

OHIO V. CLARK: TESTIMONIAL STATEMENTS UNDER THE CONFRONTATION CLAUSE

MESHA SLOSS*

INTRODUCTION

The Sixth Amendment to the United States Constitution provides: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹ The application of this guarantee, known as the Confrontation Clause, underwent a massive judicial overhaul in *Crawford v. Washington*.² There, the United States Supreme Court changed the standard under which courts evaluate the admissibility of out-of-court statements when the declarant is not present for cross-examination at trial.³ A number of definitional issues under the new standard were left unresolved by *Crawford*.⁴

The prior standard, as expounded by the Court in *Ohio v. Roberts*, permitted admission of statements from a witness who has been shown to be unavailable so long as the statements bore “adequate indicia of reliability.”⁵ In application, this standard required the out-of-court statement be either within a “firmly rooted hearsay exception” or contain “particularized guarantees of trustworthiness.”⁶ With its focus on reliability, the *Roberts* test placed great weight on the judicial evaluation of a statement’s trustworthiness, leading to great unpredictability in its application.⁷

* J.D. Candidate, Duke University School of Law, Class of 2016. Special thanks to Professor Donald Beskind for his guidance.

1. U.S. CONST. amend. VI.

2. *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (overruling the standard from *Ohio v. Roberts*, 448 U.S. 56 (1980)).

3. *Id.*

4. JESSICA SMITH, UNDERSTANDING THE NEW CONFRONTATION CLAUSE ANALYSIS: *CRAWFORD*, *DAVIS*, AND *MELENDEZ-DIAZ* 3 (University of North Carolina School of Government Administration of Justice Bulletin, April 2010).

5. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

6. *Id.* at 66.

7. *Crawford*, 541 U.S. at 63; Jerome C. Latimer, *Confrontation After Crawford: The Decision’s Impact on How Hearsay is Analyzed Under the Confrontation Clause*, 36 SETON

In *Crawford*, the Court overruled *Roberts*, believing it violated the historical principles embodied in the Confrontation Clause.⁸ Under the new, stricter standard of *Crawford*, courts now focus on the testimonial nature of a statement rather than its reliability.⁹ The Court never fully defined “testimonial,” however, leaving litigants to piece together a working definition from dicta and subsequent holdings.¹⁰ In *Ohio v. Clark*, the question before the court is whether a child’s statements to a mandatory reporter identifying his abuser are “testimonial” for Confrontation Clause purposes.¹¹

I. FACTUAL BACKGROUND

In 2010, Darius “Dee” Clark was living in Cleveland with his girlfriend and her two young children.¹² Her son, L.P., was three years old at the time and her daughter, A.T., was one.¹³ When Clark’s girlfriend would travel out of state for work, Clark would watch her children.¹⁴ On multiple occasions in early 2010, family members and the children’s mother herself suspected Clark of injuring the children while they were in his care.¹⁵

During this time, L.P. began attending William Patrick Day Head Start Center.¹⁶ According to L.P.’s teachers, on March 16, 2010, L.P. looked fine and had no marks on his face while at school.¹⁷ That evening, his mother left for a trip to Washington, leaving her children with Clark.¹⁸

HALL L. REV. 372, 415–16 (2006).

8. *Crawford*, 541 U.S. at 60.

9. SMITH, *supra* note 4, at 4.

10. *Id.* at 8; *See, e.g., Crawford*, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (deciding whether lab reports submitted without the testimony of the analyst who performed them were testimonial under the Confrontation Clause).

11. Petition for Writ of Certiorari at i, *Ohio v. Clark*, No. 13-1352 (U.S. May 8, 2014).

12. Brief of Petitioner at 2, *Ohio v. Clark*, No. 13-1352 (U.S. Nov. 17, 2014) [hereinafter Brief of Petitioner].

13. *Id.*

14. *Id.*

15. *Id.* at 2–3.

16. *Id.* at 3.

17. *Id.*

18. *Id.*

The next day at lunchtime, the teaching assistant for L.P.'s class noticed that he refused to eat and was quieter than usual.¹⁹ She also noticed his eye was "bloodshot" or "bloodstained."²⁰ When she asked L.P. what happened, the child, though initially unresponsive, eventually told her that he fell.²¹ Although the teaching assistant did not make much of the encounter in the lunchroom, in the better lighting of the classroom she noticed red marks and welts across L.P.'s face.²² She alerted the lead teacher and both asked L.P. again what had happened and who had caused his injuries.²³ L.P. "said something like, Dee, Dee," though the teachers did not know who that was.²⁴ Thinking another child might have been the source of the injury, they asked whether Dee was "big or little." L.P. responded "Dee is big."²⁵

The teachers took L.P. to their supervisor, who lifted L.P.'s shirt and discovered more injuries.²⁶ The supervisor then had the assistant make out a report of child abuse to the Cuyahoga County Department of Children and Family Services.²⁷ A social worker responded to the daycare that same day.²⁸ Little spoke with L.P., who initially told him he had fallen, but later stated that Dee had caused his bruises.²⁹ When Dee Clark picked up L.P. that day, he first claimed to know nothing about L.P.'s injuries.³⁰ He then stated he had spanked L.P. a week prior and that L.P.'s injuries were "from playing outside because he lives in the projects."³¹ Clark also claimed not to know anyone named Dee.³² Little told Clark that he would need further information from him but Clark said he did not have time and left with L.P.³³

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 3–4.

24. *Id.* at 4.

25. *Id.*

26. *Id.*

27. *Id.*; OHIO REV. COD. ANN. § 2151.421(A)(1)(a) (West 2015) (requiring that a teacher file a report of child abuse to the Department of Children and Family Services if abuse is suspected).

