UCLA
UCLA Public Law & Legal Theory Series

Title
Ohio v. Clark: Sir Walter Raleigh Meets Kindergarten Cops

Permalink
https://escholarship.org/uc/item/2899j3q5

Author
Graham, Kenneth

Publication Date
2017

eScholarship.org Powered by the California Digital Library
University of California

Ohio v. Clark: Sir Walter Raleigh Meets Kindergarten Cops

Kenneth W. Graham, Jr[1]

On March, 2017, L.P., a three and-one-half-year-old boy, showed up at William Patrick Day Head Start Center with whip welts on his face. When his teachers questioned him as they were required to do under Ohio's statute requiring them to report child abuse, he identified his mother's boy friend, Darius Clark, as the perpetrator. When Clark's case reached the United States Supreme Court, it presented two questions the Court had yet to pass on; first, does the Confrontation Clause impose the same duties to testify in court against someone they accuse as it does on adults?; and, second, does the Confrontation Clause apply to questioning by private persons in the same way that it applies to police officers?

In applying the Confrontation Clause to young children, the Court might have held them exempt from the duty to testify in the same way that they are exempt from tort liability and other adult duties. This holding could rest on the policy of preventing children from becoming a target population for sexual predators or other child abusers.

The Court might have also held that when private persons engage in questioning designed to elicit accusations against the perpetrators of some purported crime, they fall under the same rules that govern similar police interrogations. This holding could be supported by two policies. First, administrative simplicity; the Court need not develop a new set of rules to govern questioning by those not employed in law enforcement. Second, to avoid evasion of the right of confrontation; if private person questioning were exempt from confrontation scrutiny, this might tempt the police to enlist bystanders or other witnesses to interrogate each other about what they saw and capture these exchanges on camera for use in court.

As we shall see, the majority of the Supreme Court waffled, failing to provide clear-cut answers to each of these questions. To understand this outcome requires detailed analysis of the winding path that led the case to the Supreme Court.

Facts and Holdings in the Ohio Courts

Darius Clark would not appeal to anyone as an ideal defendant; a scumbag who could not hold a job, he lived off the earnings of his girl friend , T.T., as a sex-worker—indeed, he served as her pimp.[2] The woman had two children: L.P., a three and-one-half-year-old boy, and A.T., her one-and-a-half-year old daughter. At first, the children's

---

[1] Professor of Law (Emeritus) UCLA Law School.

[2] As we shall see, the U.S. Supreme Court noted Clark's character at the outset of its opinion.

grandmother babysat them while T.T. worked. This came to a screeching halt when T.T.s family discovered the nature of her new occupation.[3]

This meant Clark had to take over babysitting duty. TT, who even her own mother called a "liar", denied that Clark had harmed the children, while admitting that he had abused her.[4] In February, 2010, at a family party, the children's grandmother saw bruises on the granddaughter's chest. Questioned by the grandmother, the girl's mother claimed that her son had bruised her daughter. But the mother later conceded that Clark had injured the girl.[5]

On March 10, 2010, Clark dropped off the victim at daycare[6]. In the lunchroom, one of the teacher's saw that the victim's eye appeared bloodshot and bloodstained. When she asked "what happened?", the victim replied "I fell."[7] But in the brighter light of the classroom, she saw red welts like whip marks. She called the lead teacher who began questioning the victim; this time he answered with some bewilderment something like "Dee." [this was Clark's nickname.] After determining that another child did not do it, they took the boy to their supervisor.[8]

When the supervisor discovered more injuries, she asked the teacher to make a report to the county child abuse hotline. In response, a social worker showed up and questioned the boy, getting the same sort of response; denial, followed by he accusation of "Dee." When Clark arrived, he denied injuring the boy—-suggesting that one of his playmates might have done it. Clark also claimed that the boy did not know

---

[3] **2. Family discovered**
Petition for Certiorari, 2014 WL 6466933, p. 1. T.T. had lost her previous job in the Great Recession of 2008.

[4] **3. Abused her**
She said he "slapped her a a couple of times", "punched [her] a couple times" and threatened to kill her if she left him. Ibid.

[5] **4. Clark injured**
Ibid.

