

ORIGINAL

NO. 2012-0215

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 96207

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STATE OF OHIO

Plaintiff-Appellant

-vs-

DARIUS CLARK

Defendant-Appellee

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**MOTION FOR RECONSIDERATION, FILED PURSUANT TO S.Ct.Prac.R. 18.02(B)(4)**

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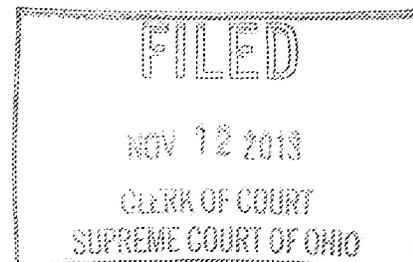
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## STATE'S MOTION FOR RECONSIDERATION

### **I. SUMMARY OF ARGUMENT**

The State requests this Honorable Court reconsider its opinion rendered in this case on October 30, 2013. Reconsideration is appropriate because the majority opinion did not address this Court's previous decisions in which the "objective-witness" test was applied when the declarant spoke to a non-law enforcement officer. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834; *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944. Nor did this Court address its prior decision which analyzed dual capacity examinations. *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775 (2010). This Court must reconcile *Stahl*, *Muttart*, and *Arnold* with the instant case. The questioners in those cases were also mandatory reporters. But, as is the case here, they are not agents of law enforcement simply because they are mandatory reporters. An examination of the circumstances of this case shows that the teachers primary concern was the welfare of the child. The questions were required to establish L.P.'s safety both in and out of school. The primary purpose was not to prepare for trial and the objective witness would not have believed the statement to a teacher was made for that purpose. Therefore, the State respectfully requests this Court reconsider its decision.

### **II. PROCEDURAL HISTORY**

An abused three and one-half year old child disclosed to a daycare teacher that "Dee" was the source of his injuries. Further investigation by social workers and law enforcement revealed both that "Dee" is Darius Clark, and that Clark had also physically abused his girlfriend's two year old daughter. As it is relevant to this decision, the daycare teachers testified to what the three and one-half year old child told them. Clark was

ultimately convicted. The Eighth District Court of Appeals reversed, finding that the admission of the child's statements through the daycare teachers violated Clark's Sixth Amendment rights. *State v. Clark*, 8<sup>th</sup> Dist. Cuyahoga No. 96207, 2011-Ohio-6623.

The State asked this Court to accept jurisdiction over this constitutional issue. This Court, in a divided decision, affirmed. *State v. Clark*, Slip Opinion No. 2013-Ohio-4731. The State now requests this Honorable Court reconsider its decision.

### III. LAW AND ANALYSIS

Under S.Ct.Prac.R. 18.02(B)(4), a party may request this Court reconsider its decision on the merits of a case. The State respectfully requests this Court reconsider its opinion. The majority opinion does not address this Court's prior decisions in *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, and *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775 (2010).

#### A. Reconsideration is necessary because *Stahl*, *Muttart*, and *Arnold* support applying the "objective-witness" test to statements made to teachers.

As a result of the United States Supreme Court holdings in *Crawford*, *Davis*, and *Hammon*, there are two primary ways to determine whether a statement is testimonial:

1. Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S.Ct. 2527, 2532, 174 L.Ed2d 314 (2009).
2. Statements are considered nontestimonial when they are made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events

potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *Michigan v. Bryant*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

These tests are frequently referred to in shorthand as the “objective-witness” test and the “primary purpose” test. The vernacular can be a source of confusion. What is clear is that the *Davis* test has not been applied outside of situations involving law-enforcement officers.

