No. 13-1352

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

THE STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Darius Clark, asks leave to file the accompanying brief in opposition to petition for writ of certiorari, without prepayment of costs, and to proceed *in forma pauperis*. Petitioner was found indigent and has been represented by court-appointed counsel in all proceedings in the courts of Ohio.

Accordingly, petitioner asks leave to proceed *in forma pauperis* in this Court. Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

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No. 13-1352

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2013

STATE OF OHIO,

Petitioner,

vs.

DARIUS CLARK,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

I, Darius Clark, being first duly sworn according to law, depose and say that I am the Resondent in the above-entitled case; that in support of my motion to

proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Answer: YES I was last employed _____. My wages at that time were approximately _____ per month. - Work 48 hours/month - minimum wage

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: SEE Answer to #2

3. Do you own any cash or checking or savings account?

Answer: NO

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: NO

I was found to be indigent by the Court of Common Pleas of Cuuyahoga County,Ohio, and permitted to pursue my appeal through the courts of the State of

Ohio without payment of costs.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dawn Clark

Subscribed and sworn to before me this 25th day of June 2014.

Notary Public

JEFFREY M. GAUSO
Notary Public State of Ohio
My commission has no expiration date

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Ohio Supreme Court correctly applied this Court's *Davis/Bryant* primary purpose test to exclude as testimonial a three-year-old child's hearsay responses to formal questioning in the absence of any emergency, where only these inconsistent statements by the child identified respondent, and where the child had been found incompetent to testify after giving numerous irreconcilable responses to judicial questioning.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

INTRODUCTION

The Ohio Supreme Court followed this Court's guidance in *Davis v. Washington*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), in ruling inadmissible under the Confrontation Clause a child's out-of-court statements to teachers who reported them to investigative authorities, Pet. App. 10a-16a. After discussing at length the principles articulated by this Court, the court below applied them to find the statements testimonial.

Petitioner and its *amici* either misrepresent or misunderstand what the Ohio Supreme Court held. As a consequence, their arguments for why correction or clarification by this Court is necessary all fail. But even if they were right this would be the wrong case to resolve the issues. The decision of the Eighth District Court of Appeals below found that similar hearsay statements made by the incompetent and unreliable child to two relatives violated Ohio Rule of Evidence 807 and were inadmissible. Pet. App. 63a-69a. The State chose not to appeal that holding which is both logically indistinguishable from the statements he made to the teachers and also the law of the case. As a consequence, any ruling by the Court would have no effect on L.P.'s statements and would be purely advisory.

Petitioner claims that the decision below conflicts with decisions of other state supreme courts, because it supposedly rested on the proposition that "the mere fact" that a statement is made "to a statutorily defined mandatory reporter . . . make[s] the statement testimonial." Pet. 18. But that is not all

the reasoning applied by the Ohio Supreme Court here, or by any other court known to respondent. Instead, the court's recognition that "teachers act in at least a dual capacity, . . . both as instructors and also as state agents to report suspected child abuse," Pet. App. 3a, 15a, led it to a full consideration of the facts at hand, as required in *Davis* and *Bryant*. *Id.* at 10a-17a. Among the factors relied on to find the statements testimonial were not only the teachers' "duties to report abuse," but also the absence of any complaint by the child or of any medical or other type of on-going emergency, and the substance and formal nature of the questioning, aimed at "ascertain[ing] facts of potential criminal activity and identify[ing] the person or persons responsible." *Id.* at 15a.

Ultimately, this case is a poor vehicle for further clarification of the Confrontation Clause's application in the context of child abuse cases. It is an extreme case in which the hearsay statements of a young child, who was ruled incompetent to testify because his answers to judicial questioning were uniformly inconsistent, were the only evidence identifying respondent. And any decision this Court might render in reviewing the Ohio Supreme Court's Confrontation Clause ruling would have no impact on the admissibility of the disputed evidence.

JURISDICTION

The State alleges that this Court has jurisdiction under 28 U.S.C § 1257, asserting that "[t]he Supreme Court of Ohio's decision qualifies as a

'[f]inal judgment or decree[]' within the meaning of that statute. *Id.; see Michigan v. Bryant,* 131 U.S. 1143, 1151-52 (2011) (granting review when state supreme court found Confrontation Clause violation and remanded for a new trial); *see also Kansas v. Marsh,* 548 U.S. 163, 168 (2006); *New York v. Quarles,* 467 U.S. 649, 651 n.1 (1984).