[6] **5. Dropped off victim**
State v. Clark,

[7] **6. "I fell"**
Brief for Petitioner, 2014 WL 6466933, p. 2

[8] **7. Took to supervisor**
Ibid.

anyone named “Dee.” He then refused to answer any more questions and drove off with the boy.[9]

After several other attempts to contact the parents. a social worker found the children in the care of teenagers and uncovered more injuries.[10] They called the police, who summoned an ambulance to take the kids to the hospital. A doctor, after seeing L.P.’s injuries and finding A.T. had bruises, burn marks, and a swollen hand, concluded that both children had been abused sometime between February 28 and March 18, 2010.[11] The children were placed in the care of their great-aunt.[12]

At trial, the judge found L.P. incompetent to testify, but allowed seven witnesses to testify to sundry hearsay statements by the child. The jury convicted defendant of all but one of the charges.

The Ohio Court of Appeals for the 8th District reversed for violation of defendant’s right of confrontation.[13]

The state appealed, but only as to the testimony of the two pre-school teachers who had first seen the injuries and questioned L.P. The Ohio Supreme Court granted review.reversed for violation of defendant’s right of confrontation.

The Ohio Supreme Court affirmed the Court of Appeals, holding:

- Because the teachers were mandated to report by the state statutes, the acted as police agents in questioning the boy.
- Applying *Davis,* the court held the statements “testimonial” because there was no ongoing emergency and the teachers were not seeking treatment.

---

[9] **8. Drove off**

Ibid.

[10] **9. More injuries**

On top of L.P.'s injuries, A.T. had two black eyes and a large burn on her cheek. J One hand, swollen badly, was largely unusable and “very cold.” Two “pigtails” in A.T.'s hair had been “ripped out at the root,” which led to a staph infection.

[11] **10. Doctor found**

Brief for Petitioner, 2014 WL 6466933, p. 3.

[12] **11. Great aunt**

During this time the boy repeated to the aunt and the grandmother that “Dee did it.” Ibid.

[13] **12. Reversed**

2011-Ohio-6623, 2011 WL 6780456

- After considering the impact of *Melendez-Diaz* and *Bryant* on *Davis*, the court held that Clark's right of confrontation had been violated.[14]

The three dissenters based their opinions largely by rejecting the view of the majority that the teachers were police agents.

Arguments in the Supreme Court

Prosecutor's Arguments

After summarizing the facts and the holdings below, the petitioners made these arguments:

- The Confrontation Clause should not bar statements taken by private persons without any police direction.[15]
- Statements made solely to private parties do not mirror the official abuses resulting in the Confrontation Clause.[16]
- Courts historically regulated statements made solely to private parties under the evolving hearsay rules, not rigid confrontation standards.[17]
- At least statements to private parties by children found too young to testify are non-testimonial.[18]
- Treating private-party statements as hearsay promotes the development of sound evidentiary rules.[19]
- The Ohio Supreme Court mistakenly held that a mandatory reporting duty turned daycare teachers into police agents.[20]
- Even under the primary-purpose test governing police interrogations, L.P.s statements are non-testimonial.[21]

---

[14] **13. Violated**

[15] Using the 18th Century dictionaries used in *Crawford*, using bits and pieces from the Court's prior decisions, analogy to casual remark to friend, and asking for a narrow, bright-line rule.

[16] Sir Walter Raleigh, Admiralty Courts, old English cases, and a scholarly critique of civil law procedure.

[17] Using writing of anti-confrontation scholar who erroneously supposes England had a right of confrontation but nonetheless admitted oodles of hearsay.

[18] More bogus history, old English cases and commentators, and one modern scholarly article.

[19] Presumably those that favor the prosecution—-the likely result of their suggestion of leaving it to the states.

[20] More reliance on bogus history plus treatment of private parties under the Fourth, Fifth, and Sixth Amendments.

[21] Since child too young to form intent, must rely on teachers whose purpose was to protect the child by keeping him from going home with his abuser.

Defense Arguments

Begins statement of facts by sketching the history of the competence of child witnesses and the rise of mandatory reporters.[22] The statement of facts resembles the states, but adds facts that make the mother seem like a possible perpetrator—-adding that the state gave her a "get-out-of-jail card" in return for her testimony against her paramour.

