IN THE SUPREME COURT OF OHIO

STATE OF OHIO	**CASE NO. 08-582**
Plaintiff-Appellant,	**ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT**
vs.	
DORON C. SILVERMAN	**COURT OF APPEALS CASE NO. 22097**
Defendant-Appellee.	

APPELLANT'S MERIT BRIEF

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STATEMENT OF THE FACTS

Sexual Abuse Disclosed

On Memorial Day weekend in 2006, Doron Silverman and his family, which included his wife, Heather, his four-year-old son, M. S., and his baby daughter, K. S., traveled to Indianapolis, Indiana to visit relatives. (Tr. 592) They arrived at the home of Silverman's parents, Martin and Deann, on Friday evening while his parents were eating dinner with Silverman's sister, Batya Silverman, and two of her friends. (Tr. 592-593) After dinner ended, Batya and her friends walked back to her nearby apartment; M. S. went with them, and he spent the next two nights with Batya. (Tr. 593-595; 598)

On Saturday, Batya and her friends took M. S. swimming at the apartment complex pool. (Tr. 595) They all returned to Batya's apartment around 2:00 p.m., and Batya decided to give M. S. a bath. (Tr. 595-596) In the bathroom, as Batya undressed M. S. he pulled on his penis, which M. S. called his "pee pee," pointed to it, and said "Poti,[1] put your mouth on it." (Tr. 596) Shocked at M. S.'s suggestion, Batya called her boyfriend, Joe Farber, into the bathroom and told him what M. S. had said. (Tr. 597) Joe asked M. S., "Why did you say that to Aunt Bati?" Id. M. S. did not respond but simply looked down at the floor. Id. Joe asked M. S. if he had ever seen that behavior in a movie or on television, and M. S. said that he had not. Id. Joe then asked M. S. if he had ever seen his mommy and daddy doing that, and M. S. said that he had not. Id. Finally, Joe asked M. S. where he learned that, and M. S. said, "Daddy did it; no more talk." Id. Batya and Joe said nothing more about the incident for the remainder of that day. (Tr. 597-598)

On Sunday afternoon, Batya and Joe spoke to M. S. again about what he said the day

[1] The family's nickname for Batya was "Bati," which M. S. pronounced, "Poti." (Tr. 592)

before in the bathroom. (Tr. 599) Batya made lunch for M. S. and also gave him a notebook and some markers to color with. Id. She then began by asking M. S. if he remembered asking her to put her mouth on his pee pee the day before, and M. S. said that he did remember. Batya repeated Joe's questions from Saturday as to whether M. S. had seen that kind of behavior in a movie or on television and whether he had seen his parents doing it, and M. S. again responded negatively. (Tr. 600) Batya then asked M. S., "Do you do it to daddy, too?" and M. S. responded, "Yes." Id. She asked M. S. what he did to daddy's pee pee, but M. S. did not answer her. So, she asked him, "Do you kiss it?" at which point M. S. said, "No, I lick it." Id. Joe asked M. S. if anyone else had ever done that to him, to which M. S. replied, "No, just daddy." Id. When Joe asked M. S. if this was a secret, M. S. said, "Yes, no more talk." Id. Batya then assured M. S. that she loved him and that he could tell her anything without getting into trouble, but M. S. replied, "No, I do get in trouble." Id. Throughout this conversation, M. S. was stabbing the notebook paper with his marker. (Tr. 609)

Shortly after the Sunday afternoon conversation Batya and Joe had with M. S., Deann Silverman arrived to drop off Batya's friend, Olivia Landi, at the apartment. Batya went outside, got into her mother's car, and told Deann what M. S. had said. (Tr. 601) Deann suggested that Batya return home with her so they could figure out what to do. After making sure that Olivia and Joe could stay with M. S., Batya left with her mother. Id. Eventually, Silverman and Heather returned to his parents' home from the Indianapolis 500 race, which they had attended that day. (Tr. 602) Silverman was confronted with M. S.'s statements by his family. (Tr. 603-604) At one point, Heather asked Silverman if he had done something to M. S., and Silverman "responded by saying that maybe he did, that he didn't remember these things." (Tr. 604)

Silverman also spoke of having to quit his job at Chuck E. Cheese because, "it would be too much of a temptation for him to work there." Id.

The Silverman family did not immediately report M. S.'s statements to the police but, instead, decided to keep M. S. and K. S. away from Silverman temporarily while he sought counseling. (Tr. 611-613) The children were to go first to stay for one week with Silverman's biological mother, Cindy Rottinghouse, after which they were to be brought back to stay with Martin and Deann Silverman in Indianapolis for ten days. (Tr. 611-612) Batya later learned that Rottinghouse had returned the children to Silverman and Heather, rather than allowing Martin and Deann to take care of them as planned. (Tr. 614-615) So, she called Children Services in Montgomery County, Ohio, where M. S. lived with his parents and sister in West Carrollton, to report the suspected sexual abuse. (Tr. 615)

Police Interview the Silvermans

On June 12, 2006, Detective Robert Bell of the West Carrollton Police Department was assigned to investigate the alleged sexual abuse of M. S. (Tr. 671-672) Detective Bell made arrangements with Heather to interview her and Silverman the following day at the police department. (Tr. 673-675) The interviews were conducted by Detective Bell and his partner, Detective Allison. While speaking with the detectives, Silverman told them about how he would take off his clothes when he got home from work and put on a robe that he sometimes left untied. (Tr. 684-685) Silverman recounted one occasion when he had left his robe untied that M. S. came up to him and pulled on Silverman's penis. (Tr. 685)

He also told the detectives about family bath time when he bathed with M. S. and Heather. Silverman claimed that M. S. would use him as a jungle gym. (Tr. 684-685) Silverman would usually lie back rather than sit up straight when M. S. climbed on him. (Tr.

686) Silverman admitted that he had an erection on several occasions when he was in the bathtub. (Tr. 685) On one occasion, according to Silverman, M. S. grabbed Silverman's penis, so Silverman, in turn, grabbed M. S's penis. (Tr. 685) Another time, M. S. purportedly bit Silverman's penis while it was erect. (Tr. 686) When asked if he ever kissed M. S.'s penis, Silverman said, "[W]ell, not intentionally." (Tr. 686) At first Silverman would not elaborate on that answer but eventually said, "[W]ell maybe when I was playing, his penis brushed across my mouth." Id.

Detective Bell asked Silverman how many times he had had his mouth on M. S.'s penis, and Silverman said two or three times for about a second. (Tr. 687) Silverman admitted that one time he had M. S.'s penis in his mouth for sexual gratification, but he was interrupted. Id. When asked what was going through his mind, Silverman answered, "[W]hen I had [M. S.'s] penis in my mouth, I spit it out…it really pissed me off...but I continued to fondle [M. S.'s] penis to see if he would get an erection." Id. Silverman said that M. S. did get an erection and that was the last time that he ever wanted to see M. S. naked or give him a bath because he would "always get those thoughts in my head of [M. S.] getting an erection." Id. Detective Bell voiced his concern about Silverman working for Chuck E. Cheese, and Silverman said, "[Y]eah, it really pisses me off seeing those young girls wearing next to nothing and I begin to get those thoughts in my head." (Tr. 688)

At trial, Silverman Denied Abuse

For his part, Silverman testified at trial that he never sexually abused M. S. (Tr. 806) Silverman claimed that he made his written statement on June 13, 2006 only because he felt that he had no choice since the detectives would not allow him to leave the interview unless he wrote out a statement. (Tr. 807-808) Silverman further claimed that Detective Bell lied during his trial

testimony, meaning that he (Silverman) did not make many of the statements Bell testified about. (Tr. 837-838)

ARGUMENT

Proposition of Law No. I:

Admissibility under Evid.R. 807 does not require a competence determination in addition to the analysis required by the evidence rule.