28. Brief of Petitioner, *supra* note 12, at 2.

29. *Id.* at 4.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

Little followed up that day by leaving information at L.P.'s known residence for the family to contact him.³⁴ Another social worker called L.P.'s mother the next morning, March 18.³⁵ Still unable to find Clark or the children, she contacted other family members and finally located the children at Clark's mother's home.³⁶ In addition to L.P.'s injuries, his little sister had two black eyes, a large burn on her cheek, a very swollen hand, and two ponytails that appeared to have been ripped out at the root.³⁷ The social worker immediately called 911 and contacted a child abuse detective.³⁸ The children were treated at a hospital emergency room where their injuries were documented.³⁹ Doctors estimated the injuries to both children had been sustained between February 28 and March 18, 2010.⁴⁰ The children were placed in the care of relatives.⁴¹ L.P. later repeated to both his great aunt and grandmother that "Dee" was the cause of his injuries.⁴² Dee Clark was later arrested and charged with five counts of felonious assault, two counts of endangering children and two counts of domestic violence.⁴³

II. PROCEDURAL HISTORY

Before trial, L.P. was deemed incompetent to testify due to his age.⁴⁴ Clark moved the trial court to exclude testimony about L.P.'s out-of-court statements identifying "Dee," arguing that these statements were testimonial under *Crawford v. Washington* and violated the Confrontation Clause.⁴⁵ The prosecution argued that the statements were non-testimonial and admissible under Ohio Rule of Evidence 807, which allows reliable statements from children in abuse cases.⁴⁶ The court denied Clark's motion on the basis that L.P.'s statements were non-testimonial and satisfied Ohio Rule of Evidence 807.⁴⁷ The court allowed testimony identifying "Dee" as the abuser from L.P.'s teachers, the involved social workers, and his great aunt

34. *Id.* at 5.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Ohio v. Clark*, No. 96207, 2011 WL 6780456 at *1 (Ohio Ct. App. Dec. 22, 2011).

41. Brief of Petitioner, *supra* note 12, at 6.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 6–7; Ohio Evid. R. 807 (West 2015).

46. Brief of Petitioner, *supra* note 12, at 6–7.

47. *Id.* at 7.

and grandmother.⁴⁸ Clark was found guilty on all counts except one and was sentenced to twenty-eight years imprisonment.⁴⁹

Clark appealed to the Eighth District Court of Appeals for Ohio, which reversed the trial court's decision, finding that all available testimony of L.P.'s statements identifying "Dee" were inadmissible.⁵⁰ The court found that, under the primary-purpose test of *Crawford*, L.P.'s statements to social workers were testimonial and, therefore, should not have been admitted at trial.⁵¹ In making this decision, the court reasoned that the social workers were "part of the preliminary investigation to aid law enforcement" and that L.P.'s statements were not "made in the midst of a police emergency" or for "medical treatment or diagnosis."⁵² The court also found L.P.'s statements to his teachers to be testimonial because "the primary purpose of [the teachers'] questioning L.P. was to report potential child abuse to law enforcement."⁵³ Finally, the court concluded that L.P.'s statements to his family about his abuser's identity were inadmissible under Ohio rules of evidence because they lacked the requisite guarantees of trustworthiness.⁵⁴

The State appealed the appellate court's finding that L.P.'s statements to his teachers were testimonial.⁵⁵ In a 4-3 decision, the Ohio Supreme Court affirmed the Court of Appeals' decision.⁵⁶ The court first found that L.P.'s teachers were state agents for law enforcement purposes when they questioned him.⁵⁷ This finding was based on the duty imposed on all school employees by Ohio Revised Code Section 2151.421 to report any actual or suspected child abuse or neglect.⁵⁸ Although the court found the core purpose of this reporting mandate was to protect abused and mistreated children,⁵⁹ legislators were also concerned with identifying and punishing those who abused them.⁶⁰ The court finally applied the primary-purpose test

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 8.

55. *Id.*

56. *Id.*

57. Brief of Petitioner, *supra* note 12, at 8.

58. *Id.*

59. *Id.* at 8-9.

60. *Id.* at 9.

and determined that L.P.'s statements to his teachers were testimonial, finding that there was no ongoing emergency when L.P. made the statements nor did he need emergency medical care.⁶¹ Accordingly, the primary purpose of the teachers' inquiries of L.P. was to fulfill their duty to report abuse.⁶²

III. LEGAL BACKGROUND

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him."⁶³ Per the Fourteenth Amendment, this clause is binding on the states.⁶⁴ In *Crawford v. Washington*,⁶⁵ the United States Supreme Court held that, in order to satisfy the Confrontation Clause, testimonial out-of-court statements are inadmissible unless the declarant has first been judged unavailable and the accused had a prior opportunity for cross examination.⁶⁶ In *Crawford*, the Court deemed as testimonial a statement by a Mirandized witness given in a video-taped interrogation by police at the station after the crime was committed.⁶⁷

As a threshold matter, a trial court must determine if an out-of-court statement is testimonial in nature.⁶⁸ In past cases the Court has held that testimonial statements included testimony given "at a preliminary hearing, before a grand jury, at a former trial; and [statements] to police during interrogations" as these are "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."⁶⁹ Besides these enumerated applications, the Court has yet to comprehensively define the scope of "testimonial" statements.

In dicta in *Crawford*, the Court provided some guidance as to the logic behind the testimonial standard. The Court noted that the historical motivation for the Confrontation Clause stemmed from the common-law tradition of live-witness testimony at trial.⁷⁰ This

61. *Id.*

62. *Id.*

63. U.S. CONST. amend. VI.

64. *Michigan v. Bryant*, 131 S. Ct. 1143, 1152 (2011).

