Penn Law
UNIVERSITY of PENNSYLVANIA LAW SCHOOL

BENCH MEMORANDUM

To: The Honorable

From: The Moot Court Board Bench Memo Committee

Wade Houston (chair)

Anna Han

Jacob Hartman

Christian Latham

John McClam

Frazar Thomas

Date: December 10, 2014

Re: University of Pennsylvania Law School Edwin R. Keedy Cup:
Ohio v. Clark

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

This case concerns the scope of a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment. The Confrontation Clause guarantees the criminally accused the right to confront certain witnesses against him. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."). But what it means for a person to qualify as a "witness" under the Confrontation Clause is the subject of extensive debate. The United States Supreme Court has held that the Confrontation Clause guarantees the accused the right to confront only those witnesses who make "testimonial" statements against him. *See generally Crawford v. Washington*, 541 U.S. 36 (2004).

In the case now before the Court, schoolteachers questioned a three-year-old student about the student's visible injuries. The teachers, suspecting child abuse, reported their suspicions to the county children's services agency under Ohio Rev. Code Ann. § 2151.421, a statute that required them to do so.[1] As a result of the investigation that followed, Petitioner – the state of Ohio – brought charges against the student's abuser, Respondent Darius Clark. Clark was ultimately charged with child abuse, but the student was deemed incompetent to testify at Clark's

[1] The text of the relevant sections of Ohio Rev. Code Ann. § 2151.421 are appended in Section VI of this memorandum.

trial. Clark moved to exclude the teachers' testimony, raising the question of whether statements the student made in response to questioning could be introduced at trial against Clark without a chance for Clark to confront the student in court. The answer to this question turns on whether the teachers can be considered agents of law enforcement and whether the student's responses to the teachers' questioning were "testimonial."

The Ohio Supreme Court held that the teachers acted as agents of law enforcement and that the student's responses to their questions were testimonial. It held, first, that teachers are considered agents of law enforcement when they act pursuant to a statute that requires them to report suspected child abuse and, second, that the student's responses were testimonial because the teachers questioned him with the primary purpose of gathering information about past criminal conduct.

The United States Supreme Court has not directly answered the question of whether an individual other than a police officer can be deemed an agent of law enforcement for Confrontation Clause purposes. To date, the Court has never held that an individual other than a police officer *is* an agent of law enforcement. In *Davis v. Washington*, the Court assumed, without deciding, that 911 operators could be agents of law enforcement when they interrogate 911 callers. 547 U.S. 813, 823 n.2 (2006). Nonetheless, the Court has also not ruled out the possibility that an individual such as a teacher could be deemed an agent of law enforcement.

In *Davis*, the Court declined to provide an "exhaustive classification" of all statements as testimonial or nontestimonial, but it did offer some guidance as to each category. 547 U.S. at 822. "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." *Id.* (emphasis added). On the other hand, statements made to law enforcement officers "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." *Id.*

Current precedent also does not directly address the related question of whether the *Davis* primary purpose test can apply to interrogations made by individuals other than law enforcement agents. In other words, when a teacher's primary purpose in questioning a student about potential child abuse is to gather information potentially relevant to a later criminal prosecution, can the student's responses be considered "testimonial" statements?

The Supreme Court has granted certiorari as to two issues:

1. Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and

2. Whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential abuse qualify as "testimonial" statements subject to the Confrontation Clause.

Issue 1: Mandatory Reporters as Law Enforcement Agents

The first issue concerns whether Ohio's mandatory reporting statute converts teachers into agents of law enforcement for Confrontation Clause purposes. Ohio argues that the Confrontation Clause only guards against the sort of questioning that resembles *ex parte*, inquisitorial-style examinations. That is, the Confrontation Clause was meant to address the sort of abusive interrogation that had existed in England at the time the Constitution was drafted. Under this view, individuals other than law enforcement officers or their agents are highly unlikely to qualify as "witnesses" under the Confrontation Clause. Mandatory reporting statutes do not confer upon teachers the power to conduct the kind of interrogations that trigger the safeguards of the Confrontation Clause.

According to Ohio, non-law-enforcement personnel can only be deemed to act as agents of law enforcement for Confrontation Clause purposes when their methods of interrogation share three critical characteristics with police interrogations and the historical abuses the Confrontation Clause was designed to confront. First, the *formality* of the interrogation must signal to the declarant that

the purpose of the questioning is to produce facts for use at trial. Second, individuals who provide false information during those types of interrogations must be subject to *significant penalties*. Third, the interrogators must occupy the *role of fact finders*, mirroring the activity of English justices of the peace, who also served an investigative function. Applying this framework, teachers are not agents of law enforcement because their questioning is less formal and because there are no punitive consequences for lying to teachers. Further, the Ohio mandatory reporting statute at issue here does not turn teachers into investigators whose role is to identify past facts for use at trial.

Clark disputes Ohio's premise that the three characteristics of police interrogation it describes are necessary prerequisites to find that a questioner acted as a law enforcement agent for Confrontation Clause purposes. He contends, instead, that individuals become agents of law enforcement when they are conscripted into serving the investigative and prosecutorial function at which the Confrontation Clause has historically been aimed. Clark's functional approach relies on the Court's statement in *Davis* that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." 547 U.S. at 840 n.5. Under this view, many individuals other than police officers are capable of conducting the exact same kind of interrogation that troubled the drafters of the Confrontation Clause. Ohio's mandatory reporting

statute confirms that fear because it contemplates that reporters will perform the investigatory function of "identification and/or prosecution of the perpetrator." App. 7a-8a (citation omitted).

Issue 2: Are a Child's Responses to Teachers' Questions About Suspected Child Abuse "Testimonial"?

The second issue concerns whether a teacher who questions a student about potential child abuse can elicit responses that constitute testimonial statements. This issue breaks down into two alternative inquiries. If teachers are in fact agents of law enforcement, is the primary purpose of questions they ask students about potential abuse to gather information relevant to a later criminal prosecution? If teachers are not agents of law enforcement, can the *Davis* primary purpose test still apply to the questions they ask?