Introduction

The long-revered doctrine of stare decisis is "designed to provide continuity and predictability in our legal system." *Westfield Insurance Company v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, 797 N.E.2d 1256, at ¶43. Adherence to stare decisis is "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 Insurance Company*, at ¶43, citation omitted. Nevertheless, "a supreme court not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors." *Westfield Insurance Company*, at ¶43, citations omitted. A prior decision of this Court may be overruled where: 1) the decision was wrongly decided at that time, or changes in the 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, meaning, "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Westfield Insurance Company*, at ¶48 and ¶58, citation omitted.

In this case, the state urges this Court to abandon its previous holding that statements made by a child under the age of ten may only be admitted under Evid.R. 807 if the trial court

conducts an in-person Evid.R. 601 competence hearing with the child and finds the child was competent to be a witness when the statements were made. *State v. Said* (1994), 71 Ohio St.3d 473, 476-477, 644 N.E.2d 337.

***Said* Was Wrongly Decided**

The *Said* case involved sexual abuse of two girls, one of whom was five years old at the time of trial. Although the trial court determined the five-year-old was competent under Evid.R. 601, the hearing was not recorded. *Said*, at 473-474. At trial, the five-year-old refused to testify; after an extensive hearing, the court found the requirements of Evid.R. 807 were met and admitted the child's statements through the testimony of other witnesses. Said was convicted of two counts of gross sexual imposition, one count relating to each girl. *Said*, at 473-474. The Lake County Court of Appeals reversed Said's convictions, however, on a finding that all requirements of Evid.R. 807 were not met. This Court granted both parties leave to appeal.

In the *Said* opinion, a majority of this Court held that Evid.R. 807 does not dispose of the need to find a child competent under Evid.R. 601. *Said*, at 476. To reach that conclusion, the majority determined that Evid.R. 807 statements must be treated differently than other hearsay exceptions, like the excited utterance, which is admissible regardless of the competence of the declarant because the circumstances involved in the making of an excited utterance guarantee its trustworthiness. *Said*, at 476-477, n. 1, citing *State v. Wallace* (1988), 37 Ohio St.3d 87, 94-95, 524 N.E.2d 466. Thus, according to *Said*, the trial court must find that a declarant under the age of ten was competent at the time he made the out-of-court statement in order to admit the statement under Evid.R. 807. *Said*, at 477. This Court also noted that a "court cannot determine the competency of a child through consideration of the child's out-of-court statements standing alone," but must conduct an in-person hearing with the child. *Said*, at 476, citation omitted.

Application of *Westfield Insurance Company* test to *Said* demonstrates that it should now be abandoned.

The rigorous test for admission set forth in Evid.R. 807 obviates the need for an additional competence determination. Evidence Rule 807(A) provides that an out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child is not excluded as hearsay under Evid.R. 802 if: 1) The court finds the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statements at least as reliable as statements admitted under Evid.R. 803 and 804, the circumstances establish the child was particularly likely to be telling the truth when the statement was made, and the test of cross-examination would add little to the reliability of the statement; 2) The child's testimony is not reasonably obtainable by the proponent of the statement; 3) There is independent proof of the sexual act; and 4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. Evid.R. 807(A)(1)

The majority in *Said* ignored the fact that Evid.R. 807 requires the trial court to find that the circumstances surrounding the making of the statement provide "particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804," and that "[t]he circumstances must establish that the child was particularly likely to be telling the truth when the statement was made." Evid.R. 807(A)(1). Guarantees of trustworthiness and reliability of out-of-court statements, if established, eliminate the need for an additional finding of the child declarant's competence at the time the statements were made. See, *Said*, 71 Ohio St.3d 479-480 (Resnick, J., concurring in part and dissenting in part); *Wallace*, 37 Ohio St.3d at 94-95; *State v. Muttart*, 116 Ohio St.3d 5, 2007 Ohio 5267, 875 N.E.2d 944, at ¶31 - ¶50. Consequently, to the extent *Said* held that statements under Evid.R. 807 should be treated differently than excited utterances and, as recently decided, differently than statements for medical diagnosis or treatment, even when the Evid.R. 807 statements are equally trustworthy and reliable, it was wrongly decided.

Moreover, this Court's holding in *Said* that an in-person competence hearing must be held before Evid.R. 807 statements may be admitted flies in the face of Evid.R. 807(B)(3), which provides that the child declarant's testimony is "not reasonably obtainable by the proponent of the statement" when the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity." See, *Said*, 71 Ohio St.3d 480 (Resnick, J., concurring in part and dissenting in part). In essence, the holding of *Said* gutted Evid.R. 807(B)(3). And, in cases where the child declarant is deceased and cannot be brought to court for a competence determination, *Said* makes it impossible to prosecute child sex abuse when the evidence consists of Evid.R. 807 statements plus inculpatory admissions from the defendant. For that reason, *Said* was wrongly decided.

Finally, the state acknowledges that this Court recently discussed *Said* at some length and distinguished Evid.R. 807's test for trustworthiness from the trustworthiness of Evid.R. 803(4) statements in *Muttart*. However, the issue before the Court in *Muttart* was not whether *Said* was wrongly decided and therefore *Muttart* is not controlling in this case. To the extent that the opinion in *Muttart* appears to have approved *Said*, it should now be limited.

***Said* Defies Practical Workability**

The lack of uniform application of the *Said* case in the lower courts shows that it defies practical workability. The Ninth District Court of Appeals has at various times affirmed convictions based in part upon Evid.R. 807 statements without requiring a competence determination and has also reversed convictions for the lack of a competence finding prior to admission of Evid.R. 807 statements. See, e.g., *City of Akron v. Deem* (1999), 135 Ohio App.3d 523, 734 N.E.2d 877; *State v. Stuart* (Apr. 4, 2001), Summit App. No. C.A. NO. 20111, 2001 Ohio App. LEXIS 1566. The Fourth District Court of Appeals has expressed reservations about *Said* even when applying it and has also refused to apply *Said* in a case involving a deceased child declarant. *In re: Shamblin* (Sept. 8, 1998), Ross App. Nos. 97CA 2347 and 98 CA 2400, 1998 Ohio App. LEXIS 4263; *State v. Meadows* (Feb. 2, 2001), Scioto App. No. 99CA 2651, 2001 Ohio App. LEXIS 3120.

Despite its prior ruling in *State v. Cardosi* (1997), 122 Ohio App.3d 70, 701 N.E.2d 44, certification of conflict dismissed (1998), 83 Ohio St.3d 1206, 698 N.E.2d 1003 that the testimony of a child declarant who is not competent qualifies as "not reasonably obtainable" for purposes of Evid.R. 807(B)(2), the Second District Court of Appeals made the somewhat contradictory decision to reverse Silverman's conviction for the reason that *Said* requires a competence finding. And the trial court in this case deemed M. S.'s statements to his Aunt Batya

trustworthy and reliable such that they were admissible under Evid.R. 807, even though M. S. could not be brought into court for an in-person competence hearing.

Furthermore, the *Said* case defies practical workability in cases like the one now before this Court where prosecution is based upon Evid.R. 807 statements of a deceased child under the age of ten, plus inculpatory statements by the defendant. Under *Said*, the state's inability to produce the child declarant for a competence hearing necessarily prevents prosecution in this case.

Abandoning *Said* Would Not Create Undue Hardship

As stated above, this Court must ask whether the *Said* decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations. *Westfield Insurance Company*, at ¶58, citation omitted. The lack of uniform application of *Said* in the lower courts demonstrates that the *Said* decision has not reached that status. And certainly the only reliance interest that might be jeopardized by overturning *Said* is the reliance of sexual offenders that target very young children and mentally disabled children who are not competent to testify in the hope of preventing prosecution.