65. *Crawford v. Washington*, 541 U.S. 36 (2004).

66. *Id.* at 68.

67. *Id.* at 38, 68.

68. *See id.* at 68.

69. *Id.*

70. *Id.* at 43 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *373-374).

tradition is contrasted by the “examination in private by judicial officers” permitted under the civil law system.⁷¹ When such civil law, *ex parte* examinations were used in common-law courts in lieu of live testimony, the accused often demanded to have the declarant-witnesses brought before him, in line with the traditions of the common law.⁷²

In their elaboration of the Confrontation Clause in *Crawford*, the Court recounted how the trial of Sir Walter Raleigh exemplified the kinds of “civil-law abuses” the Confrontation Clause was meant to prevent.⁷³ There, Raleigh was convicted of treason based on the incriminating statements an alleged accomplice made out of court in an examination by the King’s Privy Council.⁷⁴ The prosecution refused to hand over the witness to testify at trial.⁷⁵ Part of the Court’s reasoning for overruling the reliability standard from *Ohio v. Roberts* was that the language of the Confrontation Clause, in line with the history of the common law, focuses on those witnesses bearing testimony against the accused.⁷⁶ Testimony, the Court found, is not just any statement, but often “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁷⁷ Consequently, only a certain class of out-of-court statements was targeted by the Confrontation Clause.⁷⁸ The Court held that statements taken by police during interrogations are testimonial, as are statements taken by other law-enforcement officers.⁷⁹

Case law has, however, chipped away at the circumstances in which statements to law enforcement are testimonial. In *Davis v. Washington*,⁸⁰ the Supreme Court held that statements taken by law enforcement during an interrogation are non-testimonial when they are made “under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to

71. *Id.*

72. *Id.* (citing JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883)).

73. *Id.* at 51.

74. *Id.* at 44.

75. *Id.*

76. *Id.* at 51.

77. *Id.* (citation omitted).

78. *Id.*

79. *Id.* at 52–53 (“The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or [not].”).

80. *Davis v. Washington*, 547 U.S. 813 (2006).

meet an ongoing emergency.”⁸¹ Conversely, when an objective observer would believe there is no ongoing emergency and the primary purpose of the interrogation is “to establish or prove past events potentially relevant to later criminal prosecutions,” the statements are testimonial.⁸² Thus, the circumstances of the questioning, evaluated objectively, are important in determining whether the statements are testimonial.⁸³

The Court has applied this “primary-purpose test” on three occasions.⁸⁴ In *Davis*, the Court applied the test to two sets of facts.⁸⁵ First, in the *Davis* facts, a caller to 911 dispatch informed the operator that she was physically assaulted by her former boyfriend who had entered her home in violation of a no-contact order and fled the scene during the call.⁸⁶ While waiting for police to arrive, the dispatcher requested and acquired further identifying information from the caller about her assailant.⁸⁷ The victim did not testify at the subsequent trial, but nevertheless the court admitted the 911 recording in which she identified her former boyfriend.⁸⁸

On appeal, the Court determined that the statements made during the 911 call were non-testimonial.⁸⁹ The Court explained that when an interrogation had the sole purpose of establishing facts that could be used as evidence to identify a suspect or pursue a conviction against him, statements made during that interrogation would be plainly testimonial.⁹⁰ An initial interrogation during a 911 call, however, did not serve this purpose.⁹¹ Though the Court recognized that an interrogation to determine the need for emergency assistance could evolve into a testimonial conversation, the initial questioning of the caller in *Davis* was to enable police to respond to her ongoing emergency.⁹² In essence, “she was seeking aid, not telling a story about the past,” and police were seeking to “end a threatening situation.”⁹³

81. *Id.* at 822.

82. *Id.*

83. *Michigan v. Bryant*, 131 S. Ct. 1143, 1166 (2011).

84. *Davis*, 547 U.S. 813 (deciding both *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005) and *State v. Davis*, 111 P.3d 844 (Wash. 2005)); *Bryant*, 131 S. Ct. 1143.

85. *Davis*, 547 U.S. at 817, 819.

86. *Id.* at 817–818.

87. *Id.* at 818.

88. *Id.* at 819.

89. *Id.* at 828.

90. *Id.* at 826.

91. *Id.* at 827.

92. *Id.* at 828–29.

93. *Id.* at 831–32.

Second, in the facts of *Hammon v. Indiana*, police responded to reports of a domestic disturbance at the home of the declarant and her husband.⁹⁴ With the couple separated at the scene, the police learned that the husband had battered his wife.⁹⁵ They then had her fill out a battery affidavit.⁹⁶ At the husband's subsequent trial, the wife did not testify, but the prosecution had the responding officer repeat the wife's statements and authenticate the affidavit.⁹⁷

The Court found that the wife's statements to police were testimonial—and thus barred by the Confrontation Clause—because the officer's primary purpose in taking the statement was to investigate a possible crime, not to address an ongoing emergency.⁹⁸ In coming to this conclusion, the Court cited that the wife's statement was given hours after the described events occurred.⁹⁹ The Court further noted that, because the incident with her husband had ended before police showed up and she was separated from him, she faced no immediate threat to her person.¹⁰⁰ In essence, the officer questioning the wife after the incident “was not seeking to determine (as in *Davis*) what is happening, but rather what [had] happened.”¹⁰¹

*Michigan v. Bryant*¹⁰² further tested the testimonial bounds of victim statements to police officers. There, police responded to the scene of a shooting and found the victim dying from a gunshot wound.¹⁰³ Police questioned the victim for five to ten minutes about who had shot him until emergency medical services arrived.¹⁰⁴ The victim was able to identify his shooter before being transported to the hospital, where he later died.¹⁰⁵ Police used the information from the victim to seek out the suspect at his home.¹⁰⁶ At the shooter's subsequent trial, police testified about what the victim had told them at the scene.¹⁰⁷

94. *Id.* at 819.