This Court provided clarification on this issue in *State v. Stahl*, 111 Ohio St.3d 186, 855 N.E.2d 834, 2006-Ohio-5482. *Stahl* involved the admission of statements made by a rape victim to a nurse practitioner at a treatment facility specializing in treating sexual assault victims. This Court found *Davis* and *Hammon* “factually distinguishable” because “[t]hey involve(d) statements made to law enforcement officers, while the statements at issue here covers one made to a medical professional at a medical facility for the primary purpose of receiving proper medical treatment and not investigating past events related to criminal prosecution.” *Id.* at ¶25. Reviewing authority from other jurisdictions, this Court noted that the “prevailing view among jurisdictions defining ‘testimonial’ statements...does not account for the expectations of the questioner, except where the expectations could affect the reasonable expectations of a witness.” *Id.* at ¶31. This Court adopted *Crawford*’s third category, the “objective witness” test and held that for Confrontation Clause purposes, a “testimonial statement includes one made ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” *Id.* at ¶36 citing *Crawford*, 541 U.S. at 52.

This Court next revisited the issue in *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944. In *Muttart*, the child victim disclosed sexual abuse to her mother, two clinical counselors, and a social worker. Those statements were non-testimonial

because “[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils that the Confrontation Clause was designed to avoid.” *Id.* at ¶63.

In *State v. Siler*, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637, this Court addressed the admissibility of statements made by a three-year-old child during the course of a police interrogation. “[T]o determine whether a child declarant’s statement made in the course of police interrogation is testimonial or nontestimonial, courts should apply the primary-purpose test.” *Id.* at ¶30. This Court distinguished *Stahl* based on “the identity of the interrogator and the purpose of the questioning.” *Id.* at ¶28. The distinction between *Stahl*, *Muttart*, and *Siler* is significant and turns on the presence or lack thereof of law-enforcement personnel.

More recently, in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775 (2010), this Court considered the admissibility of statements a child victim made to a social worker at child-advocacy center. In order “to determine whether [the child’s] statements \*\*\* were testimonial, we must identify the primary purpose of the statements. Statements made for the purpose of medical diagnosis and treatment are nontestimonial. However, statements made to agents of the police for the primary purpose of forensic investigation are testimonial. [citations omitted].” *Id.* at ¶28. *Arnold* is particularly significant to the instant case because of the analysis of dual purpose statements. The “fact that information gathered for medical purposes is subsequently used by the state does not change the fact that the statements were made for medical diagnosis and treatment.” *Id.* at ¶43. This Court’s decision in *Clark* is incompatible with its prior holding in *Arnold*. Even if the teacher was properly considered an agent of law-enforcement, only the statements

made for purely forensic purposes implicate the Confrontation Clause. None of the statements in this case fall into that category.

The distinction previously made by this Court finds support in United States Supreme Court precedent. Addressing the testimonial nature of certain statements, the court in *Crawford* noted “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford v. Washington* (2004), 541 U.S. at 51, 124 S.Ct. 1354, 158 L.E.3d 177. Four years later, the United States Supreme Court again said that statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would not be considered testimonial for the purposes of the Confrontation Clause. *Giles v. California* (2008), 554 U.S. 353, 376, 128 S.Ct. at 2692-2693, 171 L.E.2d 488.

While this Court addressed *Siler*, it did not even mention *Stahl*, *Muttart*, or *Arnold*. Ostensibly, this is because the majority of this Court found that teachers, by virtue of their mandatory reporting duty, are agents of law enforcement. However, under R.C. 2151.421(A)(1)(b), the nurse, social workers, and counselors at issue in *Stahl*, *Muttart*, and *Arnold* are also mandatory reporters. Further consideration of these prior opinions is necessary for a complete analysis of this constitutional question. Therefore, the State respectfully requests this Honorable Court reconsider its opinion in this case.

**B. A teacher’s status as a mandatory reporter does not compel the conclusion that the teacher is an agent of law enforcement.**

Daycare teachers are not agents of law enforcement officers. A majority of this Court found that “at a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to R.C. 2151.421, a teacher acts in a dual capacity as both an instructor

and as an agent of the state for law-enforcement purposes.” *State v. Clark*, Slip Opinion No. 2013-Ohio-4731, ¶30. This holding fails to consider the broader issue.