Recent Rejection of Competence Requirement For Admissibility of Child-Victim Hearsay

In 2003, the Supreme Court of Washington considered the question of whether the State must establish the testimonial competence of a child declarant at the time his statements were made to gain admission of those statements under RCW 9A.44.120 when the child declarant is later found incompetent to testify at trial. *State v. C. J.* (2003), 148 Wn.2d 672, 63 P.3d 765. The three-year-old victim in *C. J.* reported to his parents that his thirteen-year-old cousin sexually abused him when the parents noticed that the tip of the child's penis was swollen and

asked him about it. *C. J.*, at 676. During a subsequent examination by the child's pediatrician, the doctor observed the remnant of the child's circumcised foreskin was swollen and filled with fluid. *C. J.*, at 677. The doctor noted that the physical trauma was consistent with repeated mechanical stimulation of the child's penis through rubbing or masturbation. Id.

The child's cousin was charged as a juvenile with one count of first-degree child molestation. Following a hearing to determine whether the child-victim was competent to testify at trial, the court determined he was unable to characterize the difference between truthful and false statements and unable to express a memory of the incident in words. *C. J.*, at 678. Thus, the trial court found the victim was incompetent to testify and unavailable for purposes of RCW 9A.44.120. Id.

The Washington statute governing the admissibility of a child-victim's hearsay statements provides that a statement made by a child under the age of ten describing any act of sexual contact performed with or on the child by another person is admissible if: 1) the court finds that the time, content, and circumstances of the statement provide sufficient indicia reliability; and 2) the child either testifies at the proceedings or, if unavailable to testify, there is corroborative evidence of the act. *C. J.*, at 680. The statute further requires the proponent of the out-of-court statement to make known to the adverse party the intention to offer the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. Id.

Ultimately, the trial court in *C. J.* found there were sufficient indicia of reliability to support the child-victim's statements and that the hearsay statements were corroborated by the pediatrician's findings. After a bench trial during which the victim's hearsay statements were admitted into evidence, the defendant was found guilty. *C. J.*, at 678-679.

On appeal, the intermediate appellate court reversed, holding that the trial court abused its discretion in admitting the victim's hearsay statements because the evidence did not show the child was competent at the time the statements were made. *C. J.*, at 679. The State sought review in the Supreme Court of Washington as there were conflicting decisions among the various courts of appeals as to whether a showing of testimonial competence at the time the child-victim made the hearsay statements was required for admission of those statements under the applicable statute. The Supreme Court of Washington reversed the court of appeals and held "that the proponent of a hearsay statement from a child abuse victim who is unavailable to testify at trial due to incompetency need meet only the statutory requirements of RCW 9A.44.120, and that no additional showing of competency at the time of the hearsay statement is required." *C. J.*, at 675.

Relying upon the plain language of the statute, the Supreme Court of Washington noted it was clear that the legislature did not intend to exclude the hearsay statements of a child who is incompetent to testify, so long as the statute's requirements of reliability and corroboration are satisfied. *C. J.*, at 684. Furthermore, the Court held, if the legislature had intended to require an additional finding that a child declarant understood the difference between a truthful statement and a false statement at the time the statement was made the statutory language would have included that requirement. *C. J.*, at 684-685. The Supreme Court concluded that, in cases where there is some evidence of whether the child-victim was competent at the time the hearsay statement was made, that evidence may be considered as part of the totality of the circumstances indicating reliability. *C. J.*, at 685. But, "[t]his does not mean that a determination of competency must be made as of the time of the statement, nor does it mean that the inability to distinguish between truth and lies alone ends the inquiry." Id.

The Trial Court's Ruling That M. S.'s Statements Were Admissible Should Have Been Affirmed

The admission of evidence is a matter left to the discretion of the trial court. The term abuse of discretion means more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, at ¶129-¶130. Abuse of discretion means "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Hancock*, at ¶130, citation omitted. Other cases define the term "a view or action that no conscientious judge, acting intelligently, could honestly have taken." Id, citations omitted.

During the Evid.R. 807 hearing on November 3, 2006, Batya Silverman's testimony was similar to her trial testimony. M. S. stayed with his aunt, Batya, at her apartment during the Memorial Day Weekend visit to Indianapolis. (Tr. 121, 125) On Saturday, May 27th, Batya took M. S. to the apartment complex swimming pool for two hours in the afternoon. (Tr. 122) When they returned to Batya's apartment, she prepared to give M. S. a bath. (Tr. 123) As she undressed M. S. for his bath, M. S. pointed to his penis, which he called his "pee pee," and said, "Poti, put your mouth on it." (Tr. 123-124)

Shocked by M. S.'s suggestion, Batya called her boyfriend, Joe Farber, into the bathroom and told him what M. S. had said to her. (Tr. 124) Farber asked M. S. why he said that to Aunt Bati, but M. S. did not respond. He then asked M. S. if he had seen that while watching a movie, and M. S. said, "No." (Tr. 124) The next question Farber asked M. S. was whether he had seen his parents doing that, and M. S. said, "No." Id. Finally, Farber asked M. S. where he learned that, and M. S. said, "Daddy did it. No more talk." Id.

The next afternoon, Batya and Farber broached the subject with M. S. again. Batya first asked M. S. if he recalled what they talked about in the bathroom the day before, and M. S. said,

"Yes." (Tr. 127-128) Batya then asked questions similar to those Farber had asked M. S. the day before. Again, M. S. said that he had not seen that type of behavior in movies that he watched, and, when asked, M. S. listed the names of children's movies that he had watched. Id. Also, M. S. denied again that he had seen his parents engaging in the type of behavior he suggested to his aunt. M. S. again declared that "Daddy had done it." Id. Batya asked M. S. if he did it to daddy, too, and M. S. said, "Yes." (Tr. 128) M. S. did not respond to Batya's next question, "What do you do to daddy's pee pee?" Id. So, Batya asked, "Do you kiss it?" M. S. replied, "No, I lick it." Id.

At that point, Farber asked M. S. if anyone else had done that to him, and M. S. replied that only his father had done it. When Farber asked M. S. if it was a secret, M. S. said, "Yes, no more talk." (Tr. 128) Batya assured M. S. that he could tell her anything without fear of getting into trouble, but M. S. disagreed saying, "No, I do get in trouble." Id.

Batya Silverman acknowledged in her testimony during the Evid.R. 807 hearing that M. S. had some trouble speaking and that he was still developing emotionally and physically. She insisted, however, that "if you would sit and really spend some time having a conversation with [M. S.], he could follow and he could give proper and appropriate answers." (Tr. 143-144) Batya and Farber did not ask M. S. outright if his father had done the behavior M. S. urged Batya to do on Saturday, May 27th; she only asked M. S. if he had also done that to his father after M. S. first said that his father had done it to him. (Tr. 147)

In his written decision of December 11, 2006, the trial judge determined that there were particularized guarantees of trustworthiness that made M. S.'s statements at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. Judge Hall also found that M. S. was four years old when he made the statements about sexual acts being performed on him by his father

and that M. S.'s testimony was not reasonably obtainable because M. S. was deceased. Thus, the court ruled that M. S.'s statements to Batya Silverman and Joe Farber were admissible at trial. (Decision, 12/11/06, pp. 4-7) The trial court judge did not abuse his discretion in ruling that M. S.'s statements were admissible under Evid.R. 807.

Evidence Rule 807 provides that "[a]n out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child *** is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statements at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act ***.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act ***.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness."

The trial court explained the circumstances that proved the trustworthiness of M. S.'s out-of-court statements. The initial statement was unsolicited, spontaneous, and indicated that sexual abuse had occurred. M. S.'s answers to Batya's and Farber's questions on the second occasion

they spoke to him (Sunday) were consistent with what he told them the day before. They did not coach M. S. or suggest to him what responses he should give to their questions. M. S. was not coerced by his aunt or her boyfriend into accusing Silverman of sexual abuse. M. S. recognized the nature of the subject, as evidenced by the fact that on both occasions he stopped Batya's and Farber's inquiry by saying, "No more talk." There was no motive to fabricate the allegations on M. S.'s part, and the sexual acts that he disclosed were not expected to be within a four-year-old's knowledge unless he had been the victim of such acts or had otherwise observed them. In light of these facts, the trial court's determination that M. S.'s statements provided particularized guarantees of trustworthiness that made them at least as reliable as statements admitted under Evid.R. 803 and 804 was not an abuse of discretion.

