

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: CASE NO.2012-215
PLAINTIFF-APPELLANT,	:
	: ON APPEAL FROM THE CUYAHOGA
v.	: COUNTY COURT OF APPEALS,
	: EIGHTH APPELLATE DISTRICT,
DARIUS CLARK,	: CASE NO. 96207
	:
DEFENDANT-APPELLEE.	:

**RESPONSE OF APPELLANT DARIUS CLARK TO THE STATE'S  
MOTION FOR RECONSIDERATION**

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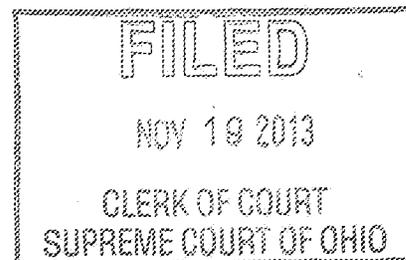
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**I. Introduction**

On October 30, 2013, this Court issued a decision affirming the Eighth District Court of Appeals. That court found that statements a child declarant made to teachers, mandated by law to report potential child abuse to police, were testimonial hearsay subject to the Sixth Amendment's Confrontation Clause. The State seeks reconsideration of that decision, arguing that the opinion underlying the holding failed to address this Court's 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. The State further complains that the "objective-witness" test used in those decisions requires a different result. The motion is ill-conceived on two fronts.

First, while the *Stahl*, *Muttart* and *Arnold* decisions are not explicitly discussed in the majority's analysis, it is clear that this Court considered them. The decisions figured prominently in the parties' briefs, the argument amici submitted, as well as the dissenting opinion. The fact that the Court chose to rely on other cases instead, including several United States Supreme Court decisions, hardly undermines the opinion's constitutional integrity. Moreover, *Stahl*, *Muttart* and *Arnold* all involved interviews undertaken for purposes of medical diagnoses. The teachers in this case

were never called upon in this case to do anything with L.P.'s information other than pass it on to law enforcement.

Second, the State's claim that the majority did not apply the "objective-witness" test when it decided the case is simply not true. The majority did apply the objective-witness test when it analyzed this case. It simply reached a result the State didn't like.

Accordingly, the State's motion does not "call[] to the attention of the court an obvious error in its decision or raise[] an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (1981). This Court's decision contains no such error or omission.

## **II. Summary of the decision**

Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse are testimonial in nature in accordance with *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed. 2d 224 (2006); and *State v. Siler*, 116 Ohio St.3d 39, 2007 Ohio 5637, 876 N.E.2d 534. *State v. Clark*, Slip Opinion No. 2013-Ohio-4731, ¶ 36.

## **III. Discussion**

The State's motion to reconsider brings nothing new to this case. As noted above, in deciding the matter, this Court concluded that, given R.C. 2151.421's

mandatory law enforcement reporting requirement, L.P.'s statements to his teachers identifying "Dee" as the person responsible for his injuries were barred by the Confrontation Clause. This Court observed that the statements were elicited during an interview, the primary purpose of which was – not to extricate L.P. from an emergency situation or to obtain urgently needed medical attention – but to determine past events potentially relevant to later prosecution. This Court concluded that these circumstances rendered the child's statements the functional equivalent of live testimony, which, therefore, made it testimonial. *Clark*, 2013-Ohio-4731, ¶ 32; citing, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-311, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Davis*, 547 U.S. at 830, 126 S.Ct. 2266, 165 L.Ed.2d 224.

The Court's holding is entirely consistent with United States Supreme Court precedent addressing the Confrontation Clause. It is also in line with Confrontation Clause decisions reached in other jurisdictions. Many courts scrutinizing circumstances like or analogous to those presented here have concluded that statements elicited by interviewers are testimonial because they were undertaken in cooperation with or at the behest of law enforcement.<sup>1</sup>

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<sup>1</sup>See, e.g. *United States v. Bordeaux*, 400 F.3d 548, 556 (8<sup>th</sup> Cir. 2005), *State v. Henderson*, 284 Kan. 267, 160 P.3d 776 (2007), *State ex rel. Juvenile Dept. of Multnomah Cty. v. S.P.*, 346 Or. 592, 624, 215 P.3d 847 (2009); *People v. Sisavath*, 118 Cal.App.4th 1396, 1402, 13 Cal.Rptr.3d 753 (2004); *State v. Hooper*, 145 Idaho 139, 146, 176 P.3d 911 (2007); *In re Rolandis G*, 232 Ill.2d 13, 32-33, 902 N.E.2d 600 (2008); *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007); *State v. Henderson*, 284 Kan. 267, 160 P.3d 776 (2007); *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 245 (Ky.2009); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006);

In asking this Court to reconsider, the State simply repeats the arguments propounded in its briefs and reiterated in the dissenting opinion. This is not the stuff of reconsideration.

The State's reconsideration motion also complains that the opinion focuses on some cases to the exclusion of others. This, according to the State, renders the decision defective. Contrary to the State's argument, this Court's decision to forego discussing *Stahl*, *Muttart*, and *Arnold*, simply underscores the fact that these cases – dealing with statements made for purposes of medical diagnoses – were distinguishable. It has never been this Court's practice to chronicle all previous cases on the same general subject matter. Nor would such an undertaking provide the clarity for which this Court strives.

Finally, the State contends that reconsideration is required because this Court's opinion will leave Ohio's children unprotected. Protecting children is a concern all of us share. The General Assembly placed teachers under the auspices of R.C. 2151.421 to further that very interest. This Court's opinion recognizing that provision hardly undermines it. There is no reason to believe that the teachers of Ohio will alter or abandon their reporting responsibility because of this case.

In the end, all this case does is require juries to hear from the child declarant firsthand, if they are going to hear a teacher's secondhand account of what the child

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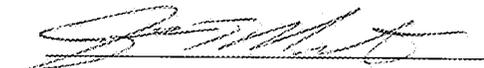
*State v. Blue*, 2006 ND 134, 717 N.W.2d 558; *State v. Mack*, 337 Or. 586, 101 P.3d 349 (2004).

told him. That practice can only help achieve more reliable verdicts, and that will not endanger children.

#### IV. Conclusion

The State's motion presents no argument that this Court has not already read, heard and rejected. It should be denied.

Respectfully submitted,



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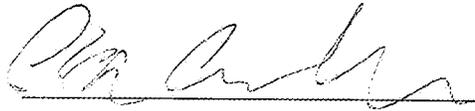


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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was forwarded by hand delivery and/or ordinary U.S. Mail this 18<sup>th</sup> day of November, 2013 upon Katherine Mullin, Assistant Cuyahoga County Prosecutor, 1200 Ontario Street, 8<sup>th</sup> floor, Cleveland, Ohio 44112 and upon Mike Dewine, Attorney General of Ohio, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215.



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