In it's brief the defense made the following arguments:

- The *Davis* primary purpose test makes the statements admitted against the defendant "testimonial"[23]
- The test applies to all statements to aid prosecution, not just those made by adults to cops.[24]
- Looking at both the teacher's perspective and the child's show they were getting evidence to use against Clark.[25]
- The history of hearsay law confirms that child's statements violated confrontation.[26]
- States have an easy solution to the problem of child testimony—-at least if they don't shoot themselves in the foot as Ohio did.[27]

State's Reply Brief

After insisting the case has the requisite finality, the state made these points:

[22] They point out that two federal panels (including one chaired by William French Smith, the managing partner of the Los Angeles law firm, Gibson Dunn & Crutcher, and a Regent of the University of California that included John Ashcroft as a member) pointed out that Federal Rule 601 tried to make kids competent witnesses but was thwarted by judicial misinterpretation of the Rule.

[23] Test applies to private parties, including teachers. Discusses Court's policy and caselaw.

[24] Invokes bogus history of the Sixth Amendment and distinguishes state's cases by pointing out that unlike the Fourth and Fifth Amendments, the Sixth governs trials, not police investigations. No reason to make categorical exception for kids; *Wright* involved a two-year old and *White* a four-year-old.

[25] Teachers immediately suspected child abuse and they tried to get the child to identify the perp as the state guidelines for mandatory reporters demands. State law makes their statements admissible. Pooh-poohs protective purpose as the only way they could keep Clark from getting the kid was to call the police. L.P.s reluctance to identify Clark shows that he understood what his answer would mean.

[26] The common law only allowed kiddy hearsay if the kid testified; the *Bryant* excited utterance exception does not apply.

[27] Ever since Wigmore, writers have said that better to let the kid testify and let the jury, not the judge decide if testimony is reliable. Can make kid testimony easier by using closed-circuit television as the Court approved in *Craig* or bring a friend or toy to the stand as many states do. Prosecutors question kid before deciding whether or not to file charges so why not the defense?

- Defense reliance on *Davis* and *Bryant* confirms the need for review.[28]
- Defense cannot reconcile Ohio decision with those in other states holding not "testimonial."[29]

Amicus Curiae Briefs

The following briefs were filed on behalf of the state:

- Child Justice, Inc.
- United States
- Domestic Violence Legal Empowerment & Appeals Project
- National Education Association, American Federation of Teachers, National School Boards Association, and Ohio School Boards Association
- Ohio Prosecuting Attorneys Association and The National Children's Alliance
- Washington, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wisconsin, Wyoming, and the District of Columbia,

The following briefs were filed to aid the defense:

- The Innocence Network
- Arizona Attorneys for Criminal Justice, Connecticut Criminal Defense Lawyers Association, and Iowa Association of Criminal Defense Lawyers
- Family Defense Center and Other Advocates for Families
- Richard D. Friedman and Stephen J. Ceci
- National Association of Criminal Defense
- Fern L. Nesson and Charles R. Nesson
- Southwestern Law Student Bernadette M. Bolan, and Professors Norman M. Garland and Michael M. Epstein, in Association with the Amicus Project at Southwestern Law School,

Various arguments for the state

Though perhaps they made them better, most of the AC briefs simply repeated arguments made by the state:

---

[28] Can assume *Davis* applies only by assuming test applies to civilians and it applies in the same way as it does to police.

[29] Other states take different view on whether mandatory reporters are cops and reject bright line rule used by Ohio, Collects cases. Defense wrong about application of Rule 807.

- Child statements to private persons not "testimonial."[30]
- Legislative intent of required reporter statutes is to protect children.[31]
- Day care teachers not police agents solely by virtue of mandatory reporting statutes.
- Historically child hearsay has been admitted.[32]
- "Primary purpose" test applies to civilians but without police participation raises no confrontation concerns.[33]
- Ohio court erroneously applied test.[34]
- Teachers primary purpose will almost always be to protect—-like the teachers here.[35]
- Evidence from mandatory reporters critical in proving child abuse.
- Treating teachers as cops could have unintended consequences such as requiring *Miranda* warnings or requiring a search warrant for locker searches.
- Ohio decision impairs protection of children in civil proceedings such as custodial hearings.[36]

AC arguments for Clark

With the exception of the Nessons' brief (which asked the Court to overrule *Crawford*), most of the briefs on behalf of Clark simply developed arguments made by his lawyers —-including use of bogus history[37].—-but they add some ideas not found in the defense brief, such as a form of confrontation that does not require cross-examination:

- Statements used here were "testimonial" under "primary purpose" test.[38]

---

[30] True generally of privates parties; statements here do not meet Court's standards; a reasonable child in LP's position could not foresee that his statement would be used in criminal proceedings.