As to the first inquiry, Ohio contends that, even if teachers are agents of law enforcement, the specific questioning the teachers conducted in this case did not have the primary purpose of gathering information relevant to a later criminal prosecution. Instead, the teachers' primary purpose was to resolve an ongoing emergency. First, any time a teacher questions a child who may have been a victim of abuse, the nature of the interaction is to resolve an ongoing emergency, because a child is in danger so long as she continues to live with her

abuser. Second, the teachers in this case asked the child what happened, rather than who did it, which suggests that they were trying to resolve an emergency. Third, the teachers asked the child whether the perpetrator of his injuries was "big" or "little," meaning they could have thought that another student hurt the child, and that no reporting of child abuse would be necessary.

As to the second inquiry, Ohio argues that the *Davis* primary purpose test does not apply to teachers because they are not agents of law enforcement. Accordingly, statements made in response to teachers' questions are not testimonial because only statements akin to *ex parte* testimony can be testimonial. This argument largely relies on historical reasoning already addressed in the first issue, but it also enjoys the support of policy justifications. The purpose of the mandatory reporting statute is to promote the safety of children, and, if conversations between teachers and children can be rendered inadmissible on Confrontation Clause grounds, then the mandatory reporting statute actually would *undermine* the safety of children. Child abusers could be saved from prosecution because of hearsay rules.

Clark, also relying on the analysis from the first issue, argues as to the first inquiry that teachers *are* agents of law enforcement and that the teachers' primary purpose in this case *was* to gather information relevant to a later criminal prosecution. First, in domestic violence cases, people other than the victim are not

usually at risk, which suggests that questions about potential abuse are not intended to resolve an ongoing emergency. Second, unlike a gunshot wound, the type of injuries inflicted upon the child in this case could only have come about through close physical contact; because the abuser was not physically present at the school, the teachers must have intended to gather criminal evidence rather than to protect the child. Third, the teachers' reactions to the injuries demonstrate there was no ongoing emergency to be resolved. The teachers merely questioned the child about his past injuries; they did not call the police or an ambulance.

Next, Clark argues that the *Davis* primary purpose test can apply to questioning conducted by individuals who are not agents of law enforcement. *Ex parte* testimony may very well be at the core of the Confrontation Clause, but the Court's decisions suggest that the Clause endows the accused with a right to confront those who provide other sorts of testimony as well. When an individual asks questions with the primary purpose of gathering information for a criminal prosecution, the declarant's responses are testimonial. Finally, Clark argues that, if the Clause only guaranteed a right of confrontation against *ex parte* testimony, then agents of law enforcement would have an incentive to engage in strategic behavior: police officers could wait on the sidelines while teachers or others conducted an investigation in their stead, and then prosecutors would enjoy an unfair advantage against the accused at trial.

II. QUESTIONS PRESENTED

1. Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause.
2. Whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

III. BACKGROUND

1. Factual Background

Respondent Darius Clark lived with his girlfriend and her two children, three-year-old L.P. and two-year-old A.T. App. 3a. The events at the center of the dispute in this case occurred at the William Patrick Day Head Start Center in Cleveland, Ohio, where L.P. was a student. *Id.* On March 17, 2010, while in the school's lunchroom, preschool teacher Ramona Whitley noticed that L.P.'s left eye looked bloodshot and asked L.P. what had happened. App. 3a-4a. L.P. initially did not answer, but then told Whitley he had fallen. App. 4a. Whitley asked him how he fell and hurt his face, to which L.P. responded, "I fell down." *Id.* Later, in better light, Whitley noticed "red marks, like whips of some sort on L.P.'s face." *Id.* (internal quotation marks omitted). She then notified the class's lead teacher, Debra Jones. *Id.*

Jones asked L.P. who had given him the injuries. *Id.* L.P. responded with what Jones said sounded like "Dee, Dee." *Id.* When Jones asked whether Dee was "big or little," L.P. replied, "Dee is big." App. 21a. This indicated to Jones that an adult, not a child, had caused L.P.'s injuries. App. 41a. Authorities later learned that "Dee" is Clark's nickname. App. 53a, 59a.

Jones took L.P. to the school office to see her supervisor, Ms. Cooper. App. 21a. After observing L.P.'s injuries, Cooper said that whoever first saw L.P. must be the one to "make the call." App. 4a. Whitley called 696-KIDS, an abuse hotline, and reported suspected child abuse. *Id.* When Whitley made the call, she was acting consistently with a state statute that requires all school employees to report actual or suspected child abuse or neglect. App. 4a, 6a.

Following Whitley's call, the Cuyahoga County Department of Child and Family Services sent a social worker to the school to speak with L.P. App. 4a. As the social worker was meeting with L.P., Clark arrived at the school. *Id.* Clark denied responsibility for L.P.'s injuries and left with L.P. *Id.* The next day, a social worker went to Clark's mother's house, found L.P., and took him to the hospital. App. 4a-5a. The physician who examined L.P. suspected child abuse, and Clark was indicted soon afterward. *Id.*

2. Procedural History

This case arrives at the United States Supreme Court on a writ of certiorari to the Supreme Court of Ohio. The first judgment in the case was issued on November 22, 2010, when a jury found respondent, Darius Clark, guilty of four counts of felonious assault, two counts of endangering children, and two counts of domestic violence. App. 53a. The trial court ruled that L.P. was incompetent to testify because of his age, *id.*, but allowed prosecutors to enter L.P.'s statements to Whitley, Jones, a police detective, and two social workers into evidence against Clark at trial. App. 54a. Clark appealed, arguing that the conviction was based on improperly admitted evidence. *Id.* On December 22, 2011, the Court of Appeals of Ohio reversed Clark's convictions and remanded the case for a new trial, finding, among other things, that admitting the teachers' statements violated Clark's rights under the Confrontation Clause of the Sixth Amendment. App. 51a, 63a.