Furthermore, the State satisfied the remaining requirements for admissibility of M. S.'s statements set forth in Evid.R. 807(A)(2), (3), and (4). M. S.'s testimony was not reasonably obtainable by the State because he was deceased and therefore unable to testify at trial. Evid.R. 807(A)(2) and (B)(3). The State's independent proof of the sexual acts at issue, required by Evid.R. 807(A)(3), existed in the form of Silverman's admission to the police that he had had his mouth on M. S.'s penis two or three times and once for sexual gratification. (Tr. 687) See, e.g., *In re: Pryor*, Ashland App. No. 02COA 037, 2003 Ohio 2988, at ¶23 (independent proof under Evid.R. 807(A)(3) includes admissions by a defendant that he committed the acts); *Reyner v. Florida* (1999), 745 So.2d 1071 (a defendant's inculpatory statement to the police, by itself, can be sufficient corroborative evidence of a child-victim's hearsay statements about sexual abuse to satisfy Section 90.803(23)(a)2b, Florida Statutes (1997)).

Finally, the State satisfied Evid.R. 807(A)(4)'s requirement that notice be provided at least ten days prior to trial of its intention to offer M. S.'s statements in evidence, the content of

the statements, the time and place at which the statements were made, the identity of the witness who would testify about the 807 statements, and the circumstances surrounding the making of such statements by filing its motion for a hearing regarding the Evid.R. 807 statements on October 27, 2006.

Conclusion

This Court has recognized that, "It does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law." *Westfield Insurance Company*, at ¶60, citation omitted. *Said* is a case that was wrongly decided, and this Court should now overrule its decision that Evid.R. 807 does not dispose of the need to find a child competent under Evid.R. 601 before the child's statements may be admitted under Evid.R. 807. Moreover, the trial court's decision in this case to admit M. S.'s statements under Evid.R. 807 was not clearly against reason and evidence. On the contrary, as the trial court's decision was not unreasonable, arbitrary, or unconscionable, the admission of M. S.'s Evid.R. 807 statements should have been affirmed on appeal.

Proposition of Law No. II:

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 illness 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.

Introduction

Assuming for the sake of argument that this Court declines to overturn *Said*, the state requests that this Court create an exception to the rule that competence may only be determined

by the trial court examining the child in-person for cases in which the child is deceased or has become incompetent subsequent to disclosing the sexual abuse.[2]

When The Child Cannot Testify To Establish Competence

The Fourth District Court of Appeals discussed the result of a strict application of *Said* to cases wherein the child declarant under the age of ten could not be brought into the trial court for a competence determination in *Meadows*. In that case, the declarant was a three-year-old child that had died from severe internal injuries subsequent to making statements about Meadows having abused her by punching her and pulling her hair and ears. *Meadows*, at *2. Her statements were admitted at Meadows's trial for murder under Evid.R. 807. Meadows challenged their admission on several grounds, including that the trial court had not determined the child was competent to testify in accordance with *Said*. *Meadows*, at *23.

After noting its previously expressed reservations about the reasoning in *Said*, the court of appeals discussed the discrepancy between *Said*'s requirement that a trial court examine the child declarant in person to determine competence and Evid.R. 807(B)(3)'s provision that the death of a child is one situation in which the child's testimony is "not reasonably obtainable." *Meadows*, at *25, citations omitted. The court concluded that a strict application of *Said* in cases where the child declarant was deceased "would exclude hearsay statements that *Evid.R. 807* plainly contemplates are admissible." *Meadows*, at *25, citation omitted. Thus, the court of appeals found that the child's death distinguished the *Meadows* case from *Said* and held that Evid.R. 807 does not require the trial court to determine the competence of the declarant under the age of ten when the child's testimony is rendered unavailable because of that child's death.

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[2] For example, a child who is competent to testify when he discloses sexual abuse to a family member might later suffer a brain injury in an automobile accident and thereafter be incompetent, or may simply be unable to testify in a courtroom setting.

Meadows, at *25.

A similar problem arose in *State v. Gitchel* (1985), 41 Wn. App. 820, 706 P.2d 1091. In that case, a three-year-old child had reported to an aunt, a social worker, a doctor, and a detective that she had been sexually abused by her father. However, in a pre-trial hearing to determine the admissibility of her out-of-court statements under Washington's child victim hearsay statute, RCW 9A.44.120, the child was "squirming, looking around, hiding her face, closing her eyes, making grimaces and really nothing of substance could be obtained from her in the way of testimony." *Gitchel*, at 824. Thus, the trial court determined the child was incompetent to testify. Id. On appeal, the reviewing court agreed with that finding. Id.

Nevertheless, the trial court held, and the reviewing court agreed, that the child's statements were admissible, in part, because the testimony of witnesses who interacted with the minor victim proved her competence at the time the out-of-court statements were made. *Gitchel*, at 824.[3] Based upon the testimony of those witnesses, the trial court found "there is nothing implausible or inconsistent or incoherent in the content of [the child's] statements" and "everyone who has testified states that they can communicate with her and she can communicate with others." Id. Therefore, the court "rejected the possibility that [the child] was dissembling, was programmed by her relatives, or was mistaken or confused" and concluded the child victim was competent to be a witness when she made the out-of-court statements accusing her father of sexual abuse. *Gitchel*, at 824-828.

As the *Meadows* case and this case show, a limited exception to the rule discussed in *Said*

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[3] The Supreme Court of Washington has recently decided that a showing of the child-victim's testimonial competence at the time the hearsay statements are made is not required for admission of the statements under RCW 9A.44.120. See, *State v. C. J.*, supra. The State has included the *Gitchel* case merely as an example of a court relying upon evidence from witnesses other than the child-victim as a means of determining whether the child-victim was competent.

that competence may only be determined by the child victim testifying in-person before the trial court is needed. In cases where the child declarant pre-deceases a competence determination, or where a child becomes incompetent to testify subsequent to disclosure of physical or sexual abuse, the proponent of Evid.R. 807 statements should be permitted to prove the child declarant's competence by: 1) evidence of the circumstances surrounding the making of the statement and 2) evidence from persons familiar with the child. See, e.g., *Gitchel*, supra. Extrinsic evidence of the child's ability to accurately receive and recollect facts and to truthfully relate facts may be introduced through the testimony of, for example, teachers, babysitters, relatives, and friends of the child's family.

The Evidence In This Case Showed M. S. Was Competent When He Made Out-Of-Court Statements To His Aunt And Her Boyfriend

The characteristics of competency are set forth in Evid.R. 601(A): 1) the individual must have the ability to receive accurate impressions of fact; 2) the individual must be able to accurately recollect those impressions; and 3) the individual must be able to relate those impressions truthfully. In this case, the record of Batya Silverman's testimony demonstrated that M. S. was competent when he made the statements about his father sexually abusing him.

M. S.'s initial suggestion to Batya that she should put her mouth on his penis was unsolicited and spontaneous. On both occasions when Batya and her boyfriend spoke to M. S. about what he had suggested Batya do, M. S. gave consistent statements that his father had put his mouth on M. S.'s penis. M. S. was also consistent in his insistence that he had not seen such behavior in movies and had not seen his parents engaging in that behavior. M. S. showed his ability to receive and relate accurate impressions of fact when he denied kissing Silverman's penis but admitted to licking it. And, as the trial court found, M. S. recognized the nature of the subject on both occasions that Batya and Farber questioned him, as evidenced by his breaking off

the conversation with the demand, "No more talk." There was no evidence that M. S. had a motive to fabricate his statements. Moreover, Batya Silverman testified that, although a mere four years old, M. S. was capable of following the thread of a conversation and giving appropriate responses to questions.

Batya's testimony showed not only that the statements at issue were reliable but also that M. S. was indeed competent when he made the statements. Thus, even if this Court declines to reverse this case on the ground that no showing of M. S.'s testimonial competence at the time he made the statements to Batya Silverman was necessary, this case should be reversed because Batya's testimony was sufficient to demonstrate that M. S. had the ability to receive and recollect accurate impressions of fact and to relate them truthfully.

