ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2012-0215

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals
DARIUS CLARK	:	
Appellee	:	CA: 96207

MOTION TO DISMISS APPEAL AS IMPROVIDENTLY ALLOWED

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FILED
DEC 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
DEC 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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MOTION TO DISMISS

Appellee, through undersigned counsel, moves this Court to dismiss the instant appeal as improvidently accepted. When the Appellant asked this Court to accept jurisdiction over Mr. Clark's case, it submitted this single proposition of law:

> Statements made to teachers by children during an interview to identify suspected child abuse and protect the future safety and welfare of that child, are non-testimonial and thus are admissible without offending the Confrontation Clause.

In presenting this proposition, the Appellant failed to inform this Court that its decision thereon will have no impact on the outcome of Mr. Clark's prosecution. This is the case, because the Eighth District also concluded that the evidence at issue here is otherwise barred under the rules precluding hearsay – and the state has not challenged that conclusion.

As Mr. Clark explained in his merit brief, when the Eighth District reversed Mr. Clark's convictions and remanded his case for a new trial, it did so because it found that the introduction of hearsay statements the child declarant made to a police officer, two child protection workers, two teachers, and two family members were inadmissible. The Court ruled that the statements the child declarant made to police, social workers and teachers violated the Confrontation Clause, while the statements to the child's grandmother and great aunt failed to meet the criteria for admission under Evid.R. 807. In its appeal to this Court, the Appellant has only challenged the Eighth District's conclusion that the two statements the child made to his teachers were barred under the Confrontation Clause.[1] On this point, the state argues that the Eighth District was wrong to find that those statements were testimonial hearsay. The State has not challenged the balance of the Eighth District's ruling.

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[1] The State not taken issue with the Eighth District's finding that the child's statements to police and social workers were testimonial hearsay admitted in violation of the Confrontation Clause.

Accordingly, the State has conceded the Eighth District's determination that the child's out of court statements were erroneously admitted under Evid.R. 807, because they lacked the "particularized guarantees of trustworthiness" that the rule requires. The Eighth District reached that decision in part because the trial court had found that the – then-four-year-old declarant was incompetent to testify at trial. The Eighth District never explicitly applied its Evid. R. 807 analysis to the statements the child made to his teachers (having already barred their introduction under the Confrontation Clause). Nonetheless, those statements were also made by the same incompetent child and, therefore, suffer from the same defect.

Consequently, whatever this Court decides with respect to the Confrontation Clause issue the State has raised, that decision will have no bearing on the outcome of Mr. Clark's prosecution. On remand, regardless of whether the child's statements to his teachers violated the Confrontation Clause, they are still inadmissible under Evid.R. 807. That strictly evidentiary issue is distinct from any Confrontation Clause analysis this Court might undertake.
By most any measure what the Appellant seeks from this Court is an advisory opinion. Under the circumstances, Appellee respectfully asks that this Court to dismiss this appeal.

Background

In reversing Darius Clark's convictions in the instant case, the Eighth District held that the trial court erred in allowing into evidence multiple hearsay statements made by the alleged victim, a three-year old child. These statements were made to social workers, relatives and teachers.

With respect to statements made to social workers and relatives, the Eighth District held that these statements were not admissible under Evid. R. 807. Evid. R. 807(A)(1) provides that a non-testifying child's out of-court statement regarding a violent act can be admitted provided

> . . . 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.

The Eighth District Court of Appeals held that, under the facts of this case, the out-of-court statements of the three-year old, who the trial court had previously found to be incompetent to testify, lacked the particularized guarantees of trustworthiness the rule required. State v. Clark, Cuyahoga App. No 96207, 2011 Ohio 6623, ¶¶ 48-52.

This aspect of the Eighth District's decision was never appealed in the instant case – it is the controlling law of the case in the event of a new trial. *Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir.2004) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318, (1983)) (The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.")

The State of Ohio appealed a different and distinct prong of the Eighth District's decision. Rather than including the statements the child made to his teachers under its Evid. R. 807 analysis, the Eighth District held that the statements to the teachers were separately inadmissible under the Sixth Amendment's Confrontation Clause. That, and that alone, is the subject of the instant appeal.