Specifically, the Court of Appeals found that when Whitley and Jones questioned L.P., the primary purpose of their questions was to fulfill their duty to report potential child abuse to law enforcement, not to resolve an ongoing emergency. App. 63a. The court determined, further, that an objective witness would reasonably expect that statements made to a teacher who is duty-bound to report suspected child abuse might be used at a later trial. *Id.* Therefore, it held

that L.P.'s statements to Whitley and Jones were testimonial and their admission at L.P.'s trial violated the Confrontation Clause. *Id.*

Ohio appealed the Court of Appeals' ruling as to the testimony of Whitley and Jones.[2] App. 6a. The Ohio Supreme Court accepted the appeal and, on October 30, 2013, affirmed. The Ohio Supreme Court held that "[s]tatements 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 are testimonial in nature." App. 17a. More specifically, a teacher acts as an agent of law enforcement when she questions a student about suspected child abuse and then reports the suspected abuse pursuant to her statutory duties. App. 3a. Moreover, a student's responses to a teacher's questions about suspected child abuse are testimonial when the teacher conducts questioning for the primary purpose of gathering information about past criminal conduct. App. 17a.

Three justices dissented from the Ohio Supreme Court's decision. App 17a. The dissenting justices argued that statements made to teachers should be scrutinized under the Ohio "objective-witness test." App. 18a. The dissenting justices noted that the United States Supreme Court has left open the question of

[2] The State declined to appeal the Court of Appeals' contemporaneous decision that admitting the testimony of the police detective and social workers about L.P.'s statements also violated the Confrontation Clause. App. 6a.

whether the *Davis* primary purpose test can apply to questions asked by individuals who are not agents of law enforcement. App. 25a. Consequently, the dissenting justices found it best to look to Ohio case law analyzing when a statement made to persons other than law enforcement officers can be testimonial. *Id*. They then found that, when Jones and Whitley questioned L.P., their questions served a protective purpose rather than a prosecutorial one. App. 18a.

On May 8, 2014, Ohio filed a petition for writ of certiorari in the United States Supreme Court. Petition for Writ of Certiorari, *Ohio v. Clark*, No. 13-1352, 2014 WL 1894369. The Supreme Court granted certiorari on October 2, 2014.

IV. DISCUSSION

A. Confrontation Clause Jurisprudence

The United States Supreme Court's modern Confrontation Clause jurisprudence could be said to begin with *Ohio v. Roberts*, 448 U.S. 56 (1980). In *Roberts*, the Court held that testimony given at a preliminary hearing where the witness was not available to appear at trial was nevertheless admissible because defense counsel's "questioning [at the preliminary hearing] clearly partook of cross-examination as a matter of *form*." *Id.* at 70. The Court focused its analysis on the reliability of the witness's testimony, ultimately concluding that it bore "particularized guarantees of trustworthiness" and was therefore admissible. *Id.* at 66.

It would be twenty-four years before the Court dealt substantively with the Confrontation Clause again. Then, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Court overruled *Roberts*, dismissing it as both too narrow and too broad to comply with the Sixth Amendment. *Crawford* held that the Constitution requires confrontation as a prerequisite to the admission of testimonial statements. *Id.* at 69. Specifically, the Court determined that the recorded witness statement of the defendant's wife, given to police after the defendant was arrested for stabbing a man, was not admissible at trial because the defendant had no opportunity to

cross-examine the witness.[3] In coming to that conclusion, the Court explored extensively the history of the Sixth Amendment, finding that the Framers of the Constitution intended to prohibit the use of *ex parte* testimony, irrespective of the testimony's trustworthiness or reliability. *Id.* at 50-54.

Two years later, in 2006, the Court addressed whether nontestimonial statements given outside the scope of a criminal investigation and without the intent to preserve evidence were admissible against a criminal defendant who could not cross examine the declarant in two cases, *Davis v. Washington* and *Hammon v. Indiana*, which it considered together in a single, consolidated opinion. *Davis v. Washington*, 547 U.S. 813 (2006). The Court held that a recorded 911 call (in *Davis*) could be admitted in a criminal trial, but that a victim's affidavit given to police investigating a domestic battery case (in *Hammon*) could not, because the latter was testimonial while the former was not. *Id.* at 822-30. A 911 call, the Court determined, is intended not to facilitate a police investigation, but rather to help authorities respond to an ongoing emergency. *Id.* A victim's affidavit, by contrast, is taken in the presence of police and, therefore, subsequent to any emergency and primarily for the purpose of aiding a criminal investigation.

[3] Since the witness in this case was the defendant's wife, she was unavailable to testify at trial because of Washington State's marital privilege rule. *Crawford*, 541 U.S. at 40.

Id. This distinction, the Court held, delineates whether or not a statement is testimonial.

Next, in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the Court held that the statement of a shooting victim – who soon thereafter died of his wounds – was nontestimonial, despite being given to police and identifying the shooter, because it "objectively indicate[d] [a] primary purpose . . . to enable police assistance to meet an ongoing emergency." *Id.* at 1150 (internal quotation marks omitted). The Court's review focused on the circumstances under which the statement was given, finding that the emergency nature of the statement indicated that it was not given to facilitate an investigation. *Id*. at 1157. Furthermore, because the victim's contact with police was largely informal – no *Miranda* warning was administered; the statement was given outdoors in a public place; and police were actively looking for the shooter – the Court was further persuaded that the statement was nontestimonial. *Id.* at 1160.

In the same year, the Court decided *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). There, the Court was faced with the question of whether the Confrontation Clause permits a prosecutor to introduce a forensic lab report through the testimony of a laboratory scientist who did not observe or perform the test or sign its testimonial certification. *Id.* at 2710. In a 5-4 decision, the Court held that only the testimony of the scientist who actually performed the test and

signed the certification could be used to authenticate and admit the lab results. The certification, the Court found, was testimonial and intended to prove a fact in a criminal trial. Only the analyst who signed the certification, therefore, was qualified to testify for the purposes of introducing the lab report.