Conclusion

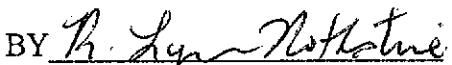
If the State is required to demonstrate the testimonial competence of a child-victim at the time out-of-court statements regarding sexual or physical abuse are made before the statements may be admitted under Evid.R. 807, then a limited exception to the rule that competence may only be determined by bringing the child into court for a hearing is needed. In cases such as this where the child cannot be brought into court for a competence determination, or where the child has become incompetent subsequent to making the hearsay statements, the State must be able to rely upon extrinsic evidence to prove the child-victim was competent at the time the statements were made.

CONCLUSION

The decision of the Second District Court of Appeals should be reversed and Doron Silverman's conviction for gross sexual imposition reinstated.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 28th day of August, 2008, to Opposing Counsel: Michael Columbus, 2100 First National Plaza, 130 West Second Street, Dayton, Ohio 45402.

By: R. Lynn Nothstine

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO	CASE NO. 08-08-0582
Plaintiff-Appellant,	ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT
VS.	
DORON C. SILVERMAN	
Defendant-Appellee.	COURT OF APPEALS CASE NO: 22097

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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FILED
MAR 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Doron C. Silverman,* Case No. 22097 on February 15, 2008.

This case involves a felony and presents a question that is of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY R. Lynn Nothstine
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was sent by first class mail on this 21st day of March, 2008, to the following: Frank A. Malocu, 2100 First National Plaza, 130 West Second Street, Dayton, Ohio 45402 and Timothy Young, Ohio Public Defender Commission, 8 East Long Street – 11th Floor, Columbus, OH 43266-0587.

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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22097
v.	:	T.C. NO. 2006 CR 2816
DORON C. SILVERMAN	:	**FINAL ENTRY**
Defendant-Appellant	:	
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 15th day of February, 2008, the judgment of the trial court is reversed, and the matter is remanded for further proceedings consistent with this court's opinion.

Costs to be paid as stated in App.R. 24.

MIKE FAIN, Judge

THOMAS J. GRADY, Judge

MARY E. DONOVAN, Judge

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22097
v.	:	T.C. NO. 2006 CR 2816
DORON C. SILVERMAN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 15th day of February, 2008.

. . . . . .

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. . . . . .

DONOVAN, J.

This matter is before the Court on the Notice of Appeal of Doron C. Silverman, filed March 22, 2007. On July 21, 2006, Silverman was indicted on two counts of rape, in

violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree. The victim, now deceased, was Silverman's four year old son.

On August 28, 2006, Silverman filed a motion to suppress which the State opposed. On September 20, 2006, a hearing was held on Silverman's motion. On October 10, 2006, the trial court issued a "Decision and Entry Overruling Defendant's Motion to Suppress."

On October 27, 2006, the "State's Motion and Memorandum to Declare Complaining Witness Unavailable & Request for an Evid.R. 807 Hearing" was filed, and on November 3, 2006, an evidentiary hearing was held on the State's Motion. Silverman and the State then filed post-hearing memoranda. On December 11, 2006, the trial court issued a "Decision and Entry Finding Admissible the Statements of Mikel Silverman to Batya Silverman and Joseph Farber." Batya Silverman is Silverman's sister, and Joseph Farber is Batya's boyfriend.

On December 14, 2006, following a jury trial, Silverman was found not guilty of both of the rape charges and guilty of the charge of gross sexual imposition (child under the age of 13). Silverman was designated a sexual predator and a habitual sex offender and sentenced to a five year prison term.

The events giving rise to this matter began on Memorial Day weekend, 2006, when Silverman, along with his wife, Heather Silverman, traveled from their home in West Carrollton, Ohio, along with Mikel and their three month old daughter, Keylee, to Indianapolis, Indiana, to visit Martin and Deanne Silverman, and Batya. Martin and Deanne are Batya's and Silverman's adoptive parents, and Silverman and Batya are not biological siblings. Silverman's biological mother is Cindy Rottinghouse. After having

dinner at the home of Martin and Deanne, Mikel accompanied Batya to her apartment to spend the night, while Silverman, Heather and Keylee remained at the home of Martin and Deanne. The following day, Batya took Mikel swimming at the pool at her apartment complex. After spending a couple of hours at the pool, Batya returned to her apartment with Mikel, and she prepared to give him a bath to wash the chlorine from his hair and skin. When she undressed Mikel, Batya observed him pulling on his penis. Mikel liked to call Batya, "Poti." While in the bathroom, Mikel looked up at Batya, while pointing to his penis, and said, "Poti, put your mouth on it."

Batya, stunned, called Farber, who was at the apartment, to the bathroom and told him what Mikel had said. Farber asked Mikel why he said what he did. Mikel did not respond. Farber then asked Mikel if he had ever seen such behavior in a movie, and Mikel said no. Next, Farber asked Mikel if he had ever observed his mommy and daddy engaged in such behavior, and Mikel again responded no. Finally, Farber asked Mikel where he learned about that behavior, and Mikel responded, "Daddy did it." Mikel then said, "no more talk." Farber and Batya did not discuss the incident further with Mikel that day.

The following day, Batya made lunch for Mikel, and she gave him some pens, markers and a notebook so that Mikel could color. She and Farber then questioned Mikel again about the statements Mikel made the day before. Batya was a student at the time, majoring in social work, and she had just completed a class on appropriate interviewing techniques for children. In the course of the Evid.R. 807 hearing, Batya stated, "when you're interviewing a child about this, you don't want to imply anything to them. You don't want to say, did so and so do this to you, did this person do this to you, because that can -

- they can have that in their mind and you're not going to be able to change it and it can sway their thoughts about what happened."

Batya stated that she "started by asking Mikel if he remembered what we had spoke about in the bathroom the day earlier, and he said that he did remember. And so, I asked him some similar questions. I asked him if he had ever seen that on a movie, and he again replied no. So, just to be clear, I asked him what kind of movies he watches at home, and he listed a few children's movies. So, then I asked him if he had seen his mommy and daddy doing that, and he again replied, no, that daddy had done it.

"So, I said to Mikel, do you do it to daddy to [sic]? And he said, yes. And I said, well, what do you do to daddy's 'pee pee?' And he didn't respond to me. So, I asked him, do you kiss it? And he very clearly replied, 'no, I lick it.'

"After that, Joe asked Mikel if anybody else had done this to him, and he replied, 'no, just daddy.' And Joe asked him if it was a secret. And Mikel said, 'yes, no more talk.'

"So, I explained to Mikel that I loved him very much and that he can tell me anything that has happened to him and he won't get in trouble. And he responded to me, 'no, I do get in trouble.'"

Deanne Silverman then arrived at Batya's home, along with a friend of Batya's. Batya asked Farber and her friend to watch Mikel, and she returned to her parents' home with her mother. Later in the afternoon, Silverman and Heather returned from the Indianapolis 500. Rottinghouse was also present in the home, along with her friend, Pam. Deanne and Batya confronted Silverman with Mikel's statements. When Silverman did not respond, Deanne stated that Silverman had molested Batya years before. Silverman said he did not remember molesting Batya, and he ran from the house to an outside porch,

accompanied by Heather. Batya then joined Heather and Silverman outside. Heather asked Silverman if he had done anything to Mikel, and Silverman said, "maybe I did. I don't remember these things." Silverman then said that he would probably have to quit his job at Chuck E. Cheese, because it was too much of a temptation for him to work there.

