

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellant/Cross-Appellee,

vs.

DENNIS D. MUTTART,

Appellee/Cross-Appellant

Case Nos. 06-1293/06-1488

On Appeal from the Hancock County
Court of Appeals, Third Appellant
District

Court of Appeal Case No. 05-05-08

AMICUS CURIAE FIRST BRIEF OF TIG INSURANCE COMPANY

**THIS BRIEF DOES NOT EXPRESSLY SUPPORT THE POSITION OF
EITHER OF THE PARTIES TO THIS APPEAL**

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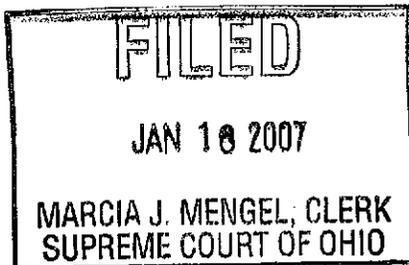


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STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

Narrowly defined, this case is about the admissibility of evidence in criminal cases of child abuse. However, much more is in the balance. This case asks this Court to alter a long-standing, fundamental concept of Ohio law that guards the integrity of evidence put before Ohio tribunals—that a hearsay declarant must be competent when an out-of-court statement is made in order for that statement to be admissible. This is not a concept intended to benefit any particular class of person or litigant—it extends to everyone appearing before Ohio’s courts. It is not a concept limited to child witnesses—it extends to all witnesses. It is not a concept that is limited to criminal cases, but also extends to civil cases. It is a concept firmly rooted in the idea that the judgments of Ohio courts should, and must, be based upon *reliable* evidence. Indeed, it is a legal axiom that advances the purpose of Ohio’s Rules of Evidence as “procedures for the adjudication of causes to the end [1] *that the truth may be ascertained and [2] proceedings justly determined.*” Evid. R. 102 (emphasis added).

Appellant/Cross-Appellee State of Ohio (“Ohio”) obtained three child rape convictions against Appellee/Cross-Appellant Dennis D. Muttart (“Muttart”), which resulted in Muttart receiving three consecutive life terms for each conviction. *State v. Muttart*, 3rd Dist. No. 5-05-08, 2006 Ohio 2506, at ¶26. On appeal, the Third Appellate District unanimously affirmed two of the convictions, but reversed a third because it was unsupported by any admissible evidence. *Id.*, at ¶¶54-56.¹ In so holding, the Third Appellate District explained that the third rape charge was supported only by the

¹The Third Appellate District panel included now Ohio Supreme Justice Robert Cupp.

hearsay statements of a five-year-old child, but there had never been any determination by the trial court that the five year old was competent at the time she made the statements. *Id.*, at ¶¶ 39-56. Accordingly, the statements were inadmissible. *Id.* Despite the fact that Muttart was still serving two life sentences, the State initiated an appeal challenging the Third Appellate District’s ruling, and asking this Court to change Ohio law to provide that it is *never* necessary to determine competency before admitting a five year old’s hearsay statements under Evid. R. 803(4). While Amicus Curiae TIG Insurance Company (“TIG”) does not expressly support Muttart’s arguments that some or all of his convictions should be reversed, TIG does urge this Court to reject the State’s misguided proposition to change Ohio law to no longer require competency evaluations before a child’s hearsay statements are deemed admissible in evidence.

As an insurer, TIG has a compelling interest in this issue as it is a party to various types of insurance policies that may provide liability coverage with respect to certain aspects of child abuse cases. Not infrequently, civil litigation follows criminal prosecutions such as Muttart’s in this case.² While Ohio public policy generally precludes liability coverage for abusers themselves, persons and/or entities that negligently hire, supervise, employ, retain or manage such abusers may be entitled to such insurance coverage for damages arising from alleged abuse. *Doe v. Schaeffer*, 90 Ohio St.3d 388, 391, 2000 Ohio 186. Under such circumstances, TIG has been called upon to provide defense and indemnity to its insureds who are entitled to coverage. One of the central issues in such cases is whether the child abuse ever occurred at all. This issue is frequently decided on a paucity of evidence—of which a child’s out-of-court statements are often the lynchpin.

²TIG has no reason to believe that it has any insurance obligations directly implicated by the instant case.