95. *Id.* at 819–20.

96. *Id.*

97. *Id.* at 820.

98. *Id.* at 830.

99. *Id.* at 827.

100. *Id.* at 829–30.

101. *Id.* at 830 (citation omitted).

102. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

103. *Id.* at 1150.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

The *Bryant* Court found, given the circumstances surrounding the victim's statements to the police, the primary purpose of their interrogation was to meet an ongoing emergency.¹⁰⁸ Consequently, the statements were non-testimonial and admissible under the Confrontation Clause.¹⁰⁹ The Court considered the circumstances of the interrogation in determining its primary purpose.¹¹⁰ These circumstances included the informal nature of the interrogation, given that it was disorganized and occurred in public, prior to the arrival of emergency medical services.¹¹¹ As further evidence of the primary purpose, the Court also considered the statements and actions of both the police and the victim, including that the victim gave no indication that his emergency had passed and that police asked questions necessary to meet the threat.¹¹²

IV. ARGUMENTS

A. *Ohio's Arguments*

Ohio first asserts that statements to non-law-enforcement officials without police involvement are non-testimonial under the Confrontation Clause.¹¹³ Ohio argues that statements between private parties are hardly ever given in the "witness" capacity contemplated by the Confrontation Clause because such statements are insufficiently formal and quite distinct from bearing testimony for an evidentiary purpose.¹¹⁴ Nor are they in line with the kinds of official abuses the Court believes the Confrontation Clause was crafted to address, namely "depositions or ex parte affidavits" used in lieu of live testimony.¹¹⁵ And in the case of private-party statements given by children too young to testify, child-declarants could never have given live-witness testimony in the first place.¹¹⁶ Therefore, their statements should be outside the Confrontation Clause's ambit.¹¹⁷ Ohio posits

108. *Id.*

109. *Id.*

110. *Id.* at 1160.

111. *Id.*

112. *Id.* at 1166.

113. Brief of Petitioner, *supra* note 12, at 14.

114. *Id.* at 18–19.

115. *Id.* at 22, 24 (citation omitted).

116. *Id.* at 31 (referencing OHIO R. OF EVID. 601(A), which states that children are too young to testify when they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined").

117. *Id.*

that L.P.'s statements meet each of these requirements: (1) they were made between private parties; (2) were formal in neither location nor circumstance; and (3) were not intended to be a substitute for live witness testimony.¹¹⁸

Petitioner notes that statements between private parties have historically raised only “*evidentiary* . . . not . . . *constitutional*” concerns, hence why they are primarily evaluated under a hearsay analysis.¹¹⁹ This hearsay analysis has been trending toward admitting more private-party statements, a trend Ohio contends would not have been possible if the Confrontation Clause were meant to be rigidly applied to these statements.¹²⁰ Furthermore, the hearsay analysis would regulate the use of these statements through various reliability tests¹²¹ and the Due Process check would offer additional guarantees of reliability.¹²² Leaving non-testimonial statements for the realm of hearsay, Ohio believes, is “consistent with the Framers’ design to afford the states flexibility in their development of hearsay law” and would sufficiently protect criminal defendants from having unreliable out-of-court evidence offered against them.¹²³

Ohio secondly argues that its mandatory-reporting statute does not turn daycare teachers into police agents for the purpose of Confrontation Clause analysis.¹²⁴ Historically, the common law differentiated between how the duty to report criminal activity applied to a “public officer,” in the sense of a government agent, versus a “common person.”¹²⁵ Furthermore, the statute requires only that the individual report something that took place in the course of her normal job function.¹²⁶ The statute does not require her to take on additional functions mirroring the role of police, such as investigating their suspicions.¹²⁷ In reality, an individual can satisfy the statute

118. *Id.* at 21, 25.

119. *Id.* at 29.

120. *Id.* at 28–29, 35.

121. *Id.* at 35 (referencing OHIO R. EVID. 802, which states hearsay must fit into an exception for admission, and 807(A)(1), which states the need for hearsay to fit into a reliable categorical exception or a residual exception with “particularized guarantees of trustworthiness”).

122. *Id.* at 36 (“Gross misuse of unreliable hearsay could violate the Due Process Clause if it is ‘so extremely unfair that its admission violates fundamental conceptions of justice.’”) (quoting *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012)).

123. *Id.* at 35–36.

124. *Id.* at 36.

125. *Id.* at 38 (citation omitted).

126. *Id.* at 39.

127. *Id.*

without ever involving the criminal justice system.¹²⁸ A reporter can choose to report suspicions to other public agents like social workers, who are not law enforcement, illustrating that the purpose of the statute is ultimately protective and not prosecutorial.¹²⁹ Additionally, the declarant's intent is also relevant to the testimonial analysis; deeming a statement testimonial based on a statute applicable only to the questioner ignores the role the declarant's intent plays in the analysis.¹³⁰ Ohio also points out that for the purposes of other constitutional rights, such as the Fifth Amendment, courts have rejected the argument that mandatory reporters are police agents.¹³¹

Finally, Ohio argues that the circumstances and actions of the parties demonstrate that, under the primary-purpose test, L.P.'s statements are non-testimonial.¹³² From the teachers' perspective, questioning a student about injuries would typically be for the protection of the student and not with an eye towards future prosecution of the abuser.¹³³ Here, the teachers' immediate response to L.P.'s injuries was to assess the situation, with the mandatory-reporting duty only an afterthought, mentioned later by their supervisor.¹³⁴ No child in L.P.'s shoes (who was only three at the time) would have reasonably considered criminal proceedings as his purpose when answering his teachers' questions.¹³⁵ Finally, L.P.'s injuries demanded the teachers seek to mitigate any danger he faced, and asking who caused his injuries was a critical part of adequately responding to the emergency situation. Ohio posits that the informal nature of such emergency questioning goes toward the non-testimonial nature of the statements. In short, the "totality-of-the-circumstances analysis . . . shows that L.P. did not implicate Clark with the primary purpose of creating an out-of-court substitute for trial testimony."¹³⁶

128. *Id.* at 40.