In order to discharge his duties (through his counsel, as an officer of the Court) under Rule 15.2, respondent notes that this Court's jurisdiction under § 1257 depends upon this Court's assessment of Ohio Rev. Code Ann. § 2945.67(A), which the State has not addressed. That statute permits the State to appeal any issue following trial, other than the verdict itself, by leave of the court, in order to secure a ruling on a legal issue with which it disagrees, even if the resolution of that appeal will have no effect on the outcome of the case in which it was rendered. Ohio Rev. Code Ann. § 2945.67(A) (West 2014); *State v. Bistricky,* 555 N.E.2d 644 (Ohio 1990).

This procedure allows the State to obtain a "later review of the federal issue," *Marsh,* 548 U.S. at 168, by a post-acquittal appeal, albeit it not to recharge the respondent if it should prevail. In finding jurisdiction under § 1257, this Court in *Marsh,* 548 U.S. at 168, and *Quarles,* 467 U.S. at 651 n.1, relied specifically on the unavailability of any further appellate review. Further, this Court would have jurisdiction to hear a federal issue resolved under the Ohio procedure allowing such advisory opinions. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617-18 (1989); *Camreta v. Greene,* 131 S. Ct. 2020,

2028-31 (2011) (holding that certiorari jurisdiction existed to review constitutional claim even though it would not affect outcome of the case).

STATEMENT OF THE CASE

The State seeks review of the reversal of respondent's conviction for assault and child endangerment, in which the "only direct evidence" implicating respondent as the perpetrator was the hearsay statements of a child deemed incompetent to testify at trial, Pet. App. 68a. The petition asks this Court to review the Ohio Supreme Court's application of the Confrontation Clause to exclude statements by the child that are practically indistinguishable from the child's other statements that the Ohio Court of Appeals found too unreliable to be admitted under State hearsay rules.

1. From 2008 to 2010, respondent Darius Clark, then 23 years old, lived with 24-year-old Taheim T., L.P., and A.T. Pet. App. 3a. Taheim, who had lost custody of three other children, Tr. 526, periodically traveled to Washington, D.C. to work as a prostitute, leaving L.P. and A.T. in respondent's care. Tr. 534-37.

On March 16, 2010, L.P.'s teachers noticed no injuries on him when Taheim picked him up from school around 4:00 p.m. Tr. 239, 281-82. No witness except Taheim said that they saw the children thereafter, prior to L.P.'s arrival at school the next day, Tr. 260-61, 424-25, 455. Meanwhile, at midnight on March 16, Taheim left Ohio and did not return until she was

extradited five months later on charges of assault and domestic violence against her children. Tr. 548-49, 562, 570, 582.

On March 17, after respondent left L.P. at school, L.P. seemed "quiet" but did not complain of pain. Tr. 255-57. L.P.'s teacher, Ramona Whitley, noticed, however, that his eye was red, and when she asked him "what happened," he said he had fallen. Tr. 236-37. When she inquired how he had "fall[en] and hurt [his] face," he repeated, "I fell down." *Id.* Later that day, she noticed under better lighting that the marks on his face appeared more serious than they had previously, and alerted her co-teacher, Debra Jones. *Id.* The two teachers took L.P. aside, away from other children, and questioned him. Tr. 257. When Whitley asked L.P. "who did this," he responded, first, that he "fell"; second, using a nickname for respondent, that "Dee did it"; and finally, "I don't know." Tr. 259, 264. Jones also asked, "Who did this? What happened to you?"; she reported that a "bewildered" L.P. responded, "Dee, Dee." Tr. 272. She further testified that she asked L.P. whether Dee was big or little, and he said "Dee is big." Tr. 278.

Jones took L.P. to the office of her supervisor, who instructed that whoever at the school had first seen L.P. should report his injuries. Tr. 278-79. Whitley, who had received training regarding her mandatory reporting duty, thus called the Cuyahoga County Children and Family Services to report the suspected abuse. Tr. 248, 279. Within three days, she and Jones

also provided statements about their interactions with L.P. to Cleveland Police. Tr. 240, 276-77.

Social worker Howard Little responded to Whitley's call and arrived at the school on the afternoon of March 17. Tr. 625. L.P. first told Little that he had fallen down the stairs, but identified respondent upon re-questioning about his bruises. Tr. 627. When respondent arrived at school at the end of the school day and took L.P. home, he denied knowledge of L.P.'s bruises. Tr. 628-29.

Social worker Sarah Bolog called Taheim on March 18, and Taheim then claimed that L.P. and A.T. were with her. Tr. 471, 474. Later in the day, however, Bolog and her supervisor located L.P. and A.T. at respondent's mother's house. Tr. 477-78. At that time, when Bolog's supervisor asked him how he became injured, L.P. named respondent. Tr. 512-13. According to Bolog, L.P. responded in the same way later in the day when asked the same question at the hospital. Tr. 513-14.