The use of hearsay in these cases is permitted and appropriate—provided it meets the requirements for admissibility. This includes a requirement that the child declarant be found to be competent at the time the hearsay statements were made.³ This requirement does not come from a slavish devotion to historical process, but rather from adherence to the recognition that the reliability of established hearsay exceptions is based upon the presumption that a competent declarant has made them. Without reliability, both truth ascertainment and justice (or fairness) are impugned, and judgments may be wrongly rendered upon inflammatory, but unreliable, evidence. Because the admission of hearsay statements precludes cross-examination and deprives the trier of fact of being able to directly judge the credibility of the declarant through personal observation, it is only by adherence to well-established procedures with a proven track record of reliability that the admission of such evidence is warranted.

Muttart may be guilty of rape, or he may not. Whether he is or not, this Court's ruling will affect a great many more persons and entities than just Muttart. Some of those affected will certainly be persons who have been wrongly accused of child abuse, rape or some other horrible crime. If the State has its way, this Court will change Ohio law to allow those wrongly accused persons to be convicted with unreliable evidence. On the other hand, if the Court rejects the State's appeal, not only will Muttart continue to serve two consecutive life sentences, but the State will have the right to retry him on the third rape charge after having to overcome only the most minor of hurdles—simply allowing a competency hearing to determine whether the five-year-old declarant was competent at

³As explained below, the sole exceptions to this requirement are for excited utterances, present sense impressions, and then existing mental, emotional or physical conditions, currently codified at Evid. R. 803(1) through Evid. R. 803(3). The historical reasons for these exceptions are discussed below.

the time she made the hearsay statements. If she was competent, the State should have every reason to believe it will obtain another conviction. If she was not competent, no reasonable person should question whether her statement should be excluded and the State can reevaluate whether it should proceed to try and obtain a third life sentence against Muttart. Either way, the only reasonable way to provide the minimum level of reliability necessary for admission of the five year old's hearsay statement is for the trial court to determine her competency at the time the statements were made.

B. STATEMENT OF THE FACTS AND CASE

TIG adopts the Statement of the Facts and Statement of the Case set forth in Muttart's First Merit Brief.

ARGUMENT

APPELLANT'S/CROSS-APPELLEE'S PROPOSITION OF LAW: A CHILD VICTIM'S OUT-OF-COURT STATEMENTS TO MEDICAL PERSONNEL ARE ADMISSIBLE UNDER EVIDENCE RULE 803(4) REGARDLESS OF THE COMPETENCY OF THE CHILD.

CROSS-APPELLANT'S/APPELLEE'S PROPOSITION OF LAW NO. I: A NON-TESTIFYING CHILD'S HEARSAY STATEMENTS ARE INADMISSIBLE UNDER EVID. R. 803(4) WHEN A COMPETENCY DETERMINATION, PURSUANT TO EVID. R. 601(A), WAS NEVER MADE BY THE TRIAL COURT.

CERTIFIED CONFLICT QUESTION: MUST A CHILD VICTIM'S STATEMENTS, MADE FOR PURPOSE OF MEDICAL DIAGNOSIS AND TREATMENT (EVID. R. 803(4)), BE EXCLUDED FROM ADMISSION AT TRIAL, PURSUANT TO *STATE V. SAID* (1994), 71 OHIO ST.3D 473, WHERE THERE HAS BEEN NO PRIOR DETERMINATION BY THE TRIAL COURT THAT THE CHILD WAS COMPETENT AT THE TIME THE STATEMENT WAS MADE?

A. INTRODUCTION

The foregoing Propositions of Law and Certified Conflict Question collectively ask this Court to decide whether a five year old's hearsay statements are admissible under Evid. R. 803(4) without

a prior determination that the five year old was competent at the time the statements were made. Accordingly, they are treated here together. As Cross-Appellant's/Appellee's Proposition of Law No. II is confined to constitutional law issues in criminal cases, TIG presents no argument with respect to that Proposition of Law.

B. THE TRADITIONAL RULE: HEARSAY IS NOT ADMISSIBLE PURSUANT TO A RECOGNIZED HEARSAY EXCEPTION UNLESS THE DECLARANT WAS COMPETENT AT THE TIME THE STATEMENT WAS MADE.