Most recently, the Supreme Court in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), held, by plurality, that if a lab report is introduced to provide a basis for the conclusions that an expert reaches, rather than to establish the truth of the matter asserted, then the report can be introduced through the testimony of the expert, even if she did not perform the test. Citing *Crawford*, the Court held that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 2235.

B. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

Ohio argues that the teachers' obligation to report suspected child abuse does not deputize them as agents of law enforcement for Confrontation Clause purposes because the statute does not imbue mandatory reporters with the authority and characteristics that place traditional police interrogations within the Confrontation Clause's prohibition. A discussion between a student and a teacher, even when the teacher has mandatory reporting duties, is unlike a typical police interrogation, which elicits "solemn" statements in formal settings where the

declarant may fear punitive consequences for offering testimony contrary to what his examiners want to hear and where the questioner's job is to gather facts for eventual prosecution.

Clark contends that individuals become agents of law enforcement when they are conscripted into serving the investigative and prosecutorial functions the Confrontation Clause was designed to guard against. Overt participation by conventional law enforcement is not required to find that a person has become an agent of law enforcement for Confrontation Clause purposes. Instead, under this functional approach, Jones and Whitley became agents of law enforcement when, in furtherance of their statutory duties, they sought information from L.P. to identify his abuser and reported the information to the police.

Ohio emphasizes that the Court's analysis is "tethered" to history. While acknowledging that the Court has not exhaustively identified all of the circumstances that produce testimonial statements, Ohio insists that the Confrontation Clause applies only to circumstances that resemble the specific historical practices that existed at ratification. In *Crawford*, the Court repeatedly referenced the notorious 1603 trial of Sir Walter Raleigh for treason as an archetype of impermissible testimony. 541 U.S. at 43-44. Lord Cobham, Raleigh's alleged accomplice, implicated Raleigh in a letter and in statements during an *ex parte* examination before the Privy Counsel. The letter and the

statements from the examination were read to the jury though Cobham himself never testified. *Id.*

Similar abuses were perpetrated in the American colonies by colonial governors and English civil law courts with jurisdiction over colonists. *Id*. at 46-47. These courts' procedures permitted *ex parte* examinations of witnesses and allowed testimony to be taken by deposition or private judicial examination. *Id*. at 47-48. These examples represent the specific type of testimony the Framers had in mind and sought to preclude when they drafted the Confrontation Clause. And it is because the testimonial nature of formal police interrogations is analogous to this kind of *ex parte* examination that such interrogations are impermissible under the Clause. *Davis*, 547 U.S. at 823-28.

Ohio contends that statements elicited from formal police interrogations are inadmissible under the Confrontation Clause because they closely resemble these historical analogues. *Id*. at 828. In contrast, statements made in scenarios that do not resemble those historical practices are admissible under the Confrontation Clause. Ohio identifies three characteristics typical of police interrogations that are analogous to historical practice and, therefore, must be found to trigger Confrontation Clause protections: police interrogations are typically formal; false statements to an investigating officer can result in fines and imprisonment; and the interrogations are often conducted to gather information to aid future prosecution.

Thus, Ohio argues, non-law-enforcement personnel only become agents of law enforcement for purposes of the Confrontation Clause when circumstances or law act to imbue them with these three characteristics.

More specifically, the formality of police interrogations is a key reason why statements given during interrogation are considered testimonial because it signals to the declarant that the purpose of the questioning is to produce facts for use at trial and most resembles the notorious historical practices that inspired the Clause. These formal interactions are exemplified in *Crawford*, where the interrogation followed a *Miranda* warning, took place in a police station, and was tape-recorded, *id*. at 830 (discussing *Crawford*), and in *Hammon v. Indiana*, where the police officer had a domestic abuse victim "fill out and sign a battery affidavit" after interrogating her. *Id.* at 820 (internal quotation marks omitted). By contrast, the difference in the level of formality between the station-house questioning in *Crawford* and the questioning by a 911 operator in *Davis*, which featured frantic answers in an unsafe environment, lacked the formal trappings of testimony. *Id*. at 827. The interrogation of the gunshot victim in *Michigan v. Bryant*, which "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion," was similarly informal. 131 S. Ct. at 1160. The informal nature of the interrogations in *Davis* and *Bryant* played a

significant role in distinguishing these cases from *Crawford* and led the Court to find the statements nontestimonial. *Id*.

The solemnity of the statements, as judged by potential penalties for speaking falsely, is another precondition for determining whether the recipient of information acts as a law-enforcement agent for Confrontation Clause purposes. *Davis*, 547 U.S. at 830 n.5. Though the examinations by Marian magistrates of old have been replaced by the police interrogations of today, the same level of solemnity and formality imparted by the magistrates' systematic examinations under oath exist in police investigations where false statements bear punitive consequences. *Id.*; *contra id*. at 835-38 (Thomas, J., dissenting) (finding mere conversations between a witness or suspect and a police officer lacking the requisite solemnity). Ohio law, like federal law, makes it illegal to intentionally provide even an unsworn false statement to a "public official" that obstructs the investigation of a crime. *See* Ohio Rev. Code Ann. § 2921.13(A)(3) (West 2013);[4] 18 U.S.C. § 1001 (2006).

Finally, police officers' role as fact finders mirrors that of the English justices of the peace. "Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an

[4] Ohio's law applies only to statements made to "public officials" intended to mislead them in the performance of an "official function." *See* Ohio Rev. Code Ann. § 2921.13(A)(3). Public officials include law enforcement personnel, judges, and few others.

essentially investigative and prosecutorial function." *Crawford*, 541 U.S. at 53. Today, that investigative and prosecutorial function is served primarily by police officers. *Bryant*, 131 S. Ct. at 1161. Law enforcement interrogations signal an investigative function when the officers request deliberate accounts in response to structured questions, take notes or tape-record the interview, or ask questions for the purpose of creating a record for trial. *See id*. at 1155; *Davis*, 547 U.S. at 830.