Det. Jody Remington met L.P. at the hospital on March 18. When she revealed her badge and asked him who hurt him, he did not answer. Tr. 605-06. She then showed him a photograph of respondent, and L.P. said, "That's Dee." Tr. 607-08. The physician who examined L.P. found that L.P. had "bruising in several stages of development" and "abrasions consistent with having been struck by a linear object," and that A.T. had "bruising, burn marks, a swollen hand, and a pattern of sores at her hairline." Pet. App. 5a.

The physician suspected abuse and estimated the injuries occurred between February 28 and March 18, 2010. *Id.*

Sometime later, L.P. told his grandmother and great-aunt that that respondent caused his and A.T.'s injuries. Tr. 431-32, 460.

The State charged Taheim and respondent with five counts of felonious assault, two counts of child endangering, and two counts of domestic violence, involve her children, L.P., age three, and A.T., age two. Tr. 531; Pet. App. 53a. Taheim, facing up to 40 years in prison, agreed to testify against respondent and to plead guilty to three charges. Tr. 570. The State dropped all other charges against her.

Following a pretrial hearing at which L.P. made numerous inconsistent statements about his birthday, his sister's age, the adult living with him, and whether he recalled living with his mother, the trial court found L.P. incompetent to testify. Respondent then made a motion in limine to exclude the testimony of adult witnesses concerning statements that three-year-old L.P. had allegedly made to each of them several months before the trial. Tr. 18-26, 163-66. Notwithstanding the trial court's incompetency finding and the fact that these statements constituted the only evidence identifying respondent as the perpetrator, the trial court denied the motion. Tr. 10-17.

At trial, no one testified to having ever seen respondent strike or otherwise hurt children. *E.g.*, Tr. 585, 670. Taheim's testimony related

largely to denials of her own culpability, *e.g.*, Tr. 549-50, and assertions that respondent occasionally had control of the children when Taheim was absent, *e.g.*, Tr. 543-47. Dorcas Willis, respondent's witness and family friend, testified that she had seen Taheim and her children "20 or more" times, Tr. 669, and that Taheim "whooped that baby [A.T.] a lot," "whipped [L.P.] with the little strap off her purse" over an argument over potato chips, and "spanked him" because "he wouldn't go to sleep," Tr. 670-71.

Nevertheless, presumably based on L.P.'s hearsay statements, which were admitted through a total of seven adult witnesses, the jury found respondent guilty on all but one charge. Tr. 770-73. The court sentenced him to 28 years in prison. Tr. 789-90. Taheim later received a sentence of eight years. Pet. App. 19a.

3. Respondent appealed the conviction to the Eighth District Court of Appeals of Ohio. Among other issues, respondent argued that L.P.'s statements should have been excluded under both the Confrontation Clause and Ohio Rule of Evidence 807, and that the manifest weight of the evidence required the trial court to reverse the conviction, because no credible, admissible evidence supported respondent's guilt. Br. Appellant at 14-24, *State v. Clark*, No. 96207, 2011 WL 6780456 (Ohio Ct. App. Dec. 27, 2011).

The appellate court reversed the conviction on the ground that the testimony of all seven witnesses recounting L.P.'s statements should have been excluded. Pet. App. 52a-73a. The court held that L.P.'s statements to

the police officer, social workers, and teachers were testimonial and violated the Confrontation Clause. Pet. App. 55a-63a. Then, the court excluded L.P.'s statements to his grandmother and great-aunt, because those statements failed two of four prerequisites to admission under Ohio Rule of Evidence 807(A).[1] Pet. App. 63a-69a. First, it found that they "lacked the 'particularized guarantees of trustworthiness'" required by Rule 807(A)(1). *Id.* 68a. Among other factors, it expressed particular concern about how to reconcile the trial court's finding that L.P. was "incompetent to testify" with its finding that "statements L.P. made eight months prior were reliable enough to be admitted at trial." *Id.* Second, the court found that "the only direct evidence" that respondent was the perpetrator was "L.P.'s statements identifying him," and thus that Rule 807(A)(3)'s requirement of "independent proof" was also lacking. *Id.*

4. On appeal to the Ohio Supreme Court, the State accepted the ruling that the statements made to the grandmother and great-aunt were inadmissible under Rule 807. Nor did the State dispute the exclusion of L.P.'s statements to three other witnesses on Confrontation Clause grounds. Instead, the appeal focused entirely on the exclusion under the Confrontation Clause of the child's statements to the teachers. Pet. 6. Respondent argued at length that any decision on the Confrontation Clause issue posed by the State would have no impact on respondent's prosecution, since the Eighth

[1] Ohio Rule of Evidence 807(A) is reproduced in the Appendix to this document.

District's ruling applying Rule 807 to exclude the testimony by L.P.'s relatives necessarily foreclosed admission of the teachers' statements on the same state law ground. Br. Appellee at 3-4, *State v. Clark*, No. 2012-0215, 999 N.E.2d 592 (Ohio 2013).