“‘Competency,’ in the law of evidence, is the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice... .” *State v. Mowery* (1982), 1 Ohio St.3d 192, 193 (citing, *United States v. De Lucia* (C.A. 7, 1958), 256 F.2d 487 at 491). The issue of witness competency embraces two important policy concerns.

First, competency may simply be a matter of whether society believes it is appropriate for certain persons be able to testify in certain cases. In this regard, Evid. R. 601(B) through (D) identify certain categories of persons, such as spouses, law enforcement officers, and expert witnesses, who may be able to provide accurate, reliable testimony, but who, for different policy reasons, are not permitted to testify in certain kinds of cases. For instance, Evid. R. 601(C) prohibits law enforcement officers “on duty for the exclusive or main purpose of enforcing traffic laws” from testifying against a person charged with a traffic offense when the officer was not at the time of the arrest “using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.” Such a competency rule embraces a number of important positive law public policy concerns regarding traffic cases (*see* Giannelli & Snyder, 1 Baldwins Oh. Prac. Evid. §601.13

(2006)), none of which is concerned with whether the officer would be able to provide accurate, reliable testimony.

The second aspect of competency filters out inaccurate and unreliable evidence from consideration in Ohio courts. This aspect of competency is governed by Evid. R. 601(A) which provides, in pertinent part, that: "Every person is competent to be a witness except . . . Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." This is a restatement of long-standing Ohio law. More than half a century ago, in *Hill v. Skinner* (9th Dist. 1947), 81 Ohio App.3d 375, 377, 79 N.E.2d 787, the Ninth Appellate District explained:

Section 11493, General Code, reads:

'All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.'

* * *

And in 2 Wigmore on Evidence (3 Ed.), Section 505, it is said:

'With reference to the general capacity to observe, recollect, and narrate, the same principles apply to Mental Immaturity that are applied to Mental Derangement.'

The essential test of the competency of an infant witness is his comprehension of the obligation to tell the truth and his intellectual capacity of observation, recollection and communication. The nature of his conception of the obligation to tell the truth is of little importance if he shows that he will fulfill the obligation to speak truthfully as a duty which he owes a Deity or something held in reverence or regard, and if he has the intellectual capacity to communicate his observations and experiences. (Emphasis added).

Such concerns are consistent with the long-standing national majority position. *See* 81 Am. Jur.2d Witnesses §209 (2006).

Evid. R. 601(A) does not provide that children can never testify as witnesses, they can. Rather, Evid. R. 601(A) recognizes that children under ten are presumed to be unreliable information sources as to be incompetent witnesses *unless* it can be affirmatively demonstrated by the proponent of the child's testimony that the child is: (1) capable of receiving just impressions of the facts and transactions respecting which they are examined and (2) capable of relating them truly. *Turner v. Turner*, 67 Ohio St.3d 337, 343, 1993 Ohio 176. In this regard, society recognizes that children under ten years of age, no matter how intelligent, well-behaved or well-raised, often have difficulty comprehending the obligation to tell the truth. Their minds are physically, emotionally and intellectually immature such that they generally do not have the capacity of observation, recollection and communication enjoyed by adults. Even when they believe they are telling the truth, they often are not. Substantial parts of their lives can be enveloped by fantasy, misperception and misconceived notions of the world and its natural processes. They are prone to uncontrolled emotional outbursts and rash, illogical thoughts. They are highly impressionable. Moreover, human experience shows that the younger the child is the less developed the child's vocabulary is, and therefore the more likely the child will communicate using an incorrect word within his or her limited vocabulary—such as calling something “hot” which is “cold” or saying something “hurts” when it does not. Collectively, this is not a permanent incapacity. It is simply childhood. But transitory or not, it is an incapacity nonetheless. It is an incapacity that negatively impacts a child's ability to perceive, receive, store, recall, and communicate information—all essential attributes of witness competency. Consequently, without some kind of judicial determination that this incapacity is not tainting their testimony, they

are presumed to be unreliable, and therefore incompetent, witnesses. It is this second aspect of competency with which this case is concerned, and which is addressed when the term “competency” is used below.