[31] This includes prosecution of their abusers. Collects legislative history. Ohio decision impedes prosecution where circumstantial evidence does not suffice; in many cases child abuse will go unpunished without testimonial evidence from required reporters.

[32] English case described. Court has relied on Founding Era common law to limit confrontation; that law allowed parents and doctors to testify to statements made by incompetent kids.

[33] Not like Marian inquisitors. Collects cases on teachers as police agents. Parses *Davis, Hammon,* and *Bryant.*

[34] Test only applies to cops; mandatory reporting does not make teachers cops.

[35] Child abuse typically allows ongoing threats to safety. Collects authorities. Concedes that under unusual circumstances, teachers might have a different purpose.

[36] Civil cases inconsistent bur some act as if rights of criminal defendants were at stake which makes it harder to protect kids from domestic violence,

[37] Raleigh and the notion that the right of confrontation came over on the Mayflower.

[38] Uses *Davis* analysis. Looks to questioner's intent and declarant's understanding; formal interrogation not required. Analogizes to Marian JPs. Totality of circumstances show statements here "testimonial."

- This need not hinder prosecution of child abusers if states reject screwed-up Ohio view that Rule 601 makes children incompetent.[39]
- Experience in other states shows that with appropriate accommodations such as use of closed circuit television, allowing dogs or people to accompany them to the witness stand, children can testify.[40]
- Young children lack the capacity to be witnesses within the meaning of the Confrontation Clause because they lack the cognitive skills to testify reliably.[41]
- Because teachers serve as both role models and authority figures but lack training in how to ask non-leading questions, children are likely to tell teachers what they think the teacher wants to hear.[42]
- Remedy? A new form of confrontation; court should appoint a qualified expert to examine the child out-of-court using a court-approved protocol and make a videotape available to play at trial.[43]
- Teachers play a critical role in prosecuting child abuse and as the state's brief concedes, they know they must share their findings with the police.[44]
- States require others ill-equipped to do so with the duty to investigate child abuse; should require a multi-disciplinary team to carry out such investigations rather than leaving them to ill-trained cops.
- Reversing would give cops a road-map on how to evade confrontation by bringing in lay persons to do their questioning for them.[45]
- Immunizing statements of mandatory reporters from confrontation could lead to false convictions of parents that would destroy families and harm children.[46]

Oral argument[47]

When the attorney for the state began by claiming Ohio court erred by making teachers cops, Justice Scalia asked if confrontation only applies to government agents,

---

[39] This will actually aid prosecutors by making kids available to testify.

[40] Collecting rules from other states showing such accommodations and noting that *Craig* provides precedent for such accomodations.

[41] Collecting scientific studies that purport to show this.

[42] The way it was done here provides a case study in the wrong way to do it—-using closed-end questions and gradually moving the child too more formal settings.

[43] Discussing things that might go in the protocol and the advantages of this procedure.

[44] All 50 states give teachers this role and the standard for launching an inquiry can be as low as "mere suspicion.

[45] Indeed, right after *Crawford*, the American Prosecutors Research Institute urged cops to use child service workers to do the interviews so they would be non-testimonial.

[46] Provides examples of psychological harm to children and suggests some collateral effects in civil cases.

[47] 2015 WL 865313

the lawyer tried a few arguments but Scalia insisted status makes no difference as long as intended as a substitute for testimony. The lawyer admitted that was the *Davis* test but Court only applied that to government agents.

At this point Justice Sotomayor jumped in to suggest that it seemed anomalous to say a child lacked the capacity to testify but could make admissible hearsay statement. The lawyer replied that incompetence does not mean everything child says and Ohio child hearsay rule admits only reliable hearsay.