Having established and explained these three critical characteristics of typical police interrogations, Ohio then argues that the state's mandatory reporting statute does not turn teachers into law enforcement agents because it does not automatically give these characteristics to every interaction they have with students. The statute does not formalize the interaction between teacher and student because the law does not require individuals to gather facts, testify at trial, record the declarant's words, or interact outside the teachers' normal environments. *See* Ohio Rev. Code Ann. § 2151.421 (West 2014) (detailing procedures of mandatory reporters to inform proper authorities of suspected abuse). The teacher must simply notify the state upon suspecting child abuse and then step out of the way. App. 6a-7a.

In its reply brief, Ohio distinguishes the Illinois Supreme Court's decision in *People v. Stechly*, where the court found that the reporting statute at issue sufficiently formalized the interactions between a nurse and a sexual assault victim

to make the nurse an agent of law enforcement. 870 N.E. 2d 333, 365 (Ill. 2007). There, the statute expressly required the specially-trained nurses to 1) testify in judicial proceedings after gathering evidence about the victim's injuries and 2) engage law enforcement officials in the investigative process. *Id.* The Ohio law does not contain any similar requirements, and it also does not extend the class of public official described under perjury or other obstruction laws to include mandatory reporters. In other words, nothing in the statute suggests that false statements made to mandatory reporters are subject to criminal or other penalties.

Finally, the statute only requires teachers to report information that comes to their attention, not to undertake any investigation into past facts to be used at trial. *See* Ohio Rev. Code Ann. § 2151.421 (West 2014) (holding the public children's services agency, and not the mandated reporter, responsible for investigation). Part of a teacher's purpose to educate children entails the obligation to care for the children's well-being, and the Ohio statute only makes explicit and mandates behavior that was already an aspect of this pre-existing obligation. The statute does not require teachers to determine the circumstances surrounding a child's injury. *Id.* Thus, teachers are not agents of law enforcement because the statute does not automatically convert their interactions with students into the kind of law enforcement interrogations that produce the *ex parte* testimony targeted by the Confrontation Clause.

Clark responds that Ohio's argument goes to the testimonial nature of the questioning, not the agency status of the agent conducting it, and the factors Ohio cites have no bearing on whether the questioner is an agent of law enforcement. Clark contends that Ohio's logic leads to the nonsensical conclusion that, because certain statements made to police officers can be ruled nontestimonial, as the Court found in *Michigan v. Bryant* , those police officers must not have been agents of law enforcement under the Confrontation Clause. Any test that leads to such an absurd conclusion cannot be viable. Clark also finds fault with Ohio's determination that testimonial settings are limited to those that share characteristics with specific historical practices. *Davis* states that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction," 547 U.S. at 830 n.5, and, while *Crawford* used police interrogations as a testimonial paradigm, the Court explicitly refused to spell out a comprehensive definition of "testimonial." 541 U.S. at 68.

Clark argues that individuals are agents of law enforcement when they are conscripted by the state to investigate past facts of an alleged crime to assist future prosecution efforts. This functional approach examines the extent to which the individual has been enlisted into the mixed investigative and prosecutorial mission the Confrontation Clause has historically targeted. Clark highlights cases from the supreme courts of Kentucky and Florida applying the functional approach and

holding that sexual assault nurse examiners and child protection teams, respectively, were agents of law enforcement because their roles involved gathering and searching for evidence. *See Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009); *State v. Contreras*, 979 So. 2d 896 (Fla. 2008).

Under this functional approach, a mandatory reporter is an agent of law enforcement when, pursuant to a duty to report child abuse, the reporter acts to ascertain past facts to assist in a future prosecution. The Ohio Supreme Court has interpreted the purpose of the reporting statute as not only to protect the child's well-being, but also to aid in the state's "identification and/or prosecution of the perpetrator." App. 7a-8a (citing *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004)). The statute explicitly requires the public children services agency to "investigate, within twenty-four hours, each report of child abuse . . . to determine the circumstances surrounding the injuries, abuse, or neglect . . . and the person or persons responsible." Ohio Rev. Code Ann. § 2151.421 (West 2014). Under this view, the state's decision to include teachers as mandatory reporters and to impose penalties on those who do not comply suggests that the state intends to deputize those people closest to children in the battle against child abuse. *Contra* App. 37a-38a (O'Connor, C.J., dissenting). L.P.'s teachers' statements and conduct demonstrate the compelling effect the mandatory reporter statute had on them: "when the children come in, we're supposed to always observe them, look

for different things, what's going on with them." App. 15a. The teachers followed the protocol precisely, even adhering to the minor procedural point of making sure the teacher who first observed L.P.'s injuries was the person to contact child services. App. 21a.

Clark further contends that Ohio's argument that a testimonial statement requires heightened formality and solemnity is unfounded in the history of the Confrontation Clause. Even Sir Walter Raleigh's conviction, which Ohio cites as an example of the kind of practices meant to be curbed by the Confrontation Clause, turned in part on the admission of a letter from Lord Cobham that was not the result of extended formal questioning. *Crawford*, 541 U.S. at 44. More recently, the Court found the statements made in *Hammon* to be testimonial despite the absence of *Miranda* warnings, tape recordings, and a police-station setting. 547 U.S. at 829-30.

Furthermore, in contrast to the formally and publicly administered oath the Marian magistrates required in their examinations, neither 18 U.S.C. § 1001 nor Ohio Rev. Code Ann. § 2921 requires that notice be given of the punitive consequences that would accompany false statements, so declarants would not necessarily be aware of the consequences for giving false statements. Thus, Ohio's modern analogue for the solemnizing effect of the magistrate's oath is conspicuously missing in informal statements made to a police officer.

