In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARCOS ARTURO SANCHEZ,

Defendant and Appellant.

Case No. S216681

Appellate District, Case No. G047666
Orange County Superior Court, Case No. 11CF2839
The Honorable Steven D. Bromberg, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
LYNNE MCGINNIS.
Deputy Attorney General
STEVE OETTING
Deputy Solicitor General
State Bar No. 142868
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2206
Fax: (619) 645-2012
Email: Steve.Oetting@doj.ca.gov
Attorneys for Plaintiff and Respondent

In *Ohio v. Clark* (June 18, 2015) __U.S. __ [2015 WL 2473372] (*Clark*), the United States Supreme Court recently held that statements made by a three-year-old child to his teachers were not testimonial for purposes of the confrontation clause. While the high court's latest pronouncement on what constitutes testimonial hearsay did not resolve all remaining questions regarding this issue, the court's decision in *Clark* nonetheless supports respondent's position that the primary purpose of several of the statements in the instant case was not to create testimonial hearsay against appellant, and further that a jury's perception of expert basis testimony does not render such an opinion testimonial.

In *Clark*, a teacher questioned a preschooler as to how he had received a blood-shot eye and red whip marks on his face; the preschooler named the defendant, his mother's boyfriend and pimp, as the perpetrator. Although the boy was later found to be incompetent to testify at the defendant's trial for felony assault, the trial court admitted the boy's earlier out-of-court statements. Writing on behalf of the court, Justice Alito held that because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the statements did not implicate the confrontation clause and therefore were admissible at trial. (*Clark, supra*, 2015 WL 2473372 at *2.) In reaching this conclusion, the court noted that under the primary purpose test, the existence of an ongoing emergency is "'simply one factor'" to be considered; an additional factor is "'the informality of the situation and the interrogation.'" (*Id.* at *5, quoting *Michigan v. Bryant* (2011) 562 U.S. 344, 366 & 377.) Notably, in determining whether a statement is testimonial, "'standard rules of hearsay, designed to identify some statements as reliable, will be relevant.'" (*Ibid.*) Further, although the primary purpose test is a necessary condition for exclusion of evidence,

it is not always a sufficient one; the confrontation clause also does not bar the admission of out-of-court statements that would have been admissible in a criminal case at the time of the founding. (*Id.* at *6.)

Applying these principles to the case before it, the *Clark* court concluded that the boy did not make his statements for the primary purpose of creating evidence for the defendant's prosecution, both because the statements occurred in the context of an ongoing emergency, and because the teachers' objectives were to protect the boy. The court underscored that the conversation between the preschooler and his teachers was informal and spontaneous, made in the setting of a preschool lunchroom and classroom. The questions thus did not resemble a formalized station-house questioning or a police interrogation. (*Id.* at *7.) The boy's age "fortifie[d]" this conclusion, because "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." (*Ibid.*) Additionally, as an historical matter, the court observed that strong evidence suggested such statements involving young child victims were admissible at common law. (*Ibid.*) While declining to address whether statements to non-law enforcement officers are categorically outside the scope of the confrontation clause, the court concluded it was "highly relevant" that the boy made his statements to his teachers rather than to a police officer. (*Id.* at *8.) Finally, in rejecting the defendant's arguments as "off-base," the court declined to view the boy's statements to his teachers from the jury's perspective as the functional equivalent of testimony: "Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony." (*Id.* at *9.)

The Supreme Court's elaboration of the primary purpose test in *Clark* supports respondent's position that four of the five basis statements in the present case were non-testimonial because their primary purpose was not to accuse appellant. (See BOM 41-49.) First, as *Clark* teaches, the mere fact that the STEP notice and FI card were not created as part of an ongoing emergency does not render the primary purpose exception inapplicable. The informality of both statements must also be considered. Neither situation involved an arrestable offense or police questioning at the station house. (See *Clark*, *supra*, 2015 WL 2473372 *5 ["A 'formal station-house interrogation,' like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused."].) Both the STEP notice and FI card also involved admissions by the defendant, which are generally deemed to be reliable under standard rules of hearsay. (Evid. Code, § 1220.) No crime had been committed at the time of these encounters, and therefore the primary purpose could not have been to provide a substitute for "testimony" under the Sixth Amendment.

Second, as to the shootings on August 11, and December 30, 2007, there is no reason to believe that the statements were obtained to gather evidence for appellant's prosecution. (See *Clark*, *supra*, 2015 WL 2473372 *7 ["There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution."].) In both instances, appellant was a witness or potential victim; nothing suggests he was ever considered a possible perpetrator. Thus, as to him, the statements could not have been testimonial.

Moreover, the significance of the *Clark* decision is not limited to its discussion of the primary purpose rule. The majority soundly rejected Clark's attempt to "shift" the focus from the context of the conversation between the boy and his teachers to the jury's perception of those statements. (*Clark, supra*, 2015 WL 2473372 *9 ["Our Confrontation Clause decisions . . . do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony."].) As respondent has previously argued, under California evidentiary rules basis evidence relied upon by experts is not admitted for its truth. (ABOM 25-39.) Appellant has argued that it is a legal fiction to suggest that the jury could evaluate expert basis testimony without considering that testimony for its truth. (See, e.g., BOM 44.) But, as in *Clark*, this argument is nothing more than an improper attempt to shift the focus to the jury's perception of the statements. And while respondent has pointed out that appellant's underlying premise regarding the jury's perception is incorrect (ABOM 26-37), *Clark* demonstrates that the jury's perception is not, in any event, what causes a statement to be considered testimonial. Indeed, as the *Clark* court observed, "[t]he logic of this argument. . . would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial." (*Clark, supra*, 2015 WL 2473372 *9.)

Accordingly, *Clark* provides further support to respondent's argument that the expert basis testimony in the present case was not testimonial, and that four of the five basis statements were not testimonial as to appellant under the primary purpose rule.

Dated: July 2, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
LYNNE MCGINNIS
Deputy Attorney General

STEVE OETTING
Deputy Solicitor General
Attorneys for Plaintiff and Respondent

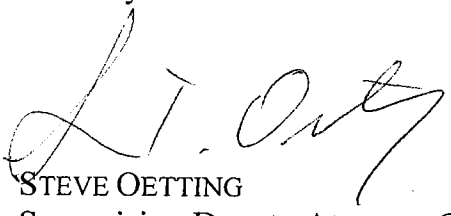
SO:lb
SD2014808147
71102570.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 1,136 words.

Dated: July 2, 2015

KAMALA D. HARRIS
Attorney General of California



STEVE OETTING
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sanchez** No.: **S216681**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 2, 2015, I served the attached ***RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

John L. Dodd
Attorney at Law
John L. Dodd & Associates
17621 Irvine Boulevard, Suite 200
Tustin, CA 92780
Attorney for Appellant Sanchez – 2 copies

Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101

The Honorable Steven D. Bromberg
Supervising Judge – Dept. C28
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

The Honorable Tony J. Rackauckas
District Attorney – Attn: Appeals
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Clerk, California Court of Appeal,
Fourth Appellate District, Division Three
601 W. Santa Ana Boulevard
Santa Ana, CA 92701

John L. Dodd
Attorney at Law
John L. Dodd & Associates
17621 Irvine Boulevard, Suite 200
Tustin, CA 92780
Attorney for Appellant Sanchez

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 2, 2015, at San Diego, California.

L. Blume
Declarant

L. Blume
Signature

SD2014808147
71102587.doc