

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO,
Appellant,**

v.

**DORON C. SILVERMAN
Appellee.**

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**CASE NO. 2008-0582
Court of Appeals Case No. 22097**

**On Appeal from the Montgomery
County Court of Appeals, Second
Appellate District**

**APPELLEE'S MEMORANDUM IN OPPOSITION TO APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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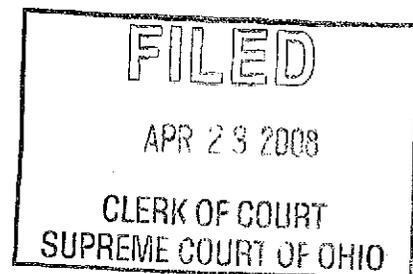


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I. EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

A jury found Silverman guilty of gross sexual imposition. The court sentenced him to the maximum five years in prison and designated him as a sexual predator. The Second District Court of appeals reversed his conviction on February 15, 2008. The State moved for Stay of Execution of Judgment and to Certify a Conflict on February 19, 2008. The Motion to Certify argued that the Second District's decision is in conflict with the holdings of the Fourth District Court of Appeal's holding in *State v. Meadows*, (February 12, 2001), *Scioto App. No. 99CA2651*, 2001 Ohio 2510. The Second District disagreed and refused to certify a conflict stating that the *Meadows* court simply ignored the mandatory precedent established by the Supreme Court of Ohio in *Said*. The state then filed this appeal.

The State of Ohio now requests this Court to reverse its long-standing and well-reasoned holdings concerning the admission of hearsay statements pursuant to *Evid.R. 807*. The state specifically requests this Court to overturn the precedent established in *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337, and *State v. Wilson* (1952), 156 Ohio St. 525, 103 N.E.2d 552. The state's request to overturn well-established and well-reasoned precedent should be denied. The issue in this matter is what *Evid.R. 807* requires before a twelve-year-old child's out-of-court statement that describes a sexual abuse may be admitted into evidence. *Said* correctly established the law. It held that the trial court must conduct an in person competency hearing before the statements concerning sexual abuse of a child under ten may be admitted pursuant to *Evid.R. 807*. The *Said* Court soundly reasoned that the Rules of Evidence and the long standing and followed precedent of *Wilson* demand this procedure.

The *Said* Court correctly stated that, "Competency is one of the few qualifications required of a witness." *Said*, 71 Ohio St.3d at 476. *Evid.R. 601(A)* provides that: "Every person is

competent to be a witness except: (A) 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 rule requires that a competency hearing be conducted with regard to children under ten years of age.” *Said*, 71 Ohio St.3d at 476. *Said* reached this conclusion by applying the precedent in *Wilson*, and this Court recently reaffirmed that reasoning in *State v. Muttart* (2007), 116 Ohio St.3d 5, 875 N.E. 2d 944.

The state now seeks to reverse valid precedent to achieve its end. “[T]he doctrine of stare decisis is of fundamental importance to the rule of law.” This Court stated in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 797 N.E. 2d 1256, that, “Like the United States Supreme Court, we recognize that our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. But any departure from the doctrine of stare decisis demands special justification.” *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 752 N.E.2d 962. *Said* is well-reasoned precedent that should not be changed. This is not a matter of public or great general interest and leave to appeal should not be granted.

II. IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW NUMBERS ONE AND TWO (addressed together and as formulated by Appellant below):

- 1. Admissibility under Evid.R. 807 does not require a competence determination in addition to the analysis required by the evidence rule.**
- 2. Where the testimony of a child declarant under the age of ten is not reasonably obtainable by the proponent of the statement because of the child's death or then existing mental health or infirmity, the proponent of the evidence may prove the child's competence by extrinsic evidence of his ability to receive and recollect just impressions of fact and to relate them truly.**

Said remains good law. "The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." *Westfield Ins. Co.*, 100 Ohio St.3d at 226, citing *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103. "[A] prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co.*, 100 Ohio St.3d at 228. The application of *Westfield Ins. Co.*'s test to the rule established in *Said* does not support diversion from long standing precedent.