Whether a witness is a child or not, if a witness is not competent to testify at trial, a question arises as to whether litigants should be able to introduce that witness’ “testimony” through previous out-of-court hearsay statements. This is particularly true where it is questionable whether the witness was competent at the time the out-of-court hearsay statements were made. Consequently, the long-standing rule has been that if a declarant was not competent at the time he or she made the proffered out-of-court statement, the statement is not admissible even if it is subject to a recognized hearsay exception. See Giannelli & Snyder, 1 Baldwin’s Ohio Prac. Evid. §601.7 (2006); *State v. Wallace* (1988), 37 Ohio St.3d 87, 94, 524 N.E.2d 466; *State v. Boston* (1989), 46 Ohio St.3d 108, 114-115, 545 N.E.2d 1220; *State v. Said*, 71 Ohio St.3d 473, 475-476, 1994 Ohio 402. As succinctly explained by this Court in *Said*:

As Professor Wigmore explains, *hearsay statements must meet the same basic requirements for admissibility as live witness testimony: “The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the asserter possessed the qualifications of a witness * * * in regard to knowledge and the like.”* . . . 5 Wigmore on Evidence (Chadbourn Rev. 1974) 255, Section 1424. *Competency is one of the few qualifications required of a witness.* Evid. R. 601. See, also, *State v. Boston* (1989), 46 Ohio St.3d 108, 114, 545 N.E.2d 1220, 1228. (Emphasis added).

71 Ohio St.3d at 475-476. The rule is simple and straight forward. Although “firmly rooted hearsay exceptions” have reliability based upon historical experience (see *Idaho v. Wright* (1990), 497 U.S.

805, 814-815, 111 L.Ed.2d 638; Evid. R. 803, 1980 Staff Note⁴), that reliability is based upon the presupposition that the declarant is competent at the time statement is made. *Said, supra*.

Historically, there has only been one exception to this rule. Hearsay exceptions that arise out of the common law concept of *res gestae* have been exempt from the competency requirement. These include statements currently categorized as present sense impression and excited utterance under Evid. R. 803(1) and (2). *State v. Lasecki* (1914), 90 Ohio St. 10, 12-13, 106 N.E. 660; *State v. Duncan* (1978), 53 Ohio St.2d 215, 219-222, 373 N.E.2d 1234; *Wallace*, 37 Ohio St.3d at 89, 93-95; Evid. R. 803, 1980 Staff Note). The reason offered for this historical exception was explained by this Court in *Wallace*:

To be competent, a witness must appreciate the duty to tell the truth and possess the ability to recall accurately. These requirements are not relevant to the admissibility of an excited utterance because an excited utterance is made while the declarant is dominated by the excitement of the event and before there is opportunity to reflect and fabricate statements relating to the event. The trustworthiness of the declaration (as being what the declarant actually believes to be true) derives from the lack of opportunity to fabricate, not the moral character or maturity of the declarant. (FN 11).

FN11. This is especially so in the case of children. See *Wigmore*, supra, at 223, Section 1751 (“Does the disqualification of infancy * * * * exclude declarations otherwise admissible? It would seem not; because the principal of the present exception obviates the usual sources of untrustworthiness * * * in children’s testimony; because, furthermore, the orthodox rules for children’s testimony are not in themselves meritorious * * * ; and, finally, because the oath test, which usually underlies the objection to children’s testimony, is wholly inapplicable to them * * *”).

⁴“In establishing exceptions to the hearsay rule there are two aspects that have predominated common law development. These are necessity and a circumstantial guaranty of trustworthiness surrounding the hearsay declaration that tends to assure truthfulness of the hearsay testimony despite the absence of the oath and cross-examination.”)

Similarly, the declarant's ability to recall is not an issue because of the requirement that the declaration be contemporaneous with its exciting cause or made while that cause dominates the declarant's thoughts. The credibility and weight of the declarations will, of course, still be judged by the fact finder.

37 Ohio St.3d at 94-95. This Court has held that *res gestae* is more akin to animal instinct than to current views of hearsay⁵, such that competency should not be a prerequisite to their admission, explaining:

Again, it is urged that the boy was not old enough to be a witness, and therefore his exclamation should not be admitted. But exclamations are not admitted on the ground of the legal competency of the person making them, but because they are a part or reflection of the transaction. *By the same token the growl of a dog or the neighing of a horse is also competent as res gestae.* (Emphasis added).