The Ohio Supreme Court affirmed. Pet. App. 3a. It found the teachers in this case to have been functioning in part as agents of law enforcement, and on that basis[2] proceeded to apply this Court's primary purpose test first enunciated in *Davis v. Washington*, 547 U.S. 813 (2006). Pet. App. 6a-9a. After carefully examining this Court's guidance in *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis*, and *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the court applied that test to the facts of this case. Pet. App. 10a-16a. The court noted that L.P. had not "complained about his injuries or needed emergency medical care," and that no other sort of "ongoing emergency existed." *Id.* 15a-16a. The teachers thus proceeded to "separate[] L.P. from other students and in a formal question-and-answer format, they sought facts concerning past criminal activity to identify the person responsible." *Id.* 16a. For these reasons, the court concluded that the primary purpose of the teachers' inquiry was "an information-seeking process to determine what had

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[2] In *State v. Stahl*, 855 N.E. 2d 834, 841-44 (Ohio 2006), the Ohio Supreme Court had previously held that, in determining the testimonial character of witness statements for purposes of the Confrontation Clause, this Court's primary purpose test enunciated in *Davis* is only applicable to statements made to agents of law enforcement. *See* Pet. 9; Pet. App. 25a-26a. The court below's agent-of-law-enforcement finding thus was necessary to justify, and led directly to, its application of the *Davis/Bryant* test enunciated by this Court.

occurred in the past and who had perpetrated the abuse, establishing past events potentially relevant to later criminal prosecution." *Id.* 16a. It thus held that L.P.'s statements to his teachers "should have been excluded . . . pursuant to the Confrontation Clause." *Id.*

The dissent would have reached a contrary outcome. It disagreed with the majority's factual findings, characterizing the questioning as "informal and spontaneous." *Id.* 40a (O'Connor, C.J., dissenting). At the same time, it believed that this Court's primary purpose test was inapplicable under Ohio precedent, because the teachers were not, in its view, agents of law enforcement for Confrontation Clause purposes. Pet. App. 30a, 39a. The dissent thus purported to apply an "objective witness test," *id.* at 30a, which it characterized as different from this Court's primary purpose test. *Id.* 39a-42a. Applying the "objective witness test" to the facts as it characterized them, the dissent found L.P.'s out-of-court statements to the teachers to be nontestimonial, and therefore admissible. *Id.* 42a.

REASONS FOR DENYING THE WRIT

I. The Ohio Supreme Court Correctly Followed This Court's Guidance in *Davis* and *Bryant* to Find the Statements Testimonial.

1. In *Davis v. Washington*, 547 U.S. 813, 822 (2006), this Court articulated a fact-intensive test to determine whether "circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal

prosecution," such that resulting statements are testimonial. This contextual inquiry "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011). The Ohio Supreme Court properly applied that primary purpose test in this case, Pet. App. 16a, to find that the statements were "elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse" and thus were "testimonial in nature in accordance with *Davis* . . ." *Id.* 17a.

To make its determination, the Ohio Supreme Court considered "whether an emergency exist[ed] and [wa]s ongoing" when L.P. was questioned. Pet. App. 14a (quoting *Bryant*, 113 S. Ct. at 1158). As the court noted, there was "no ongoing emergency" at the time of questioning. *Id.* 15a. The child had not "complained about his injuries" and did not "need emergency medical care." *Id.* Unlike in *Bryant*, the interview did not occur under conditions of an ongoing emergency that posed a "potential threat to . . . the public at large." 113 S. Ct. at 1156. Unlike in *Davis*, the interview did not concern "events *as they were actually happening*." 547 U.S. at 827. Instead, as this Court noted, there was "*no* immediate threat to [the] person" of L.P. *Id.* at 830 (emphasis added).

The Ohio Supreme Court also expressly acknowledged that the presence or absence of an emergency is not by itself dispositive of the testimonial character of a statement. Pet. App. 14a (citing *Bryant*, 131 S. Ct. at 1159). It thus examined the broader circumstances surrounding the teachers' interactions with L.P., including "the statements and actions of both the declarant and interrogators," and the "formality" of the questioning. *Id.* 14a-15a. Here, the teachers "immediately suspected child abuse" and conducted questioning to "identify the person responsible." *Id.* 16a. As the court explained, the teachers "separated L.P. from other students" and "sought facts concerning past criminal activity" in a "formal question-and-answer format." *Id.* In questioning L.P., the teachers explained, they were "trying to get a better understanding of who it was" that had caused L.P.'s injuries. Trial Tr. 274. Thus, the court reasoned, the teachers elicited statements that "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." Pet. App. 16a (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (internal quotation marks omitted)).