Clark next attacks the contention of the dissent from the Ohio Supreme Court that L.P.'s teachers were not agents of law enforcement because police officers did not initiate, control, or direct their line of questioning. Several other state courts, including those in Maryland, Colorado, and Oregon, have also adopted a police-presence requirement before finding an agency relationship. *See State v. Snowden*, 867 A.2d 314, 326-27 (Md. 2005) (treating a sexual abuse investigator as an agent of law enforcement because she was brought in by authorities, worked with detectives on questions, and reported back to detectives); *People v. Vigil*, 127 P.3d 916 (Colo. 2006) (declining to classify a doctor as law enforcement without more direct and controlling police presence); *State v. Mack*, 101 P.3d 349, 352-53 (Or. 2004) (finding DHS officer to be a proxy of law enforcement when she took over an interview from an agent and elicited statements while other officers observed). Clark argues that a police-presence requirement is inconsistent with this Court's agency approach in the Fourth Amendment context. In *Skinner v. Ry. Labor Execs.' Ass'n*, for example, this Court determined that whether a party was treated as an agent of law enforcement for purposes of the Fourth Amendment turned on the "degree of the Government's participation in the private search," while also noting that an absence of direct law enforcement action does not, by itself, undermine a finding of agency. 489 U.S. 602, 614 (1989). Even indirect encouragement without statutory support has been held to form an agency

relationship between law enforcement and a private individual. So, in *United States v. Walther*, the Ninth Circuit found that an airline employee was an agent of law enforcement because the DEA had previously acquiesced in his search. 652 F.2d 788, 793 (9th Cir. 1981). The reporting statute not only encourages and endorses fact-finding endeavors, but also requests the proceeds of the investigations and provides civil and criminal penalties for failure to comply. Therefore, argues Clark, if mere endorsement or acquiescence by a traditional law enforcement agency or individual can create an agency relationship, then the mandatory reporting statute certainly can.

C. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

Ohio argues that a child's statements to a teacher regarding suspected child abuse are not testimonial in nature. First, it asserts that L.P.'s statement to his teachers is not testimonial because it does not constitute the sort of *ex parte* testimony the Confrontation Clause specifically aims to preclude. In the alternative, Ohio argues that, even if the Court deems the teachers in this case to be law enforcement agents, and therefore relies on the primary purpose test articulated in *Davis*, L.P.'s statements were nontestimonial because the teachers' primary purpose was to respond to an ongoing emergency, not to establish the identity of the suspect for purposes of a future trial. Finally, Ohio asserts that policy

considerations, on balance, caution against a factor-based analysis for statements by children to teachers to promote the protection of children that undergirds the mandatory reporting rules.

Clark, relying on a similar set of cases, argues that L.P.'s statements were testimonial in nature first and foremost because they were delivered to an agent of law enforcement under circumstances that objectively suggested that the primary purpose of the conversation was forensic or interrogative in nature. This argument is predicated on the idea that teachers are law enforcement agents, as discussed *supra* section IV(B), and therefore the testimonial nature of the statement hinges on the primary purpose test. Clark argues that, because the child was not actively in danger or helping authorities locate a dangerous criminal on the loose, the teachers' questions were primarily designed to elicit who had committed the act in the past for the purpose of providing evidence for later prosecution, thus making the child's statements testimonial in nature.

1. Statutory History and the Purpose of the Confrontation Clause

The Supreme Court has not faced a case in which it was required to decide whether statements to individuals other than law enforcement officers and their agents can be testimonial. In *Crawford*, the Court applied the term "testimonial" to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations." 541 U.S. at 68. Ohio argues that this definition of

"testimonial" supports an interpretation of the Confrontation Clause as intended to prevent the introduction of "formalized," "*ex parte* testimony." *Id.* at 52. Relying on this narrowly cast definition of "testimonial," Ohio distinguishes the current circumstance from the kinds of statements discussed in *Crawford*. The child in this case was not asked to make a statement under oath, was not deposed, and his statements were not even recorded. As a result, Ohio argues, the statement is simply not within the spirit of what Confrontation Cause jurisprudence targets as "testimonial."

Clark takes a broader view of the statutory intent behind the Confrontation Clause. He argues that, while *ex parte* statements are part of a "core class" of testimonial statements that would always be considered testimonial, they are far from the *only* type of statements that are always testimonial. He looks at a number of Supreme Court readings of the Clause, in particular *Coy v. Iowa*, which highlights the importance of "face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution," even when doing so may "upset the truthful . . . abused child." 487 U.S. 1012, 1017, 1020 (1988) (internal quotation marks omitted). *Coy* centered around an accusation by two thirteen-year-old girls of sexual assault by the defendant. The prosecution allowed the girls to testify from behind a screen that partially obscured the defendant's view of the witness stand and prevented the witnesses from seeing the defendant at

all. The Court reasoned that this arrangement directly violated the Confrontation Clause by denying the defendant the "literal right to confront the witness," and concluded that, while "constitutional protections have costs," the discomfort of the young witnesses was not sufficient to override the importance of the constitutional protection. *Id*. at 1017, 1020. Clark contends the same issues are at stake in this case: his constitutional right to face his accuser was violated when L.P.'s testimony was permitted despite L.P. himself being unavailable after the trial court deemed him incompetent to testify.

2. Application of the Primary Purpose Test

Both sides acknowledge that the primary purpose test laid out by the Court in *Davis* is the most common means of assessing whether a statement is testimonial. The primary purpose test finds statements testimonial where "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In contrast, a statement is nontestimonial "when made in the course of police interrogations under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.*

Ohio asserts that the primary purpose test still favors the conclusion that L.P.'s statements were not testimonial because they were made in response to an attempt to resolve an ongoing emergency – the threat of further abuse to the child.

The teachers' questions were aimed at mitigating that danger; the conversation was informal; and the child's statements were reliable. Ohio bases its argument on the idea that, while the *Davis* test creates a Confrontation Clause exception to meet an ongoing emergency, 547 U.S. at 823, the Court clarified in *Bryant* that determining the existence of such an emergency demands "a highly context-dependent inquiry." 131 S. Ct. at 1158. The *Bryant* court also noted that the formality of the interrogation and reliability of the statements can inform the "testimonial" nature of the statements. *Id*. at 1160.