Lasecki, 90 Ohio St. at 20.⁶

C. CONTINUING APPLICATION OF THE TRADITIONAL RULE IN CHILD ABUSE CASES.

This Court has had the unfortunate occasion to address the foregoing evidentiary rules in a series of cases addressing child abuse from the 1970's forward. In those cases, this Court has seen described the evidentiary difficulties that can and do arise. *Duncan, supra.*; *Wallace, supra.*; *Boston, supra.*; *State v. Dever*, 64 Ohio St.3d 401, 1992 Ohio 41; *State v. Storch*, 66 Ohio St.3d 280, 1993

⁵Evid. R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(A)(1) defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion". "Assertion" is not defined by the rule. However, the plain meaning of "assertion" is "a positive statement or declaration, often without support or reason; the act of asserting." The Random House College Dictionary (1984), p. 81. "Assert" means "to state with assurance, confidence or force; affirm; to maintain or defend; to put (oneself) forward boldly and insistently." *Id.*

⁶Based upon the foregoing, it may be more accurate to categorize some historical *res gestae* as not constituting "assertions" such that they do not fall within the modern concept of hearsay at all.

Ohio 38; *Said, supra*. In *Boston*, this Court asserted:

Child abuse is a serious and growing problem in society and presents ever-increasing problems for our courts. In most instances, the only people that know the facts regarding an incident of child abuse are the victim and the perpetrator. If, due to a child's tender years, she or he is ruled incompetent to testify, and there are no objective medical signs of abuse, the state's ability to prosecute the perpetrator is severely hampered, if not rendered impossible.

* * *

[T]o prove for the protection of children in Ohio, we recommend that the Rules Advisory Committee of this court and/or the General Assembly explore the possibility of amending Evid. R. 601 and R. C. 2317.01 [footnote omitted]. Several states have already taken some action in this regard. Such amendments could be patterned after the amendments made by the states of Missouri and Utah [footnote omitted]. Under the Utah rule, "[a] child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony." [citations omitted]. Such an amendment (not limited to just sexual abuse) to Evid. R. 601 would assist our courts in resolving child abuse cases.

46 Ohio St.3d at 115. Later, in *Dever*, this Court explained:

This case presents the continuing problem of reaching just results in child abuse cases involving statements made by young children during the course of a medical examination. We must consider the admissibility of the statements at trial pursuant to the hearsay exception contained in Evid. R. 803(4). The principal dilemma arises in attempting to apply to children evidentiary rules which were drafted with adults in mind. In applying these rules of evidence to children, we encounter considerable problems in devising a reasonable and workable application.

64 Ohio St.3d at 404. Later still, in *Storch*, this Court began its analysis as follows:

A very small child may not be competent to testify in open court. If such a child is abused, the child may not be able to identify his or her attacker at a trial or tell the trier of fact what happened. Unless some other form of evidence can be presented, those who abuse children will be at liberty to do so with utter impunity. This need for admissible evidence to force those who abuse small children to face the legal consequences of the abuse pushes courts to liberalize the rules under which evidence is admitted.

Liberalizing the standards for admitting evidence in trials involving allegations of child abuse is not without risks. Not every child who says he or she has been abused has in fact been abused. Sometimes a child can be a pawn in power games and rivalries between significant adults in the child's world. Sometimes the adults are willing to believe the worst about their adult adversaries and encourage, consciously or subconsciously, stories of abuse when abuse has not occurred. Sometimes the adults refuse to believe that someone they love could do such things to a child and divert the child's accusations toward someone they dislike.

The innocent desire of small children to please the adults they encounter makes the problem more complicated still. The child may be guided less by objective standards of truth than by the desire to say what a significant adult wants to hear. For the child, "truth" can be what pleases the adult.

66 Ohio St.3d at 284-285.

Despite this Court's acknowledgment of the difficulty of the evidentiary issues in child abuse cases, *this Court has never departed from the view that in order for a hearsay statement to be admissible at trial, the declarant must have been competent at the time the statement was made* (unless the statement was *res gestae*). See *Duncan*, 53 Ohio St.2d at syllabus paragraphs one and two (holding that six year old's excited utterances were admissible at trial); *Wallace*, 37 Ohio St.3d at 93-95 (holding that five year old's excited utterances were admissible at trial regardless of presumption of incompetency); *Said*, 71 Ohio St.3d at 475-477 (holding that competency requirement also applied to Evid. R. 807).⁷ Thus, the vexing nature of child abuse cases has not caused this Court