According to Batya, those remaining in the house joined Silverman outside, and they were very supportive of him. They decided that Rottinghouse would keep Mikel and Keylee for a week, and then return them to Deanne and Martin, who would keep them for ten days, "so that the children could be kept safe and so that Doron could go and get help." On June 5, 2006, however, Batya learned that Rottinghouse returned Mikel and Keylee to Silverman and Heather. The following day, Batya contacted Children's Services in Montgomery County, and on June 10, 2006, she contacted the West Carrollton police department. An investigation ensued, during which Detectives Robert Bell and Mark Allison of the West Carrollton Police Department interviewed Heather and Silverman. Silverman admitted to having Mikel's penis in his mouth while in the bathtub with him and to fondling his son. Prior to Silverman's indictment on the above charges, Heather set fire to her family's home while Mikel and Keylee were inside, and both of the Silverman children perished. Heather has yet to be tried, having initially been declared incompetent to stand trial.

Silverman asserts six assignments of error. Silverman's first assignment of error is as follows:

"THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT DURING A CUSTODIAL INTERROGATION WITHOUT OBTAINING A KNOWING, VOLUNTARY AND

INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS."

Silverman argues that "a custodial interrogation took place and detectives failed to *Mirandize* Appellant," and that his confession was involuntary and the result of hostile treatment and promises of leniency.

"Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192.

"It is well established that the police are not required to administer *Miranda* warnings to every individual they question. (Internal citations omitted). The United States Supreme Court has held that police officers have a duty to advise a suspect of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 369-73, 86 S.Ct. 1602, 16 L.Ed.2d 694, when their questioning of the suspect rises to the level of custodial interrogation. (Internal citations omitted). A person is 'in custody' only if, under the totality of the circumstances, a reasonable person in the same situation would feel that he was not free to leave. (Internal citations omitted)." *State v.Wood*, Greene App. No. 2006 CA 1, 2007-Ohio-1027.

At the hearing on Silverman's Motion to Suppress, Detectives Bell and Allison testified, as did Silverman. Bell stated that he went to Silverman's home on June 12, 2006, that he spoke with Heather and asked her if the couple would come to the police department to speak to the detectives on June 13, 2006. Heather agreed, and Silverman and Heather arrived at the West Carrollton police department of their own accord on the 13th. Bell interviewed Heather first, for about an hour, while Silverman waited in the lobby. Silverman was not handcuffed, under arrest or guarded while Bell interviewed Heather. At about 10:30 a.m., Bell then returned to the lobby with Heather and asked to speak to Silverman. Silverman agreed, and he did not ask to speak to Heather but accompanied Bell to his office.

Bell's office, which he shares with Allison, is about eight feet by 11 feet, and contains Bell's and Allison's desks, computers and filing cabinets and two chairs. Allison was present in the office during almost all of the interview. Bell testified that he told Silverman that he was not under arrest, that Silverman did not have to talk to the detectives, and that Silverman was free to leave at any time. Silverman indicated to Bell that he understood. Bell did not administer *Miranda* rights to Silverman.

Bell obtained an oral statement from Silverman, initially asking Silverman some background information. Bell learned that Silverman was 25 years old, had graduated with his G.E.D., "had a little bit of college," and worked at Chuck E. Cheese. Bell described the tone of the interview as "very soft," and he said the detectives spoke "very quietly." At the completion of the oral interview, Bell asked Silverman to complete a written statement. Bell stated that Silverman was not threatened, and Silverman wrote a statement and then signed it. Then, to clarify some of the information he obtained in the course of the

interview, Bell wrote some questions on another piece of paper for Silverman to answer. Bell testified that Silverman was in no way coerced to write answers to the questions Bell presented to him. Allison also wrote a question for Bell to answer, and Bell testified that Silverman was again not forced to write an answer. Silverman signed the document containing the questions and answers, and Bell stated he was not forced to do so. Bell testified that, at one point, Allison indicated to Silverman that Silverman was "stonewalling." Bell did not remember Silverman receiving a cell phone call during the interview. Bell stated that he believed Silverman indicated to him that Silverman's children were at home with a babysitter, but he did not remember Silverman asking to leave to relieve the sitter.

At the completion of the interview, Bell escorted Silverman back to the lobby. According to Bell, the interview lasted approximately two hours, during which time Silverman did not ask to leave nor ask for an attorney. Bell stated that Silverman never indicated that he was unwilling to answer the detectives questions. Bell did not observe any signs of intoxication in Silverman's demeanor, and Silverman did not indicate any physical complaints to Bell. Bell testified that no promises were made to Silverman, and that Silverman was not physically mistreated. At the conclusion of the interview, Bell thanked Silverman for coming in and observed Silverman leave with Heather.

Silverman testified following Bell. Silverman stated that a detective arrived at his home on June 12, 2006, spoke to Heather, and that he and Heather proceeded on their own accord to the police department the following day. Silverman made arrangements with Chuck E. Cheese to miss work for the day. Silverman stated that he and Heather "were trying to do [their] best to cooperate." Silverman stated he wanted to accompany Heather during her interview but was told he could not do so. He stated that he could not leave

during Heather's interview because he was her only ride home. Silverman stated, after Heather was interviewed alone, that she appeared to be upset and that he was not permitted to have contact with her, although he admitted that he did not request to speak with her.

Silverman stated that the interview began as a pleasant exchange, but that, after he received a cell phone call from his place of employment, "the tone of the questioning changed very quickly." According to Silverman, Allison told him to turn off his cell phone, "that we don't need those interruptions." Silverman stated that the interview "started to get hostile." Silverman testified that about an hour into the interview, "I started to get up at one point, mentioning that our babysitter had a set time that she had to leave by. And when I did, they said to sit back down because we're not finished with you yet." Silverman also stated that Allison "stated that he's been doing this for years and that I'm doing what a therapist would call stonewalling, * * * like beating around the bush is how he explained it. * * *" Silverman testified that Allison "said that he already knows that I'm guilty and that I only have two choices. * * * I can either be locked up right now and it'll go to court and it'll be a giant mess or like they do with many cases, I can make a statement and the likelihood is it will never see the inside of a courtroom."

Silverman felt "trapped," he was worried about his wife, and he wanted to go home, according to his testimony. Silverman felt he "had no other choice" but to talk to the detectives. Silverman stated that he "wasn't telling the truth or making stuff up" in responding to the detectives questions. He was "answering the questions in the way they wanted me to." In terms of the written statement Silverman was asked to write, he stated that he wrote it "as I was instructed," and that "I had no choice." Silverman stated that no

one put a gun to his head, raised a hand to him, touched him or threatened him with physical harm but that Allison threatened him with jail time. Silverman stated that he asked if he needed a lawyer, because he "had never dealt with detectives personally without like my mother present. So, I didn't know what was going on. I didn't know what to do." Silverman stated that the detectives did not answer his question about the lawyer but allegedly told Silverman that they were "just gathering information." Silverman stated that he was not intoxicated and that he had no physical complaints in the course of the interview. He did not believe he was free to leave until the detectives instructed him to leave.

In rebuttal, Detective Allison's testimony was mostly consistent with Bell's. Allison was not present in the courtroom when Bell testified. Allison stated that Bell informed Silverman that Silverman was not under arrest or in custody, and that he was free to leave at any time. Allison stated that he was present for almost the entire interview, except that at its conclusion he left the office to place a call to Children's Services regarding Silverman's statements. Allison stated that Silverman did not ask for an attorney or ask if he needed an attorney. Allison did not remember Silverman receiving a call on his cell phone. Allison stated that Silverman never stood up to leave, and that Allison never told him to sit back down because the detectives were "not done with" him. Allison stated that he never threatened Silverman, and that he did not tell him that unless Silverman told the detectives what they wanted to hear, Silverman would go to jail. Allison stated that Silverman never indicated that he had to leave because of a babysitter. According to Allison, Silverman never mentioned anything about a babysitter. Allison stated that he never indicated to Silverman that if he confessed, Silverman would not have to go to court.

In its decision overruling Silverman's motion to suppress, the trial court determined that the interview was conducted in the manner described by Bell and Allison. The court noted that Bell and Allison testified to the same set of facts and noted the detectives' separation during testimony. According to the trial court, Silverman, "facing serious criminal charges, is the one who has a reason to shade the facts most favorably to his legal position." The court determined that the interview "was without coercion." The court went on to conclude that Silverman was not in custody and accordingly, the detectives were not required to advise Silverman of his *Miranda* rights. Finally, the court determined that Silverman's confession was voluntary: there "were no promises, threats, inducements or mistreatment of the Defendant."

