State and the Attorney General have attempted to downplay the significance of the teachers' questioning of L.P. by noting that the questions asked were "neutral" and "simple." (State's Brief, p. 13, Attorney General's Brief, p. 13). But as the Supreme Court of the United

States explained in *Davis,* "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." (Internal citation omitted.) *Davis* at footnote 1.

J. Nature of the Offense, Victim, and Mandatory Reporters

The Attorney General has suggested that the nature of the offense and the victim at issue in the present case necessitate a finding that L.P.'s statements to his teachers were admissible. (Attorney General's Brief, pp. 6-7). A similar argument was made in *Davis.* But the United States Supreme Court rejected it, explaining that

> [r]espondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases--domestic violence--requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. (Internal citation omitted.)

Davis at 832-833. Similarly, this Court should not allow the State to circumvent the constitutional requirements of the Confrontation Clause based upon the nature of the offense or the victim involved.

Both the State and the Attorney General have emphasized the special relationship between teachers and students, and that the teachers in the present case, while mandatory reporters, were primarily concerned with promoting L.P.'s health and wellbeing. (State's Brief, pp. 13-14, Attorney General's Brief, pp. 6-7, 9). As discussed above, the Attorney General has noted that doctors are mandatory reporters under R.C. 2151.421, and that statements made to doctors for purposes of medical diagnosis or treatment are nontestimonial. Thus the contention

is that teachers should be deemed to fill a similar role, and that statements made to teachers should likewise be deemed nontestimonial. But, to state the obvious, teachers are not permitted to assist with medical diagnosis or treatment, and there is no logical basis for extending to teachers the medical-personnel exception to the constitutional right to confront one's accusers.

Instead, this Court should take an approach here similar to that taken in *Arnold*, where the question was whether statements to social workers are testimonial or nontestimonial. Social workers, like teachers, are mandated reporters under R.C. 2151.421. And in *Arnold* this Court determined that whether statements made to social workers will be deemed testimonial will depend upon whether the purpose of those questions was for medical diagnosis or treatment or for furthering a forensic investigation. *Arnold* at ¶ 44.

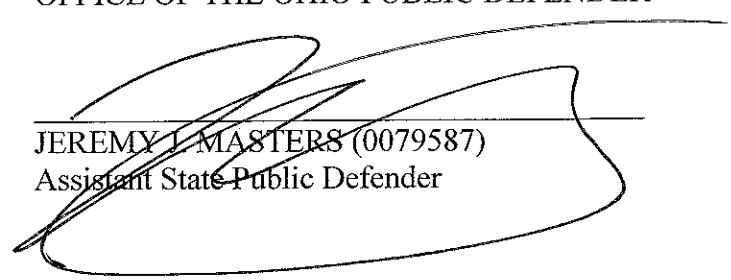
In the present case, the teachers were acting in their capacity as mandatory reporters in conjunction with law enforcement, in the absence of an ongoing emergency, and without a purpose for medical diagnosis or treatment. As a result, L.P.'s statements to his teachers were testimonial in nature, and the admission of those statements violated Mr. Clark's rights under the Confrontation Clause.

CONCLUSION

The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE DARIUS CLARK** has been sent by regular mail to Mark J. Mahoney, The Justice Center, Eighth Floor, 1200 Ontario Street, Cleveland, Ohio, 44113, Alexandra T. Schimmer, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and Erika Cunliffe, 310 Lakeside Avenue, Suite 400, Cleveland, Ohio 44113, on September 11, 2012.

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