Regarding the emergency issue specifically, Ohio argues that child abuse is distinguishable from the kinds of emergencies discussed in the Supreme Court's previous jurisprudence because the victim was a child. Historically, if a perpetrator had left the scene and the police believed only the victim was at risk, the emergency was considered to have passed, as the victim could simply stay away from the perpetrator until the legal system provided relief. This is not the case for children, especially small children, who lack the agency to remove themselves from a bad situation. Therefore, Ohio contends, the child is in ongoing danger so long as he or she continues to live with the abuser. While the child was separated from the abuser while at school, that safety was only temporary, and in fact was only a lull in an ongoing emergency, namely L.P.'s continued habitation with his abuser. Ohio further notes that L.P. was in a vulnerable condition,

focusing on the fact that the teacher described L.P. as "bewildered" and "staring out" into space at the time of the first inquiry. App. 4a. Taken together, argues Ohio, the context of the teacher's interaction with L.P. supports a finding that the emergency for L.P. was ongoing.

As to the teachers' motivations, Ohio argues that the primary purpose for the teachers' inquiry, at least at the outset, was to address this ongoing emergency. Ohio first dispenses of the idea that the primary purpose of the mandatory reporting requirements must be to "identify the perpetrator." Both the 911 operator in *Davis* and the officer in *Bryant* would have eventually had to write reports of their conversations, undermining the idea that such reporting makes all inquiries that must be reported automatically forensic. Instead, Ohio notes, the teachers not only were "shocked by [L.P.]'s injuries," but also immediately asked "what happened?" App. 40a. Ohio contends that the fact that the teachers asked *what*, not *who*, suggests that they were trying to assess what had happened and address the situation. Once L.P. said that "Dee" was responsible, they had to ask whether "Dee" was "big or little," suggesting that they were also concerned that the injuries may have been caused by another student, which would not have prompted the reporting requirements. App. 20a-21a. As a result, Ohio contends, when the teachers first spoke with L.P., the purpose of the teachers' interrogation was to

assess and meet an ongoing emergency, thus making the statements admissible under *Davis*.

Clark, in contrast, asserts that there was no ongoing emergency, and that instead the primary purpose of the teachers' inquiry was to determine who was responsible, making L.P.'s statements testimonial under the *Davis* primary purpose test. Clark focuses first on the factors for assessing an ongoing emergency, listing those from *Michigan v. Bryant*: 1) the zone of potential victims, 2) the type of weapon, and 3) the extent of injuries. 131 S. Ct. at 1154. To the first factor, Clark notes that when a crime is familial in nature, persons other than the victim himself are not usually at risk, meaning there is unlikely to be an ongoing emergency so long as the victim and perpetrator are separated. Clark also contends that the type of weapon is critical to the injury, in particular whether the weapon is a gun or other weapon that can do damage even when the perpetrator and victim are physically separated. Alternatively, if the weapon used requires close physical proximity, such as a knife or even bare hands, then the physical separation of the perpetrator and victim will be sufficient to end the emergency. In this instance, the injuries to the child suggest close, physical violence, which weighs against the assertion of an ongoing emergency because the child was clearly out of range of his abuser while at school. Clark also contrasts this with *Bryant*, in which the perpetrator had shot a victim through a door, so even physical separation did not

necessarily mean the victim was safe. Instead, the situation at hand is similar to that in *Hammon*, where the perpetrator also attacked the victim using primarily his hands, rather than a weapon. 547 U.S. at 820. These facts, taken together, Clark argues, again suggest a lack of ongoing emergency.

Lastly, Clark argues that the minimal extent of L.P.'s injuries undermines any assertion that his condition created an ongoing emergency. He notes that the cases in which the Court has found ongoing emergency deal with victims in serious peril, suggesting that the declarant was focused on receiving aid rather than providing ammunition for a future prosecution. *Bryant*, 131 S. Ct. at 1165. Here, by contrast, L.P. had been injured in the past, and the fact that neither the police nor an ambulance was called belies any argument that the injury was extensive, and so precludes a conclusion that there was an ongoing emergency.

Ohio, in its reply brief, strongly objects to Clark's characterization of the test using the enumerated *Bryant* factors and its conclusion on the issues. At the highest level, Ohio objects to the reliance on the unusual facts of *Bryant* (where an armed gunman was loose) as so different from this case as to be unhelpful, and furthermore claims that the issues Clark highlights from that case are in fact among the least relevant factors in the analysis. Ohio also objects to the very idea that domestic violence "narrow[s]" the zone of victims, and contends that this notion was explicitly dispelled by *Davis*. 547 U.S. at 832-33. It also reiterates that not

only was there at least one other victim at risk (L.P.'s sister), but also that Jones and Whitley did not even know at the outset of their questioning that they were dealing with a domestic violence situation. App. 20a-21a.

Looking beyond the more straightforward emergency-based component of the primary purpose test, Ohio also argues that the other two factors highlighted in *Bryant*, the formality of the inquiry and reliability of the testimony, support its conclusion. Ohio contends that the statements were decidedly informal. To make this claim, Ohio again looks to the kinds of contact described in *Crawford* and compares the level of formality of prior testimony and a police interrogation to that in the conversation between L.P. and his teachers. 541 U.S. at 68. Ohio asserts that L.P.'s statements to his teachers lack the "solemnity . . . not present in a mere conversation" required to hold a statement testimonial. *Davis*, 547 U.S. at 838 (Thomas, J., concurring in part and dissenting in part). Ohio notes, further, that L.P. was not made aware of his rights or placed under oath in in a manner that would liken the conversation to a police interrogation. Indeed, Ohio notes in its reply brief, the teachers did not even convey to L.P. that the situation was a serious one or that his truthfulness was important.