2. In *Bryant*, the Court also explained that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." 131 S.Ct. at 1155. In the present context, the stringent conditions of Ohio's exception for certain hearsay statements by children reflect an understanding that statements elicited

from children in *ex parte* interviews are particularly in need of testing through the "crucible of cross examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *see also* Ohio Evidence R. 807; Ohio Evid. R. 807 staff notes (1991); *see also infra* Section III. As this Court has recognized, "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 338-39 (2009) (Kennedy, J., dissenting) (citing *Maryland v. Craig*, 497 U.S. 836, 869 (1990) (Scalia, J., dissenting) (noting "the value of the confrontation right" in the specific context of "guarding against a child's distorted or coerced recollections")). The threat that a child's statement could lead to a false conviction is especially high because even corroborating proof of the child's injuries through medical evidence "sheds no light on the reliability of the child's allegations regarding the identity of the abuser." *Idaho v. Wright*, 497 U.S. 805, 824 (1990).

Accordingly, this case is much different from one in which a child's hearsay statement satisfies some independent hearsay exception, such as the excited utterance or medical-diagnosis exception. Unlike those exceptions, which are designed to identify statements made or obtained for purposes other than aiding a potential criminal investigation, Ohio's Rule 807 requires no alternative purpose. The Confrontation Clause's objective of preventing

trial by potentially misleading or inaccurate ex parte examinations, *see Crawford,* 541 U.S. at 50-51, thus becomes paramount.

3. The Ohio Supreme Court's careful application of the *Davis/Bryant* primary purpose test is not called into question by either of two critiques advanced by Petitioner's *amici.*

The amicus brief filed by the State Attorneys General acknowledges that the court in fact applied the primary purpose test, AG Amicus Br. at 7, 13, but complains that it applied it in a way that drew "a strict dichotomy," under which, once the court "found that no emergency existed, it necessarily followed that the teachers' primary purpose was to establish past events potentially relevant to a later criminal prosecution." AG Amicus Br. at 13 (inner quotation omitted). To the contrary, the court below expressly recognized, as did this Court in *Bryant,* that the existence of an emergency "is but one factor to consider when determining the primary purpose of an interrogation," and proceeded to discuss more generally the circumstances in which the questioning took place. Pet. App. 14a (citing *Bryant,* 131 S. Ct. at 1159).

In addition, the amicus brief filed by the American Professional Society on the Abuse of Children (APSAC) calls the decision below into question on the ground that it misconceived the purpose of Ohio's mandatory reporting law. APSAC Amicus Br. 4-11. In so arguing, it cites numerous inapposite decisions of this Court, *id.* at 5-6, ostensibly to establish the categorical

proposition that the purpose of mandatory reporter laws is always "to protect children, not to prosecute their abusers," *id.* at 8. Relying on that supposed clear purpose, and on the contention that "legislative purpose can play an important role in determining whether a hearsay statement . . . is testimonial hearsay," *id.*, APSAC claims that the teacher statements here should therefore have been found non-testimonial.

Under this Court's decisions, however, testimonial character of hearsay statements is determined by considering the totality of the circumstances in which specific statements are taken, and not by divining the legislative purposes of a mandatory reporter statute. Even if it were otherwise, there is no single monolithic purpose guiding all mandatory reporting statutes, which are creatures of state law. And here, the Ohio Supreme Court's ruling that the Ohio legislature "*considered identification and prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection,*" Pet. App. 8a (emphasis in decision below) (quoting *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St. 3d 205, 209 (2004)), is dispositive as to the purposes of Ohio's statute.

II. Petitioner's Claimed Conflict – Over Whether Mandatory Reporter Status Renders All Statements Taken Testimonial – Does Not Exist.

1. Although the Ohio Supreme Court correctly applied this Court's "highly context-dependent" test, Pet. App. 14a (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1158 (2011)), petitioner suggests that it in fact utilized a

fundamentally different legal standard to determine whether the statements in question were testimonial, Pet. 18-23. To that end, petitioner falsely characterizes the court below as applying a simplistic reasoning process in which a questioner's mandatory reporting duty renders virtually all statements to that person testimonial, regardless of the circumstances of questioning or the actions and statements of the parties. Pet. 18-19. *See also* APSAC Amicus Br. at 2-3 (decision below "effectively held that *any* statement in response to a mandatory reporter's question is by definition testimonial hearsay.")

