# CHILD'S STATEMENT TO TEACHERS MAY SOMETIMES BE USED AGAINST ABUSER EVEN THOUGH CHILD IS UNAVAILABLE FOR CROSS-EXAMINATION

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Over the last decade, the United States Supreme Court has considered a number of cases that deal with statements made by victims/witnesses who are not available in the legal sense or literal sense for trial and whether or not the statements made to law enforcement during the event or investigation can be used against the defendant. The constitutional argument is that all defendants have a Sixth Amendment Right to confront and cross-examine their accuser. Most of these cases have turned on the circumstances of whether the questions by law enforcement or the statement by the witness/victim was made in trying to resolve an emergency or, in the alternative, trying to gather information to investigate/prosecute a criminal. Simply stated statements made during questioning that seeks evidence is considered testimonial in nature while statements made for other purposes are generally non-testimonial in nature.

In *Ohio v. Clark*, [i] the United States Supreme Court considered whether a child's statement to teachers detailing and identifying his abuser could be used against the defendant when the child was unavailable to testify in the criminal case.

The Court outlined the facts as follows:

> Darius Clark, who went by the nickname "Dee," lived in Cleveland, Ohio, with his girlfriend, T. T., and her two children: L. P., a 3-year-old boy, and A. T., an 18-month-old girl[ii]. Clark was also T. T.'s pimp, and he would regularly send her on trips to Washington, D. C., to work as a prostitute. In March 2010, T. T. went on one such trip, and she left the children in Clark's care.
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> The next day, Clark took L. P. to preschool. In the lunchroom, one of L. P.'s teachers, Ramona Whitley, observed that L. P.'s left eye appeared bloodshot. She asked him "'[w]hat happened,'" and he initially said nothing. Eventually, however, he told the teacher that he "'fell.'" When they moved into the brighter lights of a classroom, Whitley noticed "'[r]ed marks, like whips of some sort,'" on L. P.'s face. She notified the lead teacher, Debra Jones, who asked L. P., "'Who did this? What happened to you?'" According to Jones, L. P.

"'seemed kind of bewildered'" and "'said something like, Dee, Dee.'" Jones asked L. P. whether Dee is "big or little," to which L. P. responded that "Dee is big." Jones then brought L. P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse.

When Clark later arrived at the school, he denied responsibility for the injuries and quickly left with L. P. The next day, a social worker found the children at Clark's mother's house and took them to a hospital, where a physician discovered additional injuries suggesting child abuse. L. P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A. T. had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair…

At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. Under Ohio law, children younger than 10 years old are incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." After conducting a hearing, the trial court concluded that L. P. was not competent to testify. But under *Ohio Rule of Evidence 807*, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L. P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

In analyzing the case, the Court wrote:

In *Davis v. Washington and Hammon v. Indiana, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)*, which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse. The victim in *Davis* made statements to a 911 emergency operator during and shortly after her boyfriend's violent attack. In *Hammon*, the victim, after being isolated from her abusive husband, made statements to police that were memorialized in a "'battery affidavit.'

We held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not. Announcing what has come to be known as the "primary purpose" test, we explained: "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." Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the *Confrontation Clause*.

In *Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)*, we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." And we reiterated our view in *Davis* that, when "the primary

purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." At the same time, we noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry.". Instead, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." One additional factor is "the informality of the situation and the interrogation." A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant.". In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony."

Applying these principles in *Bryant*, we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same analysis applies to statements made to individuals other than the police.

Thus, under our precedents, a statement cannot fall within the *Confrontation Clause* unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the *Confrontation Clause*." But that does not mean that the *Confrontation Clause* bars every statement that satisfies the "primary purpose" test. We have recognized that the *Confrontation Clause* does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the *Confrontation Clause*.

The Court noted that in this case they were considering statements made to preschool teachers and not law enforcement. The Court made clear that they were not going to create a rule that all statements made to non-law enforcement personnel are admissible but noted that such statements are much less likely to be testimonial.

In deciding that the child's statements to the teachers should come in, the Court noted that the statements were made in the context of an ongoing emergency where the teachers had to determine the extent of the injuries and whether it was safe to release the child at the end of the day. The Court determined that the teachers "questions and L.P.'s answers were primarily aimed at identifying and ending the threat."

The Court concluded that the child's statements were non-testimonial in nature and therefore the use of the statements during the criminal trial was not a violation of the confrontation clause.

**Bottom Line:**

**Law Enforcement should document statements made during an ongoing emergency whether made to dispatchers, law enforcement officers on the scene or others.**

**Law enforcement should document and recognize that statements made outside of the emergency i.e. interviews during the investigation may not be admitted when the witness/victim is unavailable (in the legal or literal sense) for trial.**

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[i] *Ohio v Clark*, 135 S. Ct. 2173 (2015)

[ii] Like the Ohio courts, we identify Clark's victims and their mother by their initials