Argument

This appeal should be dismissed as improvidently accepted because whatever decision this Court reaches with respect to the Appellant's Proposition of Law, it will have no bearing on the case's outcome. The Eighth District's decision focused on the admissibility of certain evidence. Specifically, statements made by a child declarant – in the absence of that witness's live testimony, the admissibility of his statements is dependent on two factors – 1) they must meet state evidentiary rules; and 2) they must be consistent with governing constitutional provisions. An examination of the Eighth District's decision makes it clear that it found the evidence at issue here inadmissible under both hurdles – only one of which the Appellant challenges. Accordingly, even if this Court ascertains that the evidence was not barred under the Confrontation Clause, its introduction will still be precluded by the Rules of Evidence.

This Court does not issue advisory opinions or answer moot questions, and has explained the prohibition this way -

> [t]he duty of this court, as of every judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. * * *

State ex rel. Eliza Jennigs, Inc. v. Noble, 49 Ohio St.3d 71, 74, 551 N.E.2d 128, 131 (1990), quoting from *Miner v. Witt*, 82 Ohio St. 237, 238-239; 92 N.E. 21, 22 (1910), which, in turn quotes from *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

Additionally, when there is no actual controversy related to a particular issue, this Court not only has a duty not to provide advisory opinions, but also to follow "the cardinal principle of judicial restraint-if it is not necessary to decide more, it is necessary not to decide more." *State v.*

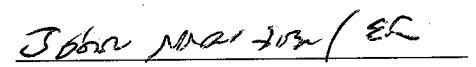
Chappell, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, fn 1. To that end, this Court also does not gratuitously decide constitutional issues. When a case can be resolved on a non-constitutional basis the constitutional issue – like the one here – should be left for another day. *Rzepka v. Solon*, 121 Ohio St.3d 380, 385, 2009 -Ohio-1353, 904 N.E.2d 870, citing *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio -5125, 835 N.E.2d 5, ¶ 54.

Since the Appellant did not challenge the Eighth District's determination that the child declarant's statements were inadmissible under Evid. R. 807, any opinion in this pending matter would become either an advisory opinion or would violate the "cardinal rule" referenced above. See also *Joys v. University of Toledo*, 10th Dist. No. 96AP08-1040, 1997 WL 217581 (April 29, 1997) (a cause becomes moot when it is impossible for the reviewing court to grant meaningful relief, even if it were to rule in favor of the party seeking relief.) Consequently, an opinion from this Court adopting Appellant's proposition of law would be entirely advisory and not necessary.

On September 5, 2012, this Court dismissed as improvidently allowed a case from the Twelfth District Court of Appeals, *State v. Daniel Estrada-Lopez,* OSC Case No. 2010-0659. *Estrada-Lopez* concerned the admissibility of evidence in a case where the Twelfth District held that the evidence was properly admitted but went on to say that, even if the evidence were admitted in error, the error was harmless in light of the other evidence in the case. *State v. Lopez,* 186 Ohio App.3d 328, 2010-Ohio-732 (12th Dist. 2010). After this Court accepted *Estrada-Lopez,* the State filed a motion to dismiss as improvidently allowed, explaining that, in light of the Twelfth District's holding that the properly admitted evidence would not have affected the outcome of the trial, any holding of this Court on the proposition of law presented would not be outcome determinative. This Court granted the State's motion.

Under the circumstances, this case's dismissal is called for in light of aforementioned precedent and this Court's treatment of *Estrada-Lopez*. Wherefore, Appellee, Darius Clark hereby moves this Court to dismiss the present appeal as improvidently allowed.

Respectfully submitted,



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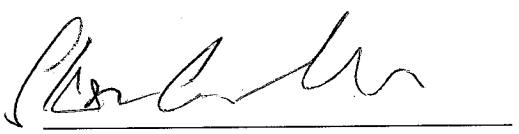
CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Motion to Dismiss Appeal was served via ordinary U.S. Mail this 6th day of December, 2012 upon Timothy J. McGinty, 1200 Ontario Street, 9th floor, Cleveland, Ohio 44112 and upon Mike Dewine, Attorney General of Ohio, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.



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