Justice Scalia dismissed the hearsay point to ask if the child could have the intent required by *Davis.* The lawyer agreed he could not. At this point Justice Kennedy asked if the child's testimony could be so unreliable that it violated Due Process Confrontation.[48] The lawyer agreed that it might if states adopted sham hearsay rules to avoid live witnesses

Scalia injected that he thought hearsay rules were for the states and the lawyer parried that putting reliability into confrontation would go back to *Roberts.*

Justice Kagan wondered if saying that kids lack the intent to make testimonial statements meant that confrontation never applies to kids.[49] The lawyer responded that the declarant's intent was only one part of the inquiry; courts could look at the intent of the questioner or the circumstances of the questioning; the Ohio courts only looked at the intent of the questioner.

Justice Sotomayor pointed out that he overlooked the circumstances prong; were the questions asked for prosecution or only to respond to an emergency? The lawyer jumped at the latter—-adding they would have done the same thing even without the reporting requirement. Justice Sotomayor responded that reliability was a question for the jury.

Sotomayor suggested that what Justice Kagan meant is that in deciding what the declarant intended, you have to look to the other two prongs. The lawyers brushed this off by switching to the question of whether the teachers were acting as such or as agents or the police.

Justice Kagan hypothesize a competent 13-year-old with the same injuries who the teacher told she would report what he told her to the police. The lawyer agreed that would be testimonial to which Kagan responded that maybe we should ignore the private party distinction. The lawyer said private discussions would rarely be testimonial but looking to the distinction first could avoid that inquiry.

---

[48] Justice Kennedy suggested they should remand to let the state courts look at that possibility but got no response.

[49] Justice Kagan suggested that maybe the Court needed a substitute test and the lawyer suggested avoiding that by taking the private party inquiry first/

Justice Ginsberg asked about the hearsay statements of others who heard what the child said. The lawyer told her that they came in under the state child hearsay statute—-but the Ohio courts said that was error. Justice Ginsberg wondered why the same would not apply to the teachers. The lawyer pointed out that the lower courts did not decide that question but only considered the constitutional question.

Argument of the Solicitor General as Amicus Curiae for the State

The lawyer began trying to tell the Court how teachers differ from police officers and had turned to the lack of solemnity when Justice Kagan interrupted to pose the same hypothetical she raised with the state.[50] Unlike his predecessor, this lawyer refused to concede the statement would be "testimonial", this lawyer tried to distinguish it on policy grounds.[51]

The lawyer added that they got the incriminating statement before they knew they would have to report it to social services. Justice Ginsberg suggested they could also have called the police. The lawyer responded that even if they did so, the cops would defer to social services.

Justice Kennedy asked if social services had to report to the police; the lawyer responded lamely that "they cooperate." Asked whether the Ohio statute required them to call the police or if they would routinely do so in cases of serious injury, the lawyer had to confess ignorance—but added that the police were not called in this case until two days later.[52]

Justice Alioto then asked how to distinguish a protective purpose from preparation for criminal prosecution in cases of an ongoing threat to the child. Conceding that would be difficult in police questioning but not in cases of private persons, adding such cases should be left to the hearsay rules.

The Chief Justice then asked: "Suppose the teacher is told that 'Dee did it', she knows Dee is not around, and she asks 'has he done this before? Doesn't that seem like gathering evidence for prosecution?" The lawyer responded that the teacher was not thinking of prosecution.

The Chief Justice pressed on: "How do you know that? Maybe she thinks the best way to protect the child is to get the perp locked up. She doesn't need to know who did it for the immediate safety of the child. I mean, she doesn't need to know if he has done it before." The lawyer replied that the perpetrator would pick up the child at the end go the day.

---

[50] Justice Kagan hypothesize a competent 13-year-old with the same injuries who the teacher told she would report what he told her to the police.

[51] That unlike police officers, teachers would not shade the truth.

[52] From our reading of the record, this seems incorrect.

Justice Kennedy then asked about dual motivation; 50% to comply with the statute and 50% to comply with her duty to report to the police. The lawyer replied you look at the intent of the child and the circumstances of the case; which would lead here to a conclusion that the statement was not "testimonial."

Argument for Clark

The lawyer began that the state cannot have it both ways; the child incompetent to testify but competent to make admissible hearsay statements. Justice Ginsberg asked him how he would cross-examine a three-year-old and added: isn't he incompetent because he is unreliable? The lawyer replied that the state claimed he passed the reliability standard of the state's child hearsay statute.

Justice Ginsberg pressed on. There is no problem of memory when the child makes the statement; but there is at trial because children have problems with memory. The lawyer responded by invoking *Owens*—-in which the Court held an impaired memory did not make cross-examination constitutionally deficient.