⁷In *Boston*, *Dever* and *Storch*, the competency issue was discussed tangentially, but was not directly passed upon because of the histories of those specific cases. For instance, in *Boston*, this Court characterized the trial court's finding that the child declarant was "incompetent" as a finding that the child declarant was competent but "unavailable"—thereby avoiding exclusion of the evidence under Evid. R. 601. 46 Ohio St.3d at 113-116. In *Dever*, this Court addressed a similar record, and therefore specifically noted that its opinion was not addressing "a child's competency to testify as a witness and Evid. R. 601(A)" because such issues "are not relevant to the instant case." 64 Ohio St.3d at 406, FN 4. Finally, in *Storch*, the issues of competency and availability were simply not part of the controversy before this Court. Instead, this Court reversed the defendant's criminal conviction based upon Sixth Amendment considerations.

to alter the traditional rule. Why? Because to do so would undermine the reliability of evidence in such cases. While there are strong public policy reasons to create conditions under which child abuse offenders can be successfully prosecuted, there are equally strong public reasons to preclude prosecutors from using unreliable evidence in such cases.

D. APPLICATION OF THE TRADITIONAL RULE TO THE INSTANT CASE: THE FIVE YEAR OLD'S HEARSAY STATEMENTS ARE NOT ADMISSIBLE UNDER EVID. R. 803(4) IF THE CHILD WAS NOT COMPETENT AT THE TIME THE STATEMENTS WERE MADE.

Based upon the foregoing, both legal reasoning and controlling legal precedent firmly establish in this case that a five year old is presumed incompetent to testify, and therefore her hearsay statements are not admissible under Evid. R. 803(4) if there has been no prior determination by the trial court that she was competent at the time the statements were made. The State concedes this, but asks this Court to change Ohio law: (1) to limit the holding of *Said* to Evid. R. 807 (State's First Merit Brief, pp. 11-16, 20-25) and (2) to equate Evid. R. 803(4) with the hearsay exceptions developed under *res gestae* (*Id.*, pp. 16-20). However, for the reasons that follow, the State's request represents poor legal reasoning, poor public policy and should be rejected.

First, limiting the holding of *Said* does not solve the State's problem because *Said* simply restated a rule that has existed for hundreds of years—that is, children under a certain age are generally not competent as witnesses, and therefore litigants may not use their hearsay statements as evidence without a demonstration that the child was competent at the time the statement was made. *Lasecki, supra; Wallace, supra; Boston, supra; Giannelli & Snyder*, 1 Baldwin's Ohio Prac. Evid. §601.7 (2006). This does not change by limiting *Said*. Rather, what the State is really asking is for this Court to overrule a century of legal precedent supporting the traditional rule. However, the State

has failed to demonstrate that the overruling of this well-established, well-reasoned precedent is warranted. *See Westfield Ins. Co v. Galatis*, 100 Ohio St.3d 216, 226-231, 2003 Ohio 5849.

Second, although *Said* was specifically addressing Evid. R. 807, the rationale underlying its holding was clearly and unequivocally broader. As this Court explained:

Out-of-court statements that fall within Evid. R. 807, *like other hearsay exceptions*, possess a “circumstantial probability of trustworthiness.” See 5 *Wigmore*, supra, at 253, Section 1422. *In other words, under unique circumstances, we make a qualified assumption that the declarant related what she believed to be true at the time she made the statement. However, those same circumstances do not allow us to assume that the declarant accurately received and recollected the information contained in the statement.* [FN 1]

FN 1. *As we noted in State v. Wallace (1988), 37 Ohio St.3d 87, 94-95, 524 N.E.2d 566, 473, the circumstances involving an excited utterance make the exception sui generis with respect to requiring competency of a child declarant. See also, Boston, supra, 46 Ohio St.3d at 114, 545 N.E.2d at 1228, fn.1.*

Whether she accurately received and recollected that information depends upon a different set of circumstances, those covering the time from when she received the information to when she related it. *As a result, even though a statement falls within a hearsay exception, two elements of the declarant’s competency remain at issue and must be established.* Thus, a trial court must find that declarant under the age of ten was competent at the time she made the statement in order to admit that statement under Evid. R. 807 [citations omitted]. (Emphasis added).