Clark's argument is that the conversation *was* relatively formal and occurred in a manner suggesting intent to discern what had happened rather than to mitigate an emergency. He acknowledges that the level of formality does not reach the

level seen in *Crawford*, but argues that it need not reach that level to be testimonial. 541 U.S. 36, 53 n.4. Instead, Clark focuses on the fact that, like the victim in *Hammon*, L.P. was in a separate space from the perpetrator during the conversations with his teachers. 547 U.S. at 830. Clark lays out three factors to establish formality. First, L.P. had been separated from his classmates, then taken to the school office, suggesting a higher level of formality than seen in *Bryant* or *Hammon*. Next, Clark looks to the content of the questions. He contends that, because the teachers asked both "what happened?" and "who did this?", the content of the questioning was sufficiently formal to prompt a testimonial answer. Finally, Clark asserts that the timeline of the questioning suggests both formality and that the teachers intended to gather information for future prosecution. In support of this assertion, Clark highlights the fact that it was only after L.P. stated that "Dee, Dee" was responsible for his injuries that a teacher called the abuse hotline. Clark argues that this timeline supports the contention that the teachers were only questioning to find out who was responsible, thus making the teachers' questioning forensic and L.P.'s responsive statements testimonial.

Finally, looking to the reliability criteria, Ohio argues that L.P.'s statements were reliable based on their consistency. Outside of L.P.'s initial claim that he fell, which Ohio dismisses as a clear example of a failure on the child's part to maintain

a deception, L.P. consistently identified "Dee" as the cause of his injuries. This consistency, Ohio argues, suggests that the statement is inherently reliable.

Clark does not address the reliability of testimony issue.

3. Policy Considerations

Looking beyond the strictures of statutory intent and the existing Supreme Court Confrontation Clause jurisprudence, Ohio argues at length that policy considerations favor its position that statements between students and teachers not be held inherently testimonial. In addition to reiterating the intended procedural safeguards of the Confrontation Clause (preventing the introduction of *ex parte* testimony), Ohio argues that the mandatory reporting statute, coupled with the Confrontation Clause, should be interpreted in a way that enhances the objective of the statute: promoting the safety of children.

If conversations between children and teachers are automatically blocked from admission in court on Confrontation Clause grounds, then the outcome of mandatory reporting may actually undermine the safety of children by making key evidence against child abusers inadmissible on hearsay grounds. Given the widespread occurrence of child abuse in the U.S. alone (700,000 cases are reported every year), and the fact that the mandatory reporting rules are explicitly designed to address the problem, interpreting this law in a way that would prevent teachers

from testifying as to what they are told by abused children would produce the absurd result of "subvert[ing] the point of the reporting obligation itself."

In contrast, Clark argues that exempting mandatory reporters would be the worse outcome. He asserts that if statements made by a child to a teacher or other mandatory reporter were automatically admissible, police would be incentivized to remain on the sidelines while teachers or other third parties conducted the investigation, thus allowing police and prosecutors to avoid the Confrontation Clause deliberately and strategically.

Ohio, in its reply brief, claims that this fear of police questioning by proxy is entirely unfounded. Ohio notes first that there was no police intervention in this case until well after the statements in question were made, and, in fact, that the inquiry took place even before a call to child services. Further, Ohio notes that, if the teachers, or another party such as the principal, had tried to go further and conduct a more extensive interview, perhaps recording L.P.'s responses, suddenly the conduct would begin to look a great deal like the *ex parte* testimony the Clause was intended to avoid, thus providing a simple valve for excluding any testimony obtained via the police questioning by proxy proposed by Clark.

On a separate, but perhaps more important, policy note, Clark notes that the Court has not definitively established that the primary purpose test is the appropriate line of inquiry when evaluating statements to non-law enforcement

agents, but proposes that it should be, leaning heavily on suggestions to that effect by the pluralities in *Bullcoming* and *Williams*. Clark asserts that any approach allowing a third party to collect and present testimony in court without giving the accused the opportunity to cross-examine the original testifier is simply a violation of the Sixth Amendment, and that the status of the individual asking those questions should not be the determinative inquiry.

Ohio rejects the notion that *Bullcoming* and *Williams* imply that the "primary purpose" test applies to non-law-enforcement agents. Ohio notes that these cases focused specifically on written reports from forensics labs. *Bullcoming*, 131 S. Ct. at 2707, 2715; *Williams*, 132 S. Ct. at 2224-25. While Ohio acknowledges that the lab employees in these cases were not law enforcement officials, the reports they prepared were explicitly for use as evidence at trial, thus making them far more like the sort of *ex parte* testimony the Framers intended to preclude than the statement of L.P., a child, to his teacher.

4. Other Arguments Meriting Consideration

Although not addressed by the Keedy petitioners and respondents, counsel for Ohio in the Ohio Supreme Court put forth an additional argument that merits consideration: that the primary purpose test should be viewed from the eyes of the speaker, in this case the child. Citing a large number of examples from other counties within Ohio as well as a number of states, Ohio asserted that, in

evaluating whether a statement is testimonial, "it is clear that the focus is to be on the beliefs and expectations of the child." Merit Brief of Plaintiff-Appellant at 9, *State v. Clark*, 999. N.E.2d 592 (2013) (No. 2012-0215), 2012 WL 3234560, at *9 (internal quotation marks omitted). Taking this into account, Ohio's earlier counsel asserted that there is no evidence that the three-year-old L.P. could have possibly imagined his statements would have a role in a legal proceeding, and nothing indicates that the teacher may have suggested such a possibility to him.

V. APPENDIX

Relevant sections of Ohio Rev. Code Ann. § 2151.421

Persons required to report injury or neglect; procedures on receipt of report

(A)(1)(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist;

practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor

pursuant to Chapter 3107. or 5103. of the Revised Code; third party employed by a public children services agency to assist in providing child or family related services; court appointed special advocate; or guardian ad litem.