The lawyer continued that the kid had a motive to lie when the teacher questioned him because he had seen children taken from their families in cases of abuse. Justice Sotomayor jumped in to point out that the child named "Dee" first and he did obviously not make up the name. The lawyer agreed.

The lawyer continued that the defendant needed cross-examination whether or not it looked promising to counter the state's hearsay. Justice Kennedy asked about the possibility of cross-examination in a clinical setting. The lawyer agreed that under *Maryland v. Craig*, special accommodations for child testimony was constitutionally permissible.

But Justice Ginsberg retorted that in *Craig*, the child was competent. The lawyer seized the chance to argue that states make the rules of competence and, unlike Ohio, many of them make kids competent. He added that Justice Kennedy's proposal was acceptable.

Justice Kennedy asked if had his system been used, the child's statement would be admissible. The lawyer said it would. Justice Ginsberg asked how he would feel about a system in which the court would appoint a clinical expert to examine the child. The lawyer said that would be satisfactory if the defense got a part—-such as suggesting questions for the expert to ask.

Justice Sotomayor asked if the child's statement was "testimonial" because the teachers were mandatory reporters. The lawyer said they relied on the *Davis/Bryant* "primary purpose" test—-adding that the state would concede that if the teacher had said "tell me what happened so I can tell the police."

But Justice Alioto said “but that’s a far cry from what happened here.” He asked if the lawyer thought a three-year-old foresee the use of his accusation to prosecute Dee. When the lawyer answered “no”, Justice Alioto said that his understanding could not make the statement “testimonial”—-adding that the teachers said nothing about gathering evidence for trial because they were probably more worried about protecting the child.

The lawyer did not respond directly but argued that though the child does not understand the criminal justice system, he can understand when asked if someone did something wrong to him. And he could understand that his accusation might lead to his removal from the home as happened to his siblings. Justice Alioto, misunderstanding the argument, that it was a big assumption that the child understood the criminal justice system.

After correcting Justice Alioto, the lawyer returned to the teacher, he began that they had to look to the nature of the injuries, the training of the teacher, and Ohio law—-at which point Justice Ginsberg cut him off to say that she agreed with Justice Alioto’s suggestion that the teachers were more concerned about protecting the child than future prosecution.

The lawyer responded that the teacher knew the injuries were serious and did not take place in the classroom. Justice Sotomayor interrupted to ask why the teacher said she wanted to make sure it was not another child. The replied that she didn’t—-but she did ask if Dee was big or little to see if another sibling had injured the child. She knew it didn’t happen in the classroom because LP had just got to school.

The lawyer tried to return to the state reference book for teachers, but only got as far as the instructions to look out for child abuse and gather information about the perpetrator so the prosecution can decide whether to prosecute when Justice Ginsberg cut him off. She wanted to know if the child was to be returned to the perpetrator—adding that that, not prosecution, was the immediate concern. Justice Kennedy chimed in to say that would be consistent with not wanting the child to return to abusive siblings,

The lawyer conceded that the teacher wanted to protect the child—-but added that was one of the purposes of prosecution. But, Justice Ginsberg pointed out, that comes much too late. The lawyer responded that this made it similar to *Hammon*—-both cases of ongoing crimes where statements to stop the crime could also be used for prosecution. Where purpose are intertwined, the statements should be “testimonial.”

He tried to turn to confrontation in civil cases, but Justice Sotomayor wanted to linger on the previous point. In the case of the abused woman, she can decide if she wants to return to her abuser, but the child cannot make that choice. The lawyer tried to evade the point by claiming that the dynamics of an abusive relationship make it difficult for the abused spouse to leave

Justice Sotomayor conceded the point, but argued there was a big difference between protecting an adult and protecting a child. The lawyer asked her to compare a drug dealer; people will be harmed as long as he sells—-we don't claim that statements gathered to arrest him are not testimonial.

Apparently believing that one bad analogy deserves another, Justice Alito wanted to know whether the teachers would have done anything differently if the perpetrators had diplomatic immunity. They lawyer conceded they might not but even if they gathered it for a civil case it would still be "testimonial." When Justice Alioto expressed doubt, the lawyer explained.