Said was well-reasoned in conjunction with the Confrontation Clause and the precedent of *Wilson*. A child's out-of-court statements concerning sexual abuse cannot stand alone to determine the competency of a four year old. *Evid.R.* 601(A) provides generally that "[e]very person is competent to be a witness except: ... children under ten years of age, who appear

incapable of receiving just impressions of facts and transactions respecting which they are examined, or of relating them truly.” This Court in *Said*, 71 Ohio St.3d 473, established the rule of law concerning the admission of statements pursuant to *Evid.R.* 807, while at the same time bolstering the fifty-six year old precedent of *Wilson*, 156 Ohio St. 525. This Court succinctly summarized *Said* in *Muttart*, 116 Ohio St.3d at 10-1. It stated:

“In *Said*, we stated that “[a] competency hearing is an indispensable tool” and that “[a] court cannot determine the competency of a child through consideration of the child’s out-of-court statements standing alone.” 71 Ohio St.3d at 476, 644 N.E.2d 337. Citing our prior decision in *State v. Wilson* (1952), 156 Ohio St. 525, 532, 46 O.O 437, 103 N.E.2d 552, we reiterated that “the essential questions of competency can be answered only through an in-person hearing” in which the court can consider the child’s appearance, fear, composure, general demeanor and manner of answering. *Id.*”

The *Muttart* Court also explained the constitutional justification for establishing this rule and the “fundamental differences between *Evid.R.* 807” and other hearsay exceptions. It stated:

“The test contained in *Evid.R.* 807 has a purpose different from the test discussed here [for *Evid.R.* 803(4)]. *Evid.R.* 807’s ‘totality of the circumstances’ test is designed specifically with the Confrontation Clause requirements in mind. See Staff Notes to *Evid.R.* 807. On the other hand, the test under 803(4) goes solely to whether the statement was made for purposes of medical diagnosis or treatment. If a statement *is* made for purposes of diagnosis or treatment, it is admissible pursuant to *Evid.R.* 803(4).” (Emphasis added.)” *Muttart*, 116 Ohio St.3d at 12, citing *State v. Dever* (1992), 64 Ohio St.3d 401 at 414, 596 N.E.2d 436.

Said provided detailed reasoning on the difference between 807 and other hearsay exceptions. It stated:

“Out-of-court statements that fall within *Evid.R.* 807, like the other hearsay exceptions, possess a “circumstantial probability of trustworthiness.” 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. Whether she accurately received and recollected that information depends upon a different set of circumstances, those covering the time from when she received the

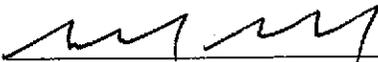
information to when she related it. As a result, even though a statement falls within a hearsay exception, two elements of the declarant's competency remain at issue and must still be established. Thus, a trial court must find that a declarant under the age of ten was competent at the time she made the statement in order to admit that statement under *Evid.R. 807.*" *Said*, 71 Ohio St.3d at 476, (citations omitted).

A court must conduct an in-person hearing to determine whether a child correctly received and recollected the information to which he speaks. This interview is necessary to determine the trustworthiness of the child's statement. Accordingly, *Said* and *Wilson* were correctly decided. The state's proposition that this mechanism be disregarded in cases involving a child's death ignores clear and rational thought.

The state seeks to admit incriminating child testimony through extrinsic evidence, more than likely through a relative whom is unsympathetic to the defendant, in a criminal trial without the benefit of cross-examination. Essentially, the state argues that somehow a child's statement becomes more reliable upon his death. This proposition provides much greater leeway for the admissibility of a decedent's statements than *Evid.R. 804(B)(5)(statement by a deceased or incompetent person)*. This rule permits only a statement made by a deceased person to be admitted for the purpose of rebutting "testimony by an adverse party on a matter within the knowledge of the decedent..." *Evid.R. 804(B)(5) (July 1, 2001)*. *Said* does not hinder prosecution anymore than suppressing evidence and statements illegally obtained in violation of the *Fourth and Fifth Amendments* thwarts a criminal prosecution. *Said* protects an accused from prosecution based on unreliable hearsay statements, even in unfortunate cases such as this.

III. CONCLUSION

Application of the *Westfield Ins. Co.* factors to *Said* does not warrant reversal of its established and well-reasoned precedent. This Court should decline to hear the state's appeal.

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CERTIFICATE OF SERVICE

Counsel for the Defendant-Appellant hereby certifies that a copy of the forgoing was hand delivered to the Prosecuting Attorney, Second Appellate Division, 301 West Third Street, 5th Floor, Dayton, Ohio 45422, on the date the same was filed.

Respectfully submitted,

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