129. *Id.* at 39–40.

130. *Id.* at 40 (“Statements made unwittingly to a government informant’ do not become testimonial merely because of the listener’s hidden prosecutorial motives.”) (quoting *Davis v. Washington*, 547 U.S. 813, 826 (2006)).

131. *Id.* at 42–43 (discussing similarities in the Fourth and Sixth Amendment analyses).

132. *Id.* at 51.

133. *Id.* at 50–51.

134. *Id.* at 52.

135. *Id.* at 52–53.

136. *Id.* at 55.

B. Clark's Arguments

Clark first argues the primary-purpose test applies to all statements designed to aid criminal investigations, not just statements that adults make to law-enforcement officials.¹³⁷ Clark notes that “police involvement has never been the touchstone of the Confrontation Clause.”¹³⁸ A statement not taken by a law-enforcement official can still implicate the very threat the Confrontation Clause is aimed at eradicating: *ex parte* statements functioning as the equivalent of live testimony.¹³⁹ Clark asserts that children can make statements that function as substitutes for live testimony just as well as adults.¹⁴⁰ Clark argues that the “investigative function” of the questioner is what really determines if a statement is testimonial, and both police and civilians have the power to investigate, even if civilian investigation occurs less frequently.¹⁴¹

Clark next argues that under the primary-purpose test, the statement here is testimonial.¹⁴² Considering the circumstances objectively, he asserts that both L.P. and his teachers would have reasonably believed the primary purpose of their dialogue was to provide facts to investigate potentially criminal past behavior and, thus, L.P.'s statements were testimonial.¹⁴³ Although the teachers' ultimate goal in questioning L.P. may have been to protect him, the means by which that goal would be achieved—and not the goal itself—should be the focus of the primary-purpose inquiry.¹⁴⁴ Here, they could protect L.P. by questioning him to establish facts about potentially criminal past behavior for the purposes of future prosecution.¹⁴⁵ The mandatory-reporting statute in this case achieves its protective purpose by identifying abusers for prosecution, and the teachers here were trained specifically to investigate potential abuse to garner this information.¹⁴⁶ Thus, from the teachers' perspective, their primary purpose could not have been to protect L.P. in any ongoing emergency, given it was very unlikely he faced any harm in

137. Brief for Respondent at ii, *Ohio v. Clark*, No. 13-1352 (U.S. Jan. 7, 2015) [hereinafter Brief for Respondent].

138. *Id.* at 29.

139. *Id.* at 25–26 (citation omitted).

140. *Id.* at 19.

141. *Id.* at 30.

142. *Id.* at 19.

143. *Id.* at 34.

144. *Id.* at 35.

145. *Id.*

146. *Id.* at 36.

the classroom or at school.¹⁴⁷

Considering L.P.'s perspective, Clark argues a child would reasonably have understood the purpose of the questioning was to elicit "a consequential accusation of wrongdoing."¹⁴⁸ In support of this assertion, Clark points to L.P.'s young age and the level of seriousness the boy would have associated with questioning from his teachers, who held an authoritative position in relation to him.¹⁴⁹ Clark lastly analyzes the circumstances surrounding the teachers' questioning, focusing on the implied formality of the situation as indicated by the formal student-teacher relationship, the duty to report under Ohio law, and the criminal and civil consequences of failing to report.¹⁵⁰ Clark claims this formality assessment is supported by the jury's treatment of L.P.'s accusation as the equivalent of live testimony.¹⁵¹

Clark finally argues that the history and development of hearsay law confirm that L.P.'s statements were testimonial. Child hearsay statements in lieu of live testimony were historically inadmissible when the child was deemed incompetent to testify.¹⁵² Clark asserts that states have in their power a readily available solution to the problem of child testimony by legally permitting children to testify in certain instances, such as in abuse cases, instead of deeming them incompetent due to their age.¹⁵³ Clark believes this is a more viable option to prosecute child-abuse cases and one that would not undermine the adversarial system with the use of ex parte accusations during trial.¹⁵⁴

V. ANALYSIS

The Supreme Court will likely find L.P.'s statements to his teachers were non-testimonial and admissible under the Confrontation Clause.¹⁵⁵ The primary-purpose test as expounded upon in *Davis v. Washington* and *Michigan v. Bryant* expressly applies only

147. *Id.* at 38.

148. *Id.* at 40.

149. *Id.* at 39–40.

150. *Id.* at 41–42.

151. *Id.* at 42.

152. *Id.* at 43, 48–49.

153. *Id.* at 50 (referring to OHIO R. OF EVID. 601, under which the trial court deemed L.P. incompetent to testify because he was a child younger than ten).

154. *Id.* at 57.