Undeterred, Justice Alioto still wanted to know if the teachers would have done anything differently if all the perpetrators were immune from prosecution. When the lawyer thought not, Justice Alioto sprung his "gotcha": then that would be the end of the question because the teacher would not be gathering evidence for a criminal prosecution.

The lawyer responded that it was enough that they were gathering evidence for serious legal proceedings—-but he didn't have to make that argument because of the way the state child hearsay statute overhung this interaction. Ohio law requires social services to share with the police and the mandatory reporter statute and the hearsay exception make the statements admissible.

Justice Kagan moved on to what she considered the strongest argument for the defense: you have an accusation of crime by a three-year-old but despite its potential unreliability you are denied cross-examination. "How" she wondered, "does that fit the primary purpose test?"

The lawyer told her to ask if the statement works as an in-court substitute for trial testimony. Justice Kagan found this unhelpful. She thought the primary purpose test turned on the understanding of the declarant. The lawyer explained that when the primary purpose is for later use at trial, then such use is as a substitute for in-court testimony—-as happened in this case.

When Justice Alioto asked if that was not true of all hearsay, the lawyer told him that a casual remark to a friend or a call for help had been found not "testimonial" by previous decisions of the Court.

The lawyer then returned to the child hearsay statute. The legislature passed it after the *Roberts* decision to make hearsay accusations admissible but, since the legislatures wished to evade confrontation, it has nothing to do with reliability.

When coupled with Ohio's version of Rule 601 it creates a system that allows the state to use hearsay accusations while denying the defense any right to cross-examine. Texas has a similar system. This case shows the problems with that system; the only

direct evidence of guilt was LP's hearsay. He was incapable of testifying but capable of making hearsay accusations.

The state attorney-general asks teachers to gather evidence for trial. So Ohio has a system of trial by out-of-court accusation—-just what the Confrontation Clause was supposed to stop. So the court needs to look at the big picture, not just the primary purpose test. If the Court is concerned about the scope of the right, this is not the case to cut back on it. These statements would be inadmissible even under *Roberts.*

After the Justices sat stone-faced through this argument, Justice Kennedy asked if this did not show that the "testimonial" is somewhat awkward and formalistic. When the lawyer answered "no", Justice Kennedy asked whether some states made everybody a required reporter. The lawyer agreed, but added that his case rested on more than that.

Justice Ginsberg suggested that maybe the "primary purpose" test did not work well here. She asked the lawyer what he thought of the claim made in some of the briefs that in most cases the abuser is not tried; instead the safety of the child is provided for by family counseling or other means.

The lawyer responded that most cases do not involve injuries as serious as LP's. Here the defendant did not get counseling, he got thirty years in prison. In fact, the county guidelines tell social workers to divide cases between the more and less serious.

The lawyer then asked the Justices to consider a state in which most states divert drug offenders into treatment programs. He argued that, given the intertwining of diversion incentives and criminal prosecution, that would take drug cases out of the Confrontation Clause.

Justice Breyer chimed in to suggest that their misgivings arose from seeing the Confrontation Clause swallow up all 30 hearsay exceptions leaving the Court to draw lines. He suggested that leaving cases like this to Due Process would allow states to experiment with other solutions to the dilemma of letting the child abuse to continue or sending someone to jail on unreliable evidence

The lawyer responded that his concern was only the Ohio child hearsay exception —-not the ordinary hearsay exceptions. He answered in the negative when Justice Sotomayor asked if he was raising a Due Process argument and whether the Ohio statute was a traditional exception.

Justice Sotomayor asked about the excited utterance exception but also goes to reliability—-suggesting he was not raising the right challenge; until he said the case was really about the Confrontation Clause. And as he stepped away from the podium, he asked Justice Breyer to give the defendant what the state got—-the right to question his accuser—before putting him away for 30 tears.

State's Rebuttal Argument.

The state's lawyer disagreed with Clark's interpretation of Ohio law; it does not impose a duty on mandatory reporters to investigate; if it did, we would have a different case. The Confrontation Clause aims at government abuses; teachers reporting to social services do not resemble Marian magistrates.

Justice Kennedy asked if the teacher could satisfy the statute by calling social services, saying "I have a kid in my class with terrible abuses", then hanging up. The lawyer answered "yes"—-but added they could also call the police. Since the police have to report to social services, this shows the purpose is to protect kids.