Petitioner's claimed conflict consists of eight cases in which courts found non-testimonial statements made to mandatory reporters. Pet. 18-23. From these opinions, petitioner culls language that "the mere fact of a declarant making a hearsay statement to a . . . mandatory reporter does not make the statement testimonial," Pet. 18 (quoting *People v. Phillips*, 315 P.3d 136, 165 (Colo. App. 2012)). In other words, "'this duty to report, by itself, did not render all statements made by [the child] to [the social worker] testimonial.'" Pet. 20 (alteration in original) (quoting *Seely v. State*, 282 S.W.3d 778, 788 (Ark. 2008)); *see also* Pet. 19-23 (citing similar holdings in *United States v. DeLeon*, 678 F.3d 317, 324 (4th Cir. 2012), *vacated*, 133 S. Ct 2850 (2013); *United States v. Squire*, 72 M.J. 285, 288-89 (C.A.A.F. 2013); *People v. Cage*, 155 P.3d 205, 220 (Cal. 2007); *State v. Spencer*, 169 P.3d 384,

389 (Mont. 2007); *People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011); and *State v. Bella*, 220 P.3d 128, 132-33 (Or. Ct. App. 2009)).

But the Ohio Supreme Court certainly did not find the statements to the teachers to be testimonial simply because they were mandatory reporters. Instead, the court below applied this Court's totality of the circumstances test to the facts of this case before concluding that the statements were testimonial. Pet. App. 15a-16a. Because Ohio law first requires a finding that the questioner "acted as an agent of the police" before an Ohio court may "pursuant to *Davis* . . . employ the primary-purpose test," *State v. Arnold*, 933 N.E.2d 775, 784 (Ohio 2010), the Ohio Supreme Court's analysis began with the question whether teachers here are agents of law enforcement. Pet. App. 6a-9a. Concluding that "[a]t a minimum" the teachers were "act[ing] in a dual capacity as both instructor and as an agent of the state for law-enforcement purposes," the court proceeded to apply this Court's primary-purpose test. *Id.* 15a.

Indeed, in other factual contexts, the Ohio Supreme Court has found statements made to statutory mandatory reporters to be nontestimonial, further demonstrating that a mandatory reporting duty is not the dispositive inquiry under Ohio law. *See State v. Stahl*, 855 N.E.2d 834, 846 (Ohio 2006) (statements made to a nurse practitioner found nontestimonial); *State v. Muttart*, 116 Ohio St.3d 5 (2007) (statements made to a social worker found nontestimonial); *Arnold*, 126 Ohio St.3d 290 (same).

2. Petitioner makes no effort to claim the existence of a conflict between the opinion below and the decision of another court based on their facts and contexts. Nor could petitioner do so, because the "circumstances in which the encounter occur[red] and the statements and actions of the parties" involved in this case, *Bryant*, 131 S. Ct. at 1156, differ sharply from those in cases cited by petitioner as at odds with the Ohio Supreme Court.

Five of the eight cases cited by petitioner involve the wholly dissimilar context of statements made to medical personnel in the course of medical examinations addressing immediate health needs. *See Squire*, 72 M.J. at 286; *Seely*, 282 S.W.3d at 788-90; *Cage*, 155 P.3d at 219-20; *Duhs*, 947 N.E.2d at 618; *Bella*, 220 P.3d at 131-32.

For instance, in *People v. Cage*, the court found that statements made by a 15-year-old to a physician during a medical exam were nontestimonial. 155 P.3d at 207-08. The court observed that the statements at issue came in response to a single question asked by a doctor who then "asked no further questions, but turned his attention to treating the wound." *Id.* at 208. In addition, the court noted that the declarant "needed immediate acute treatment," and that the question asked was necessary to "deal with the immediate medical situation." *Id.* at 218.

So, too, in *Seely*, where a child experiencing pain made nontestimonial statements in response to questions necessary "for the purpose of defining the scope of [a] medical examination." 282 S.W.2d at 789. In stark contrast, the

Ohio Supreme Court noted that the child in this case did not need "urgent medical care" and that "his teachers did not treat the situation as involving an ongoing medical emergency." Pet. App. 9a.

The three nonmedical cases cited by petitioner also differ on their facts. First, in *State v. Spencer*, the court found statements made to a professional counselor nontestimonial. 169 P.3d at 390. Whereas the Ohio Supreme Court noted in this case that the teachers "immediately suspected child abuse" and structured their questioning to identify the perpetrator, Pet. App. 16a, in *Spencer*, the Supreme Court of Montana stressed that the counselor was "unaware that law enforcement awaited the results of her interviews" when the statements were made, 169 P.3d at 389. Moreover, the interview in *Spencer* took place in the counselor's office "while [the counselor] played [with the children] on the floor," and the "initial statements regarding sexual abuse were unexpected and not the product of coaching or leading questions." *Id.* at 389-90. So, too, the *Spencer* court found statements overheard by a foster mother nontestimonial, noting that those statements came "out of the blue" while the children were being tucked into bed, and not in response to questioning. *Id.* at 389. Such spontaneous statements are plainly different from what the Ohio Supreme Court rightly characterized as accusations given in response to "formal question-and-answer" designed to ascertain "facts concerning past criminal activity." Pet. App. 16a.