155. See *Crawford v. Washington*, 541 US. 36, 68 (2004) (holding testimonial out-of-court statements inadmissible when there was no prior opportunity for cross-examination of declarant).

to statements to law enforcement officials.¹⁵⁶ Other courts have been loath to find that mandatory-reporting statutes transform recipients of information about child abuse into agents of law enforcement.¹⁵⁷ Without such a finding, the primary-purpose test is likely not applicable to these facts.¹⁵⁸ Furthermore, the historical background of the Confrontation Clause, as understood by the Court, supports the argument that allowing statements such as L.P.'s at trial would not offend the Confrontation Clause.¹⁵⁹ Regardless, as Ohio correctly notes, the circumstances objectively indicate that the primary purpose of the dialogue between L.P. and his teachers was not to establish information for future prosecutorial use and, therefore, L.P.'s statements would be non-testimonial under the primary-purpose test.¹⁶⁰

A. The Primary-Purpose Test is not Applicable to L.P.'s Statements.

The simplest resolution to this case would be to find that the primary-purpose test was inapplicable because L.P.'s teachers were not law enforcement. The Ohio Supreme Court came to the opposite conclusion, determining Ohio's mandatory-reporting statute transformed the teachers into law-enforcement agents and, consequently, the primary-purpose test applied to their questioning of L.P.¹⁶¹ Ohio Revised Code Section 2151.421 mandates that an individual

acting in an official or professional capacity . . . [who] knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or

156. See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (describing the primary-purpose test as applicable to statements to law enforcement); *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011).

157. Brief of Petitioner, *supra* note 12, at 43; see, e.g., *People v. Younghez*, 202 Cal. Rptr. 907, 911 (Cal. Ct. App. 1984); *Wilkerson v. State*, 173 S.W.3d 521, 528–29 (Tex. Crim. App. 2005); *State v. Sprouse*, 478 S.E.2d 871, 874–76 (S.C. Ct. App. 1996); *People v. Cavaiani*, 432 N.W.2d 409, 414 (Mich. Ct. App. 1998).

158. See *Davis*, 547 U.S. at 822 (stating that the primary-purpose test is applicable to statements made to law enforcement).

159. See *Crawford*, 541 U.S. at 51 (stating the Confrontation Clause applies only to statements bearing testimony via “a solemn declaration or affirmation made for the purpose of establishing or proving some fact”).

160. See *Davis*, 547 U.S. at 822 (holding when the primary purpose is to meet an ongoing emergency and not to establish facts for prosecutorial use, a statement is non-testimonial).

161. See *State v. Clark*, 999 N.E.2d 592, 597 (Ohio 2013).

condition of a nature that reasonably indicates abuse or neglect of the child

immediately report such suspicion or knowledge to the appropriate authority.¹⁶² The list of mandatory reporters is expansive and includes an “administrator or employee of a child day-care center” and a “school teacher” or “school employee.”¹⁶³ The Ohio Supreme Court had previously found that the Ohio legislature enacted Section 2151.421 with the main objective of protecting abused and neglected children, but that identifying and prosecuting the perpetrators was “a necessary and appropriate adjunct in providing such protection.”¹⁶⁴

The court used the prosecutorial purposes of the law to find that L.P.’s teachers were law-enforcement officials.¹⁶⁵ The court was mistaken in inferring from the statute’s secondary concern with prosecuting abusers that the legislature intended to deputize every mandatory reporter.¹⁶⁶ Considering the broad applicability of the statute, this interpretation would mean a substantial portion of the civilian population would be deputized as agents of law enforcement when reporting child abuse.¹⁶⁷ Such a result would lead to child statements to reporters not being admissible in the subsequent trials of their abusers, which seems to squarely contradict what even the Ohio Supreme Court has recognized as the main objective of the statute: protecting children from abuse.¹⁶⁸

If L.P.’s teachers were not agents of law enforcement, the next issue is whether the primary-purpose test applies at all. If it does not, what other test applies?¹⁶⁹ The Court has yet to decide whether or under what circumstances statements to non-law enforcement

162. OHIO REV. COD. ANN. § 2151.421(A)(1)(a) (West 2015).

163. *Id.* § 2151.421(A)(1)(b) (West 2015) (listing additionally as mandatory reporters attorneys, registered nurses, health care professionals, licensed psychologists, speech pathologists, coroners, social workers, humane society agents, and certain spiritual advisors).

164. *Yates v. Mansfield Board of Education*, 808 N.E.2d 861, 865 (Ohio 2004).

165. *State v. Clark*, 999 N.E.2d at 596–97 (“Prosecution for criminal acts of child abuse is expressly contemplated by the reporting statute . . .”).

166. *See Yates*, 808 N.E.2d at 865 (stating the primary objective of the statute is “to facilitate the protection of abused and neglected children rather than to punish those who maltreat them”).

167. *See Brief of Petitioner*, *supra* note 12, at 38 (“If Ohio’s reporters are police agents, this traditional duty deputized the entire populace.”).

168. *See Yates*, 808 N.E.2d at 865 (“[T]he primary purpose of reporting is to facilitate the protection of abused and neglected children. . .”).