If teachers are agents of law enforcement because they have a duty to report, then the same status could apply to every citizen in the State of Ohio. R.C. 2921.22(A)(1) states that “no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.” Such a broad application of the Confrontation Clause is inconsistent with precedent from both this Court and the United States Supreme Court. It would effectively prohibit the State from prosecuting defendants where a minor victim is unavailable to testify. It also fails to consider that the nurse, social workers, and counselors at issue in *Stahl*, *Muttart*, and *Arnold* are also mandatory reporters.

Reconsideration of this opinion is appropriate in order to fully consider the broad implications of classifying teachers as agents of law enforcement. This opinion may have an unintentional chilling effect of those who are best positioned to notice and respond to child abuse. Therefore, the State requests this Court reconsider its opinion in this case.

**C. The primary purpose test does not entirely turn on the existence of an ongoing emergency.**

Even if the *Davis* test were to apply here, L.P.’s statement to his daycare teachers should have been deemed nontestimonial. This Court, at multiple points in the opinion, states that there was no ongoing emergency. In support of this position, this Court relied on the fact that “L.P. did not complain of his injuries, he did not have any need for urgent medical care, and his teachers did not render any medical treatment.” *State v. Clark*, Slip Opinion No. 2013-Ohio-4731, ¶¶16, 30. However, “there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of

creating an out-of-court substitute for trial testimony.” *Michigan v. Bryant*, \_\_ U.S. \_\_, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011) (Emphasis in the original).

While the majority discussed *Bryant*, it ultimately relied on the lack of need for immediate medical attention as the controlling factor for an ongoing emergency analysis. In *Braynt*, the Supreme Court reversed, finding that the Michigan Supreme Court “assumed that *Davis* defined the outer bounds of ‘ongoing emergency,’” and “failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry.” *Id.* at 1158. The same flaw exists in this case. The analysis fails to consider that there was an ongoing emergency which did not include medical care. The daycare teachers also needed to determine whether or not it was safe to send the child home. To send a child home to an abusive situation would have been negligent and would entirely frustrate the purpose behind having mandatory reporters- which is to protect the abused and neglected children. *Yates v. Mansfield Bd. Of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶25.

In evaluating the safety of L.P., the daycare teachers also learned of facts that would be important to know for a future criminal prosecution. This Court held that because “the information also led to criminal prosecution...the use of the child’s statements implicates the defendant’s constitutional rights.” *State v. Clark*, Slip Opinion No. 2013-Ohio-4731, ¶17. However, as this Court has repeatedly found, the potential benefit to prosecution is immaterial. See *State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742, ¶¶ 26, 43; *State v. Muttart*, 116 Ohio St. 3d 5, 2007-Ohio-5267, ¶ 62.

This Court did not consider that there was an ongoing emergency despite the lack of need for urgent medical care. The facts of this case support an ongoing emergency. Clark took L.P. home from daycare that day despite the fact that the responding social worker

attempted to stop him from leaving with L.P. The agency was unable to find L.P. until the next day. Sending a child home to an abusive situation is an emergency. The fact that the same information learned during this critical inquiry was also later used during trial does not transform the nature of the statements. Therefore, the State respectfully requests this Court reconsider its opinion in this case.

#### IV. CONCLUSION

The Confrontation Clause does not apply to statements made by an abused child to his daycare teacher. This Court should reconsider its decision in light of the previously unaddressed issues discussed above in order to ensure the ongoing protection of the children in this state.

Respectfully submitted,  
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#### CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was sent by regular U.S. mail this 8<sup>th</sup> day of November 2013 to: **ROBERT L. TOBIK, ESQ.** Cuyahoga County Public Defender, **JOHN MARTIN, ESQ.**, **ERIKA CUNLIFFE, ESQ.**, Assistant Public Defenders, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44114.



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