In *United States v. DeLeon*, the court found statements made by an eight-year-old child to a social worker nontestimonial. 678 F.3d at 326. That court noted, among other facts, that the social worker made "no effort . . . to separate [the child]" from others, that the child "came to the meeting with his family," that the purpose of the meeting was to "develop a written treatment plan," and that there was no evidence that the social worker attempted to "memorialize" the information gathered during the encounter for use in a criminal prosecution. *Id.* at 324-25. None of those facts is true in the instant case.

People v. Phillips, the only case cited by petitioner involving statements to a teacher, is likewise different on its facts. There, the child was not deemed incompetent to testify at trial. 315 P.3d at 157. In contrast to the persistent questioning and formality observed by the Ohio Supreme Court in the instant case, the *Phillips* court noted that "the questioning was informal; the public school employees did not conduct a structured interrogation." *Id.* at 162. The teachers in *Phillips* did not ask persistent or leading questions; instead, they reacted to a child who had made "an outcry about his injuries." *Id.* Moreover, in *Phillips* the "statements and actions of both the interrogator and the declarant" suggested a purpose to "ascertain the extent and cause of [the child's] injuries," *id.*, whereas in this case the Ohio Supreme Court noted that the teachers did not treat the situation as involving any immediate medical need, Pet. App. 9a.

Phillips also is the decision of a Colorado intermediate appellate court reaching a question on which the Supreme Court of Colorado has yet to weigh in. Indeed, in *People v. Moreno*, 160 P.3d 242 (Colo. 2007) (en banc), seemingly the only occasion on which the Supreme Court of Colorado has decided a post-*Crawford* case about the admission of child hearsay, the court found that the admission of a child's statements without the possibility of cross-examination would violate the Confrontation Clause, despite finding the child medically unavailable to testify. *Id.* at 246-47.

3. In addition, Amicus APSAC urges the Court to grant review on the ground that a different conflict exists in the lower courts "regarding the relevance of the child's age in determining whether his or her statements are testimonial." Br. at 18-20. *See also* AG Amicus Br. at 15 (arguing statements were non-testimonial based in part on consideration of the child's age). But this issue of the proper consideration, if any, to be given to a child's age is not one raised in the Petition, or that petitioner claims to have raised in the courts below. As a result, the courts below did not consider the question, and it played no part in the decision below. Particularly when dealing with a state court, certiorari should not be granted to consider arguments never made below.

III. The Decision Below Is Also Not Certworthy Because an Unappealed Portion of the Eighth District Decision Makes Clear That the Child's Hearsay Statements Are Inadmissible in Any Event Under Ohio Rule of Evidence 807.

Respondent was convicted of child abuse without any testimony that he had ever been observed to harm anyone. Because the child was found incompetent to testify after a hearing at which he repeatedly gave inconsistent answers to the same questions, the only evidence identifying respondent as the perpetrator came from seven adults who repeated hearsay statements that the child had allegedly made to them eight months before the trial.

On appeal to the Eighth District Court of Appeals, this hearsay testimony of all seven adults was ruled inadmissible – five on Confrontation Clause grounds and two (L.P.'s grandmother and great-aunt) because they were inadmissible under Ohio Rule of Evidence 807. Pet. App. 68a. In appealing to the Ohio Supreme Court, the State did not even challenge the adverse rulings as to five of the seven witnesses who had offered child hearsay evidence at trial. This left standing – and still leaves as the law of the case – the Eighth District's Rule 807 ruling. *See Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co.*, 690 N.E.2d 515, 518-19 (Ohio 1988) ("[L]aw of the case precludes a litigant from attempting to rely on new arguments on retrial which could have been pursued in a first appeal."); *see also Nolan v. Nolan*, 462 N.E.2d 410, 412 (Ohio 1984).

Ohio Rule of Evidence 807 is a "tender-years" statute, similar to those enacted by many states, which create special and more forgiving rules for the admission of hearsay statements by children in connection with sexual and

physical abuse that the child may have suffered. But the ability to invoke Rule 807 turns on satisfying its special requirements, including showing 1) "particularized guarantees of trustworthiness" when the facts are viewed under "the totality of the circumstances;" 2) the "unobtainab[ility]" of the child's testimony; and 3) the existence of "independent proof" of the harm at issue. *See* Rule 807(A)(1), (2),(3) in Appendix A.

In finding the hearsay statements by L.P.'s relatives to be inadmissible, the Eighth District focused first on the State's failure to "establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement." Ohio Evid. R. 807(A)(1). The appellate court was "concerned with reconciling the court's finding L.P. incompetent to testify in November of 2010 with the court's finding that the statements L.P. made eight months prior were reliable enough to be admitted at trial." Pet. App. 68a. Thus, L.P.'s many conflicting statements at the competency hearing (Trial Tr. 10-17) were seen to undermine the reliability of his earlier statements to the witnesses. Ohio Evid. R. 807(A)(1).