169. *See Davis v. Washington*, 547 U.S. 813, 822 (2006) (describing the primary-purpose test as applicable to statements made to law enforcement).

officials are testimonial.¹⁷⁰ The Court could develop a new test applicable to statements to non-law enforcement.¹⁷¹ Such a test might rely on the lack of law enforcement involvement as a sign of a statement's non-testimonial nature. For example, in *Seely v. State*, an Arkansas court held that a social worker was not an agent of law enforcement because the police did not "instigate, observe, or participate in" her questioning of the child, even though she may well have expected her questioning to be used as evidence in a subsequent prosecution.¹⁷² Or the test might, like the primary-purpose test, keep the focus on the objective purpose of the statement. For example, the dissent in *Ohio v. Clark* applied an objective-witness test, concluding L.P.'s statements were non-testimonial because "[n]o objective witness could reasonably believe that the interviews served a prosecutorial purpose rather than a protective one."¹⁷³

Others argue this case is an opportunity for the Court to prevent the total evisceration of the right to confrontation by applying the Confrontation Clause analysis to all statements, not just those made to law enforcement.¹⁷⁴ For example, the authors of the Nesson Amicus Brief suggest a new test which considers whether a hearsay statement would be essential to a conviction to determine admissibility.¹⁷⁵ Under this proposed test, statements which only corroborate other evidence would be admissible, but those which do more than just corroborate would not be admissible.¹⁷⁶ Overhauling the imperfect testimonial/non-testimonial scheme the Court has spent so much time developing in favor of a test that would also require extensive guesswork by a court, however, does not make the right to confrontation any more guaranteed. And adopting a wholly new test would be an ambitious undertaking by the Court given the radical overhaul Confrontation Clause analysis already received in *Crawford*.¹⁷⁷

170. *Id.* at 823 n.2; *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011).

171. *See, e.g.*, Brief Amicus Curiae of United States at 13, *Ohio v. Clark*, No. 13-1352 (U.S. Nov. 24, 2014) (proposing a categorical exclusion of statements to civilians as non-testimonial).

172. *Seely v. State*, 282 S.W.3d 778, 787, 788-90 (Ark. 2008).

173. *State v. Clark*, 999 N.E.2d 592, 601 (Ohio 2013).

174. *See* Brief Amicus Curiae of Fern L. Nesson and Charles R. Nesson at 2, *Ohio v. Clark*, No. 13-1352 (U.S. Nov. 24, 2014).

175. *Id.* at 5.

176. *Id.* at 3-4.

177. *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (overruling the standard from *Ohio v. Roberts*, 448 U.S. 56 (1980)).

B. Statements Such as L.P.'s are not Within the Confrontation Clause's Intended Ambit.

Furthermore, the historical context of the Confrontation Clause indicates that admitting statements such as L.P.'s would not offend the Confrontation Clause because it was never meant to exclude such statements.¹⁷⁸ Admittedly, and contrary to Ohio's argument, the admission of statements by a declarant who is legally incapable of testifying does seem problematic in light of the common-law tradition of live-witness testimony.¹⁷⁹ After all, it could provide a backdoor for statements which otherwise would not be admissible at trial. L.P.'s statements, however, do not implicate a key concern of Confrontation Clause analysis in that his statements are not the kind of ex parte examination in which a declarant is bearing testimony against the accused.¹⁸⁰ This was ultimately the concern that led the *Crawford* court to distinguish between testimonial and non-testimonial statements.¹⁸¹

As the Court suggested in *Crawford*, statements made to law enforcement are more akin to bearing testimony than other statements.¹⁸² When speaking to the police formally, such as in the video-taped interrogation in *Crawford*, no reasonable person involved would doubt that the statements could be used against the accused at trial.¹⁸³ The testimonial nature of these statements is relatively clear. L.P.'s statements were informally made to teachers without any direction or involvement by law enforcement. Nothing about statements like L.P.'s suggests the kinds of "civil law abuses" where "testimony" for trial is collected by a means other than having the witness testify at trial.¹⁸⁴ In fact, these abuses would rarely, if ever, be a risk in communications solely between private parties, where prosecutorial aims seem objectively unlikely.

178. *See id.* at 51 (finding that the Confrontation Clause applies only to a certain class of statements).

179. *See* Brief of Petitioner, *supra* note 12, at 31; *see Crawford*, 541 U.S. at 43 (discussing the common law tradition of live witness testimony).

180. *Crawford*, 541 U.S. at 51 (examining the kinds of statements contemplated by the Confrontation Clause).

181. *See id.* at 60 (overruling the *Roberts* standard because it violated the historical principles embodied in the Confrontation Clause).

182. *Id.* at 68.

183. *See id.* at 38, 68 (finding this video-taped interrogation to be testimonial).

184. *See id.* at 50.

C. The Totality of the Circumstances Demonstrates L.P.'s Statements Would Satisfy the Primary-Purpose Test as Non-Testimonial.

Even if the court did find L.P.'s teachers were agents of law enforcement, under the primary-purpose test, his statements are not testimonial. The circumstances fail to indicate that either L.P. or his teachers would have reasonably believed that the primary purpose of their dialogue was to provide facts for the criminal prosecution of L.P.'s abuser.¹⁸⁵ The informality of the questioning and the immediacy of the threat to L.P.'s safety support that his statements were made as part of an ongoing emergency and were, therefore, non-testimonial.¹⁸⁶

The circumstances of the questioning were informal: L.P.'s teacher first noticed his injuries at lunch and asked casually what had happened.¹⁸⁷ Though she continued her questioning, this was only after seeing how severe his injuries really were back in the classroom.¹⁸⁸ If anything, her persistent questioning demonstrates the panic provoked by the severity of L.P.'s injuries. Despite the positional authority the teachers held in relation to L.P., authority does not formality make.¹⁸⁹ While L.P. was pulled aside to be questioned, nothing about the initial interrogation, which took place in the lunchroom and a classroom, was private.¹⁹⁰ Perhaps a different case could be made for his secondary identification of Dee when taken to the supervisor's office,¹⁹¹ but even there, neither police nor social services had been alerted.¹⁹²

Furthermore, the questioning took place to assess and address the threat L.P. was facing.¹⁹³ The teachers' line of questioning indicates

185. See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that when the primary purpose of an interrogation is to prove facts for later prosecution, the statement is testimonial).

186. See *id.* (finding statements to police during an ongoing emergency are non-testimonial under the Confrontation Clause).