Having thoroughly reviewed the transcript of the hearing on Silverman's motion to suppress, we conclude that the evidence supports the trial court's determination that Silverman was not subject to custodial interrogation and entitled to be *Mirandized.* Silverman scheduled time away from his job, he drove himself to the police station, he was informed that he was not in custody and that he was free to leave at any time, he had the means to leave, and he indicated to the detectives that he understood the nature of the interview. In other words, under the totality of the circumstances, a reasonable person in the same situation as Silverman would feel that he was free to leave, and Detectives Bell and Allison were not required to administer *Miranda* warnings to Silverman.

We further conclude that the evidence supports the trial court's determination that, under the totality of the surrounding facts and circumstances, Silverman's decision to talk to the police was made voluntarily. Silverman was a 25 year old adult when he made his confession. Silverman voluntarily presented himself to the detectives for the interview.

Silverman was lucid and capable of reasoning. There was no indication of intoxication or physical impairment. Silverman was told that he did not have to speak to the detectives and that he was free to leave, and he indicated to the detectives that he so understood. The length of the interview, approximately two hours, was not excessive. The interview was not physically coercive or overbearing, and Silverman was not mistreated by Silverman's own admission. As the trial court noted, Silverman had reason to misrepresent the nature of the interview. The trial court was free to find the detectives' testimony more credible than Silverman's, and we rely upon and defer to the trial court's ruling regarding the weight and credibility of witness testimony. Despite Silverman's testimony to the contrary, the detectives made no promises to Silverman that if he confessed he would "not see the inside of a courtroom." In other words, Silverman was not, as he argues, "unfairly coerced" or compelled into making his incriminating statements.

Since Silverman was not in custody during his interview with Detectives Bell and Allison, and since his confession was voluntary, the trial court did not err in overruling his motion to suppress.

There being no merit to Silverman's first assignment of error, it is overruled.

Silverman's second assignment of error is as follows:

"THE TRIAL COURT ERRED BY ADMITTING STATEMENTS MADE BY THE DECEASED FOUR YEAR OLD VICTIM."

Silverman argues, as he did in his post-hearing memoranda, that the State failed to establish Mikel's competency as a witness. Silverman also argues that the State failed to comply with Evid.R. 807 before it admitted Mikel's statements to Batya and Farber. According to Silverman, a "fundamental flaw in the trustworthiness of Mikel's statements

is that Batya, the person proposing Mikel's statement (and Joe Farber, her boyfriend), holds a strong bias against the Defendant. Batya unsubstantially accused Defendant of raping her, and her distaste for Defendant places doubt on the means by which she elicited Mikel's statements." According to Silverman, admitting Mikel's statements, "absent a prior opportunity for cross-examination by the defendant, violates the accused's confrontation right under the Sixth Amendment to the United States Constitution." Finally, Silverman argues that there is not independent proof of the of the sexual acts with which Silverman was charged to corroborate Mikel's statements.

"A reviewing court will not reverse the trial court's admission of evidence absent an abuse of discretion." *State v. Bellomy*, Montgomery App. No.21452, 2006-Ohio-7087. "An abuse of discretion connotes more than a mere error of law or judgment. It implies an arbitrary, unreasonable, or unconscionable attitude on the part of the court." Id. (Internal citations omitted).

Evid. R. 601(A) provides in relevant part, "Every person is competent to be a witness except: * * * children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or relating them truly."

"'Hearsay' is 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(C). "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Evid. R. 802.

Evid. R. 807 provides an exception to the hearsay rule as follows: "(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with or on the child * * * is not excluded as hearsay under Evid. R. 802 if all of the following apply:

"(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act * * * .

"(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

"(3) There is independent proof of the sexual act * * * .

"(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the

statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

"(B) The child's testimony is 'not reasonably obtainable by the proponent of the statement' under division (A)(2) of this rule only if * * *

* * *

"(3) The court finds * * *

"(a) the child is unable to testify at the trial or hearing because of death * * *.

* * *

"(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling."

Silverman relies upon the Ohio Supreme Court case of *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337, 1994-Ohio-402, for the proposition that the State failed to establish Mikel's competency. In *Said,* the defendant was convicted of gross sexual imposition, and the victims were his granddaughters, ages 15 and five at the time of trial. Before trial, the court held a hearing to determine if the five year old was competent to testify under Evid. R. 601. The court failed to record the hearing, but a review of the transcript indicated that the trial court found the child competent. At trial, the five year old refused to testify, and the court conducted a hearing to determine if her out of court statements to her mother and to a sexual abuse investigator regarding the offense were admissible pursuant to Evid. R. 807. Without making findings of fact on the record, the trial court determined that the five year old's statements were admissible. The Supreme Court of Ohio determined that the trial court committed reversible error when it failed to record

the competency hearing, and also that it erred when it failed to make the findings required by Evid. R. 807(C), since "findings in the form of skeletal conclusions are inadequate under Evid. R. 807."

According to the *Said* Court, "A competency hearing is an indispensable tool in this and similar cases. A court cannot determine the competency of a child through consideration of the child's out-of-court statements standing alone. As we explained in *State v. Wilson* (1952), 156 Ohio St. 525, 46 O.O. 437, 103 N.E.2d 552, the essential questions of competency can be answered only through an in-person hearing: 'The child's appearance, fear or composure, general demeanor and manner of answering, and any indication of coaching or instruction as to answers to be given are as significant as the words used in answering during the examination, to determine competency. * * *

"Such important and necessary observations cannot be made unless the child appears personally before the court.'" (Internal citation omitted).

The *Said* Court further determined, "Evid. R. 807 clearly does not dispose of the need to find a child competent. Competency under Evid.R. 601(A) contemplates several characteristics. (Internal citation omitted). Those characteristics can be broken down into three elements. First, the individual must have the ability to receive accurate impressions of fact. Second, the individual must be able to accurately recollect those impressions. Third, the individual must be able to relate those impressions truthfully."

The Court in *Said* went on to note, "Out-of-court statements that fall within Evid. R. 807, like the other hearsay exceptions, possess a 'circumstantial probability of trustworthiness.' (Internal citation omitted). In other words, under unique circumstances we make a qualified assumption that the declarant *related* what [he] believed to be true at

the time [he] 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 [he] accurately received and recollected that information depends upon a different set of circumstances, those covering the time from when [he] received the information to when [he] 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 [he] made the statement in order to admit that statement under Evid. R. 807." Id.[1]

In its "Decision and Entry Finding Admissible the Statements of Mikel Silverman to Batya Silverman and Joseph Farber," the court initially concluded, since Mikel is deceased, the requirement that his statements are "reasonably unobtainable" is met. 807(A)(2). In a footnote, the court noted, "It does not matter that this four year-old child may not have been found competent to testify if he had survived because when a child is found not competent, the testimony is 'not reasonably obtainable' anyway." Next the court determined, "Defendant has made statements which are admissions of the acts charged in the indictment and these admissions constitute independent proof of the sexual acts as required by * * * section (A)(3)." The court further determined that the State notified the defense in writing of Mikel's "statements, the time and place made, the witnesses, and the circumstances surrounding the statements," and that the State accordingly complied with

[1]Here we note our disagreement with the Fourth District's rationale interpreting *Said* and holding, "Evid. R. 807 does not require the trial court to determine the competence of the declarant of an out-of-court statement under the age of ten when the child's testimony is rendered unavailable because of that child's death." *State v. Meadows,* Scioto App. No. 99CA2651, 2001-Ohio-2510.

Section (A)(4).

In terms of the State's compliance with Section (A)(1) of Evid. R. 807, the court determined, "the totality of the circumstances surrounding the making of the statements provides particularized guarantees of trustworthiness, including the following:

"1. The initial statement of the child was unsolicited and spontaneous. Although that statement was not a direct accusation, it was of a sexual nature and indicative of what the Defendant is accused of doing. The subsequent statements were not inconsistent.