In concluding that the first prong of Rule 807 demanding "guarantees of trustworthiness" was not met, the court also evaluated each factor prescribed by the rule, including the statements' "spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a

child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement." Ohio Evid. R. 807(A)(1); Pet. App. 64a. The court noted that L.P.'s references to the cause of his injuries were inconsistent, and that his mental state was "unstable," *id.* 66a. The appellate court also specifically recognized that L.P.'s statements to his teachers "were made in response to investigative questions asked by adults," further indicating their unreliability. *Id.*

In addition to the unreliability of L.P.'s statements, the Eighth District found the statements to the relatives had to be excluded on the distinct ground that Rule 807(A)(3) requires independent proof. The appellate court ruled that the issue which required independent proof was "not whether the abuse occurred" but "[w]ho abused L.P.," Pet. App. 67a, and further that "the only direct evidence that defendant was the perpetrator was L.P.'s statements identifying him," *id.* 68a.

The Eighth District's decision applying Rule 807 has been completely ignored by petitioner since it was rendered. Not only did petitioner fail to appeal the ruling, leaving it now as the law of the case, but petitioner has also offered no explanation as to why the reasoning of the Eighth District is any less applicable as a ground for excluding the statements made to the teachers. Indeed, in both particulars – the absence of indicia of trustworthiness and of independent evidence – the Eighth District's Rule 807 reasoning is directly applicable to the testimony of the teachers. The Eighth

District relied heavily on the inconsistencies in L.P.'s responses to the teachers, and the fact that they "were made in response to investigative questions asked by adults," as a ground undermining the reliability of L.P.'s responses in general. Pet. App. 66a. And there is certainly no doubt now, with Petitioner not even disputing the proper exclusion of the other five witnesses, that the testimony of the teachers would be literally the only evidence identifying respondent as the perpetrator.

Accordingly, under the reasoning of the Eighth District Court of Appeals decision below, it is quite clear that the hearsay statements of L.P. made to the teachers, which were excluded under the Confrontation Clause by the decision of the Ohio Supreme Court, are inadmissible in any event under the Rule 807. Thus any decision made by this Court on the issues pressed in the petition would not be outcome determinative, since the evidence is not even admissible under state evidentiary rules.

It is well established that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. T.V.A.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). This

Court should thus deny certiorari and thereby decline the invitation to reach a constitutional question that would have no impact on the admissibility of L.P.'s statements.

Obviously, given that the applicability of the Confrontation Clause in the context of child abuse is a frequently recurring issue, this Court will have ample opportunity to address these issues should it wish to do so in an appropriate case. But it is further notable that even the State of Ohio has ample opportunity for further review in future cases that may be resolved in trial courts by relying on the decision below. The State would have two avenues to challenge an exclusion of statements resting solely on Confrontation Clause grounds. First, under Ohio Rule of Criminal Procedure 12(K), the State could take an interlocutory appeal from suppression if it certifies that it cannot go forward without the suppressed evidence. Alternatively, the State could appeal, after an acquittal, any issue other than the verdict itself, by leave of the court, in order to secure a ruling on a legal issue with which it disagrees, even if the resolution of that appeal will have no effect on the outcome of the case in which it was rendered, Ohio Rev. Code Ann. § 2945.67(A) (West 2014). And this Court would have certiorari jurisdiction over such an appeal. *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617-18 (1989); *see also Camreta v. Greene,* 131 S.Ct. 2020, 2028-2031 (2011)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: July 1, 2014

Respectfully submitted,

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APPENDIX A

Ohio Rule of Evidence 807 Section A

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

No. 13-1352

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

THE STATE OF OHIO,

Petitioner,

vs.

DARIUS CLARK,

Respondent.

On Petition for Writ of Certiorari To
The Supreme Court of Ohio

PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Erika B. Cunliffe, counsel for Respondent and a member of the Bar of this Court, hereby certifies that on July 1, 2014, she served Katherine E. Mullin, Assistant County Prosecutor and counsel of record for the State of Ohio in this case, along with Eric E. Murphy, State Solicitor, by placing in the United States Mail, postage prepaid, properly addressed to them at The Justice Center 1200 Ontario Street, Cleveland, Ohio 44113; and 30 East Braid Street, 17th Floor, Columbus Ohio, 43215, respectively with copies of the following:

1. A copy of the Brief in Opposition to Petition for Writ of Certiorari;

2. A copy of the Motion for Leave to Proceed *In Forma Pauperis* with attached affidavit;

Copies of the Brief in Opposition were also served on all amici.

All parties required to be served in this case have been served.

Respectfully submitted,

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