187. Brief of Petitioner, *supra* note 12, at 22; see *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011) (considering the informality of the interrogation as evidence statement was non-testimonial).

188. Brief of Petitioner, *supra* note 12, at 3–4.

189. See Brief of Respondent, *supra* note 137, at 39–40 (arguing L.P. would have known his statements were for prosecuting wrongdoing given his teachers' authoritative position).

190. Brief of Petitioner, *supra* note 12, at 3.

191. *Id.* at 4; see *Davis*, 547 U.S. at 828–829 (stating an initial interrogation assessing an emergency could evolve into testimonial dialogue).

192. Brief of Petitioner, *supra* note 12, at 4; see *Bryant* 131 S. Ct. at 1160 (considering emergency medical services not being on the scene yet as indicative of the primary purpose of the questioning being to address an ongoing emergency).

193. See *Davis*, 547 U.S. at 828–29 (finding a statement not testimonial when the purpose of the questioning was to enable police to respond to a declarant's ongoing emergency).

their desire to identify the threat to L.P.'s safety, asking, for example, whether Dee was "big or little."¹⁹⁴ Underlying many of Clark's arguments is the suggestion that identifying the perpetrator of a crime is always equivalent to bearing testimony against that person and, therefore, testimonial, a sentiment also adopted by the Ohio Supreme Court.¹⁹⁵ The case law, however, simply does not support this contention. Both *Davis v. Washington* and *Michigan v. Bryant* found identification of a perpetrator to be non-testimonial because of the ongoing emergency that needed to be addressed.¹⁹⁶ Unlike the police officers in *Hammon v. Indiana*, the teachers were not trying to make a record of what happened to L.P. for future criminal prosecution.¹⁹⁷ Questioning L.P. about his injuries was necessary to assess and address the threat he faced.

Being only three years old, L.P. could not have reasonably considered Dee's prosecution when he answered his teachers' questions.¹⁹⁸ First, it is wholly unlikely he would have even known at such a young age what a criminal prosecution was. And, as indicated by his initial reluctance to tell his teachers and the social worker at school what had happened to him, he was afraid.¹⁹⁹ A fearful toddler could hardly be interpreted as bearing testimony for prosecutorial purposes.²⁰⁰ L.P.'s abuse was undoubtedly an emergency situation and, like the 911 caller in *Davis*, L.P.'s emergency continued even though the perpetrator was not on the scene at that moment.²⁰¹ Although L.P. gave information about past abuse, he did so while the threat of future abuse was all too present. L.P. may have been safe at school, but he likely understood that his own safety would vanish once he was handed back over to his abuser at the end of the school day. He likely

194. *See id.*; Brief of Petitioner, *supra* note 12, at 4.

195. *See* Brief of Respondent, *supra* note 137, at 37–38; *State v. Clark*, 999 N.E. 2d 592, 597 (Ohio 2013).

196. *Bryant*, 131 S. Ct. at 1150 (identification of a shooter at a crime scene is non-testimonial); *Davis*, 547 U.S. at 828 (identification of an assailant in a 911 call is non-testimonial).

197. *See Davis*, 547 U.S. at 830 (finding the primary purpose of officers having a victim fill out a battery affidavit was to investigate a possible crime and not address an ongoing emergency).

198. Brief of Petitioner, *supra* note 12, at 2; *see Bryant*, 131 S. Ct. at 1166 (considering the circumstances, statements, and actions of both parties in determining the primary purpose).

199. Brief of Petitioner, *supra* note 12, at 3, 4.

200. *See Davis*, 547 U.S. at 822 (finding a statement is testimonial when made primarily for prosecutorial purposes).

201. *See id.* at 828–29 (finding a statement to enable police to respond to a caller's emergency situation non-testimonial although the perpetrator had fled the scene).

thought his teachers could have protected him from this threat, yet seeking protection is not the same as seeking to prosecute. The existence of an ongoing emergency is also supported by the fact that when Dee picked L.P. up from school later that day, both police and social workers were on the move to locate not only Dee, but the children as well.²⁰² All circumstances suggest L.P.'s teachers were trying to assess and address an ongoing emergency and not gather information to be used in lieu of live witness testimony at trial. Therefore, L.P.'s statements should be deemed non-testimonial for the purpose of Confrontation Clause analysis.²⁰³

CONCLUSION

The decision of the Ohio Supreme Court will likely be overturned. L.P.'s statements to his daycare teachers identifying his abuser are non-testimonial under the primary-purpose test promulgated in *Davis v. Washington*.²⁰⁴ It is almost certain that this test without further guidance from the Court, however, applies only to statements to law-enforcement officials.²⁰⁵ Statements solely between private parties do not implicate the kinds of ex parte examinations the Supreme Court deemed to be the focus of the Confrontation Clause at its inception.²⁰⁶ Interpreting mandatory-reporting statutes as deputizing reporters as agents of law enforcement not only does not fit into the Confrontation Clause's historical scheme but also threatens to severely inhibit a state's interest in protecting children from abuse. For these reasons, the Supreme Court will likely decide that L.P.'s statements to his teachers were non-testimonial under the Confrontation Clause and admissible against his abuser at trial.

202. Brief of Petitioner, *supra* note 12, at 5; *Bryant*, 131 S. Ct. at 1150, 1166 (finding a statement non-testimonial even when police relied upon it to search for a shooter).

203. *See Davis*, 547 U.S. at 828 (finding a statement non-testimonial when made to address an ongoing emergency).

204. *See id.* at 822.

205. *See id.* (describing the primary-purpose test as applicable to statements to law enforcement).

206. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004) (examining the kinds of statements contemplated by the Confrontation Clause).