"2. The statements made on the second day were consistent with statements first made.

"3. The witnesses who heard the statements were aware they should not suggest answers to the child by their questioning and they were careful in this regard. The child was not coached in regards to his statements, and the statements were given without input from Batya Silverman or Joe Farber.

"4. The means by which the statements were obtained, i.e., spontaneous statement followed by unobtrusive questioning of the child, was not coercive or suggestive toward any particular response.

"5. The child recognized the nature of the subject on both occasions when he said 'no more talk.'

"6. There was no evidence that the child's mental state was out of the ordinary at the time of the statement, although he did appear agitated after his disclosure on the second day that he would get in trouble.

"7. The terminology used by the child was not unexpected of one his age but the sexual acts he reported are not expected to be within a small child's knowledge unless he

had observed such acts or he had been the victim of them.

"8. There is no indication of either a motive or lack of motive to fabricate."

Finally, the court concluded, "excluding the independent proof by admission, the Court determines there are particularized guarantees of trustworthiness that make the statements at least as reliable as statements admitted pursuant to Rules 803 and 804 in the Ohio Rules of Evidence. * * * the statements of Mikel Silverman which were testified to at the evidentiary hearing are not excluded by the hearsay rule and are admissible under Rule 807 in the Ohio Rules of Evidence."

The trial court, in the course of its analysis pursuant to Evid.R. 807, found in part that under the totality of the circumstances surrounding *the making of* Mikel's statements, particularized guarantees of trustworthiness existed. However, even if we make a qualified assumption that Mikel related what he believed to be true at the time he made the statements, for purposes of Mikel's competency, whether or not Mikel accurately *received and recollected* his impressions depends upon different circumstances which cover the time from when Mikel was abused to when Mikel related the abuse to Batya and Farber. Even if Mikel's statements fall within the hearsay exception provided by Evid. R. 807, the trial court, due to Mikel's death, was unable to analyze two elements of Mikel's competency prior to admitting his statements under Evid. R. 807, namely his accurate receipt and accurate recollection of his impressions. Because Evid. R. 807 does not dispose of the need to find a child competent pursuant to *Said*, the analysis under the rule must fail as it lacks a fundamental pre-requisite. Absent a determination of competence, the trial court abused its discretion in admitting Mikel's statements.

Because Mikel's inadmissible statements are not cumulative of the testimony of

other witnesses and there is a lack of extrinsic evidence, this error did materially prejudice Silverman. Silverman's second assignment of error is sustained.

Silverman's third assignment of error is as follows:

"THE TRIAL COURT ERRED IN FAILING TO CHANGE VENUE OF APPELLANT'S TRIAL."

Silverman argues that the voir dire herein "reveals that several jurors had knowledge of Appellant's case through publicity generated by [Silverman's] wife's murder case. * * * The voir dire indicates knowledge and bias against Appellant." Silverman then cites generally to pages 301 - 554 of the trial transcript.

"[A] change of venue is not automatically granted when there is extensive pretrial publicity. Any decision to change venue rests largely within the discretion of the trial court. (Internal citation omitted). '[A] careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.' (Internal citation omitted). Also, a 'defendant claiming that pretrial publicity has denied him a fair trial must show that one or more jurors were actually biased.'" (Internal citation omitted). *State v. Frazier* (2007), 115 Ohio St.3d 139, 174, 873 N.E.2d 1263, 2007-Ohio-5048.

At the start of voir dire, the trial court presented the venire with four categories of potential jurors, and it then asked the jurors to determine into which of the four categories each juror belonged. The trial court then questioned each juror privately at side bar about their knowledge of the case. The court described the categories as follows: (1) "jurors who are not familiar with case, news accounts, parties or attorneys and who have not formed an opinion about this case. That's someone that everything I've said so far does not have

any impact on you, you don't know anything about it, and you could be fair and impartial because you haven't heard anything about it * * * "; (2) "jurors somewhat familiar with the case, may have heard news accounts, parties or attorneys, have some knowledge about that, who may recall some news broadcasts or writings, but not the details, and who have not formed an opinion about the case. So, people who may have heard something, you have something in the back of your mind, yeah, I think I heard about that case, but you really don't have any concrete memory of it and you don't know any specific details or you haven't formed an opinion about any of those things * * *"; (3) "jurors who are familiar with the case, news accounts, parties or attorneys, jurors who followed news accounts and recall specific details or reports, and who have formed or expressed an opinion about the case, but that opinion is not firmly held. That's people who are knowledgeable about some of the details, have talked about it among their friends or family, may have said what they think about the case to someone about their opinion about the case, that opinion is open ended in the sense that it is not a firm belief"; (4) "jurors who may be very familiar with the case, news accounts, parties or attorneys, closely followed news accounts, and have substantial recall of details of the reports and who have formed or expressed an opinion about this case and that opinion if firmly held."

Once the jurors categorized themselves, the court explained its purpose in interviewing the jurors privately at side bar regarding their individual knowledge of the case and any resulting bias against Silverman as follows: "The reason for doing this is if one of you remembers a lot of details and we ask you about [that] in the presence of everybody else, you may hear things about either this case or that other unrelated case that might give you an impression one way or the other that it['d] be better that you don't hear. So,

unfortunately, this is the only method which I can think that we can go through this to try to get a fair and impartial jury."

As the state correctly notes, several potential jurors were excused for cause after they indicated to the trial court that they were familiar with the case and were unable to set aside their personal feelings and consider the evidence in an impartial manner. When the jury was seated, the trial court overruled Silverman's motion for a change of venue, noting, "we have found a fair jury here in this county." While Silverman then renewed all of his pretrial motions, he did not specifically indicate to the court that any juror in particular was actually biased, and he makes no such argument in his brief.

Since the trial court excused those jurors, after addressing them privately at sidebar, who indicated a bias against Silverman, and was able to seat an impartial jury, the trial court did not abuse its discretion in overruling Silverman's motion for a change of venue. Silverman's third assignment of error is overruled.

Silverman's remaining assignments of error are as follows:

"THE TRIAL COURT ERRED IN DESIGNATING APPELLANT AS A SEXUAL PREDATOR AND A HABITUAL SEXUAL OFFENDER."

And,

"THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THE CHARGED OFFENSES, AND THE JURY'S GUILTY VERDICT AMOUNTS TO A MANIFEST MISCARRIAGE OF JUSTICE."

And,

"APPELLANT'S SENTENCE IS INCONSISTENT WITH SENTENCES OF SIMILAR

OFFENDERS, A LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT DEMEAN THE SERIOUSNESS OF THE OFFENSE AND IMPACT OF THE VICTIM AND CONSECUTIVE SENTENCES ARE NOT JUSTIFIED."

These assignments of error are rendered moot by our ruling on Silverman's second assignment of error. Judgment reversed and remanded for further proceedings consistent with this opinion.

. . . . . .

FAIN, J. and GRADY, J., concur.

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(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

(4) Statement against personal or family history. A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

(Amended, eff 7-1-81; 7-1-93; 7-1-01)

RULE 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. Attacking and Supporting Credibility of Declarant

(A) When a hearsay statement, or a statement defined in Evid. R. 801(D)(2), (c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence that would be admissible for those purposes if declarant had testified as a witness.

(B) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

(C) Evidence of a declarant's prior conviction is not subject to any requirement that the declarant be shown a public record.

(D) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Amended, eff 7-1-98)

RULE 807. Hearsay Exceptions; Child Statements in Abuse Cases

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement,

including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) The child is absent from the trial or hearing;

(b) The proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) It is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) The child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) The illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

(Effective 7-1-91)

ARTICLE IX
AUTHENTICATION AND IDENTIFICATION

RULE 901. Requirement of Authentication or Identification

(A) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversation. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio by other rules prescribed by the Supreme Court.

RULE 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in