71 Ohio St.3d at 476-477. Thus, this Court was equating newly enacted Evid. R. 807 hearsay exceptions with older, more established hearsay exceptions under Evid. R. 803 and Evid. R. 804. In so doing, it applied the same competency requirements and noted the same *res gestae* exceptions. This association was not accidental. In order to pass constitutional muster under the Sixth Amendment, it was necessary for Evid. R. 807 to share “the particularized guarantees of trustworthiness” of “firmly rooted hearsay exception[s].” Consequently, this Court equated Evid.

R. 807 with its older predecessors—subjecting it to the same historical competency requirements. Cases which suggest that *Said* should be limited Evid. R. 807 have willfully turned a blind eye to this analysis in order to justify the admission of otherwise inadmissible evidence.⁸ To this end, the State’s appeal in this case presents this Court with an opportunity to firmly stamp out such results-oriented sophistry in favor of the traditional rule.

Third, there is no legal justification for imposing the limitations demanded by the State. Eliminating the foregoing requirement would undermine the legitimacy of the judgments of Ohio courts. The traditional rule is one of reliability and is needed to guaranty the truth ascertainment goal of cases before Ohio courts. While triers of fact are certainly capable of sorting through all kinds of evidence, there is some evidence that has no business being considered by the trier of fact because it has no demonstrated indicia of reliability. *See eg. Valentine v. Conrad*, 110 Ohio St.3d 42, 2006 Ohio 3561, at ¶¶17-23 (holding that testimony from even eminently qualified scientific experts is not admissible if lacks basic scientific reliability); Evid. R. 901 (requiring authentication of documents before admissibility); Evid. R. 1001 *et seq* (governing the admissibility of duplicate documents). It is the duty of the trial court to keep such unreliable evidence from consideration by the trier of fact, and to ensure that any verdict is rendered only upon reliable evidence. The State has failed to demonstrate that reliability can be preserved if the hearsay statements of incompetent witnesses are made admissible.

Fourth, there is no practical justification for the limitations demanded by the State. The requirement of a competency determination before a five year old’s hearsay statements can be

⁸The State’s argument that several lower court decisions in Ohio are “in conflict with *Said*” should also be unpersuasive. If these lower court decisions are truly “in conflict” with *Said*, then they are void.

admitted does not impose an onerous burden upon the prosecution in child abuse cases. Indeed, in *Storch*, this Court expressly mandated a similar pre-trial hearing regarding child declarants' "availability," explaining:

We hold that the determination of a child declarant's availability is best made at a pretrial proceeding. Evid. R. 807 contemplates that a pretrial hearing will be conducted at which time the ability of the child to testify should be addressed and initial determination as to the admissibility of the child's statements should be made. This would allow both parties to prepare for trial in accordance with the trial court's ruling. A pretrial hearing would also permit an interlocutory appeal if the trial court's ruling on the child's availability and/or admissibility of the child's extrajudicial statements so hinders the state's evidence that the state cannot proceed with its case. (Emphasis added).

66 Ohio St.3d at 293. As such a hearing would generally be required for other purposes, it would allow determination of whether the child's statements were reliable evidence and would only impose a de minimis burden on the prosecution, it is questionable whether there are any countervailing interests with sufficient weight to justify obviating the requirement of a pretrial competency hearing.

Finally, there is no justification to treat Evid. R. 803(4) in a manner similar to the *res gestae* hearsay exceptions. As previously explained, present impressions and excited utterances have historically been considered exempt from the competency requirement on the basis that there is no reflective process involved in such statements. Modern psychology and psychiatry may disagree, but this issue is not squarely before this Court.⁹ What is before this Court is the State's assertion that Evid. R. 803(4) should equated with the *res gestae* hearsay exceptions as to be exempt from the competency requirement of Evid. R. 601. However, this assertion is unsupported.

⁹If a child's mental, emotional and intellectual immaturity render a child incapable of properly inputting and reacting to his or her environment, it is questionable whether the child's excited utterances or present sense impressions have the requisite degree of reliability as to justify exemption from the competency requirement. However, this is an issue for another day.

The 1980 Staff Notes to Evid. R. 803(4) provide, in pertinent part:

The circumstantial guaranty of trustworthiness of this exception is derived from the assumption that a person will be truthful about his physical condition to a physician because of the risk of harmful treatment resulting from untruthful statements.