The lawyer went on to argue that "accusation" does not automatically mean "testimonial." He added that teachers in Ohio would be surprised to learn that the Supreme Court made them cops when talking to kids in their classrooms. He stepped away from the podium with a bow to Sir Walter Raleigh.

The Court's Opinions.

Justice Alito wrote an opinion for the majority of the Court that adopts most of the arguments made by the state prosecutors.[53] Justices Scalia and Ginsberg joined in an concurring opinion that accepted the majority's conclusion but rejected its reasoning. Justice Thomas, writing separately, did the same.

The majority opinion

Justice Alito begins with facts and leads off with those that paint Clark as an unworthy defendant.[54] He then notes that Ohio's version of the Evidence Rules makes children under ten incompetent to testify but says nothing about how this departs from the version approved by the Supreme Court and Congress.[55] He concludes by pointing out that the Supreme Court split 4-3 on the case.[56]

Turning to the law, Justice Alito reviews the Court's post-Crawford cases, suggesting that making sense of them is hard work and opining that the "primary purpose test" used by the lower courts is a "necessary but not sufficient" requirement for finding a statement "testimonial."[57]

---

[53] See above, text following note call 14.

[54] Ohio v. Clark, ___ U.S. ___, 135 S.Ct. 2173, 2177, ___ L.Ed.2d ___ (2015)(noting that Clark pimped the children's mother).

[55] 27 FPP § 6001 (2007). However, many federal courts have read competency back into Rule 601. Id. at § 6605, p, 54.

[56] 135 S.Ct. at 2178.

[57] 135 S.Ct. at 2179, 2180-2181)

Justice Alito then applies this version of the facts to Clark's case.[58] He begins by refusing to adopt a categorical approach to the application of the Confrontation Clause to non-police declarants, but opines that they are "much less likely to be testimonial" than statements to officials.[59]

Applying the "primary purpose rest", Justice Alito finds that the teachers wanted to prevent further harm to the child rather to aid the prosecution.[60] To him, the child's age "fortifies" this conclusion; relying on the arguments from the amicus brief from the American Professional Society on the Abuse of Children that kids do not understand the details of the criminal justice system.[61]

The majority opinion than turns to the Court's traditional "bogus history" to show that children's testimony was admissible at English common law.[62] But England did not recognize a right of confrontation until the 21st Century; the Sixth Amendment rested on developments on this side of the Atlantic during the colonial era.[63]

The majority opinion concludes with a brisk rejection of the defense arguments.[64]

The Scalia-Ginsberg concurring opinion.

Justice Scalia begins by agreeing with the Court's holding and refusal to decide if mandatory reporting laws turn private persons into state actors and whether ordinary citizens should have a lower standard for determining whether their questioning should be "testimonial."[65]

He then sketches the majority reasoning he accepts, including its bogus history.[66] But he jumps ship at what he sees as the majority's attempt to reverse Crawford *sub silentio.*[67] He quotes Justice Kagan to support this claim.[68]

---

[58] 135 S.Ct. at 2181.

[59] Ibid.

[60] Ibid.

[61] 135 S.Ct. at 2182.

[62] This history began with Crawford. 30A FPP § 6371.2, text at note call 19 (Supp. 2017).

[63] This conclusion is supported at great length in volumes 30 and 30A of FPP.

[64] 135 S.Ct. at 2182-2183.

[65] 135 S.Ct. at 2183.

[66] 135 S.Ct at 2184.

[67] Ibid.

[68] Ibid.

He find's the majority's dicta quite harmful, especially the remark that the primary purpose test is a "necessary but not sufficient" requirement for making a statement "testimonial."[69] Finally, he objects to what he sees as Alito's shiftingg of the burden of proof to defendants' to rebut the majority's bogus history.

Justice Thomas' concurring opinion

Justice Thomas accepts the majority's conclusion but objects to its refusal to offer "clear guidance" for future cases on how the right of confrontation applies to private parties.[70] He then climbs on the hobby horse he has been riding ever since Crawford; that the right of confrontation only applies to statements with a degree of "solemnity" that resembles in-court testimony.[71]

---

[69] 135 S.Ct. at 2184-2185.

[70] 135 S.Ct. at 2185.

[71] 135 S.Ct. at 2186. This argument recurs in each of the cases analyzed in this Supplement.