* * *

The exception is limited to those statements made by the patient which are reasonably pertinent to an accurate diagnosis and should not be a conduit through which matter of no medical significance would be admitted.

This expressly indicates a reflective aspect to this category of statement. This reflective aspect was examined in *Boston*, where this Court explained that it had “serious reservations” about whether Evid. R. 803(4) should ever be applicable in cases “where the child involved is of tender years” because in order to be admissible under Evid. R. 803(4), the child’s statement must have been motivated by her desire for medical diagnosis or treatment—an inherently reflective process. 46 Ohio St.3d at 120-124. Three years later, in *Dever*, this Court limited strict application of the motivational requirement of Evid. R. 803(4), and alternatively held that “when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Evid. R. 803(4) are present.” 64 Ohio St.3d at 412. Thus, this Court mandated that the trial court undertake an “analysis of the circumstances surrounding the examination of a child . . . to determine whether the child understood the need to be truthful to the physician.” *Id.* That is, the trial court was required to analyze the reflective thought processes of the child to determine if the motivational requirement could be demonstrated by circumstantial evidence. Finally, a year later, in *Storch*, this Court further explained:

A common practice in prosecution of child abuse cases is to take a child to a medical practitioner, at least in part to obtain evidence for purposes of subsequent prosecution.

* * *

Cross-examination of a child making a statement to a physician could in fact enlighten the trier of fact in many circumstances. **A small child's statement to a physician previously unknown to the child is not automatically more reliable than the child's statement to any stranger if the child is too young or otherwise unable to appreciate the benefits of telling the truth to assist the physician in diagnosis or treatment.** *Knowing why the child made the statement and the circumstances surrounding the giving of the statement could be extremely important and would in most circumstances assist the trier of fact.* (Emphasis added).

66 Ohio St.3d at 291. As a preliminary matter, this Court made clear that a child's statement to a physician has no inherent indicia of reliability. This is philosophically consistent with the incompetence of the child as a witness. Moreover, conspicuously lacking from the foregoing was any suggestion that Evid. R. 803(4) shared the lack of reflective thought attributed to *res gestae*. Indeed, this Court's insistence that the trial court examine the circumstances surrounding the child's statements to determine if there is circumstantial evidence of the motivational requirement is in fact an insistence that the child's thought processes at the time the statements were made be evaluated. This analysis is directly analogous to the determination of competency required for hearsay exceptions. Although neither *Boston* nor *Storch* directly addressed the competency requirement in direct relation to Evid. R. 803(4), their analysis did not indicate an intent to depart from the traditional rule and, in fact, was consistent with historical justifications for the traditional rule requiring competency of the hearsay declarant.

Thus, there is no legal, philosophical or practical justification to adopt the State's position in this case. Accordingly, it should be categorically rejected, and the Third Appellate District should be affirmed with respect to its ruling as to Evid. R. 803(4).

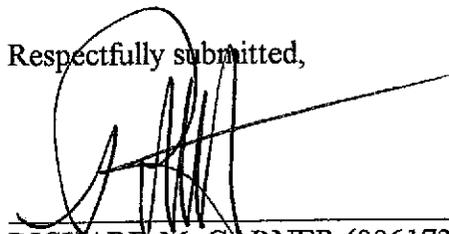
CONCLUSION

Long-standing Ohio law designed to protect the reliability of evidence brought before Ohio's tribunals holds that a hearsay declarant must be competent when an out-of-court statement is made in order for that statement to be admissible as evidence. This rule applies whether the proceedings are civil or criminal. It applies whether the proceedings relate to child abuse or a car accident. It applies whether the hearsay is offered by a prosecutor, a plaintiff or a defendant. It applies whether the hearsay declarant is a child or an adult. It has one recognized exception—hearsay statements that fall with the traditional *res gestae* category are exempt because there is no reflective thought process that occurs with respect to such statements.

The State now seeks to change that long-standing law so that it can obtain a third consecutive life sentence against Muttart—who is currently serving two consecutive life sentences on related charges. As explained above, there is no justification for changing Ohio law in this case. To the contrary, there are strong public policy reasons to reject a change. The most important of which is that adoption of the State's position would invite the introduction of unreliable evidence into Ohio

courtrooms. This would undermine pursuit of justice and the truth ascertainment functions of the Rules of Evidence.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. M. Garner', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

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CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail on this 15th day of January,

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