

IN THE SUPREME COURT OF OHIO
Case No. 2012-0215

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

MOTION FOR FURTHER BRIEFING AND ORAL ARGUMENT
TO ADDRESS WHETHER THIS COURT'S HOLDING SHOULD BE REAFFIRMED
BASED ON INDEPENDENT
AND/OR PURELY STATE CONSTITUTION GROUNDS

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**MOTION FOR FURTHER BRIEFING AND ORAL ARGUMENT
TO ADDRESS WHETHER THIS COURT’S HOLDING SHOULD BE REAFFIRMED
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On October 30, 2013, this Court issued a decision, which held 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 of Ohio's motion for reconsideration was denied on December 24, 2013. On June 18, 2015, the US Supreme Court reversed, concluding that introducing the statements the child declarant in the instant case made did not violate Mr. Clark's Sixth Amendment Confrontation rights. *Ohio v. Clark*, ___ U.S. ___, 135 S.Ct. 2173, 192 L.Ed. 2d 306 (2015). The High Court then remanded the matter to this Court for further proceedings not inconsistent with its opinion.

This matter originally came before this Court as a State appeal from a decision by the Eighth District Court of Appeals, which had reversed Mr. Clark's convictions for multiple reasons and remanded his case for a new trial. In seeking this Court's jurisdiction over the case, the State of Ohio posited 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.

Nevertheless, the Court of Appeals had ruled that the evidence involved in this case was inadmissible under both the Federal Constitution and state evidentiary rules. Accordingly, notwithstanding the US Supreme Court's decision that the declarant's statements to his teachers were not barred by the Federal Constitution, they still remain inadmissible under the State Rules of Evidence. In fact, the State of Ohio did not challenge the Eighth District's finding that some – and, by logical extension, all – of the declarant's out-of-court statements the prosecution

introduced at Mr. Clark's trial were unreliable and, therefore, inadmissible in light of the criteria set forth in Evid. R. 807.

More pertinent to this motion, however, because of the case's procedural posture, Mr. Clark was not able to challenge the inadmissibility of the statements at issue here either under the Ohio Constitution or alternative Federal Constitutional grounds.

Specifically, under Article I, § 10 of the Ohio Constitution, the right to confront witnesses at trial requires the accused and accuser to "meet face to face." This Court has read the right of confrontation as "contained in Section 10, Article I to require live testimony where reasonably possible." *State v Storch*, 66 Ohio St. 3d 280, 315, 612 N.E.2d 305 (1993). Clearly, this reading is broader than the construction the US Supreme Court has accorded the Sixth Amendment's Confrontation Clause. See, *Maryland v. Craig*, 497 U.S. 836, 857, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) (Face-to-face requirement is not absolute and may be abridged when necessary to further an important public policy).

As for alternative Federal Constitutional grounds, this issue initially came up before the US Supreme Court during oral argument, where several of the justices suggested that the out-of-court statements involved here might implicate important federal due process concerns. See, accord, Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 251-52 (2002) (Noting that because children's brain development is in its early stages, the information they provide is not testimonial, it may even be probative, but it is not infallible); and Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 681-85 (1987) (analyzing a case in which a child presents the description of a stranger's apartment, where she was allegedly molested). According to Richard Friedman, in the interest of fairness, the defense is entitled to have some kind of reasonable

access to the child witness before the prosecution should be able to introduce any out of court statement that child declarant might provide. See, *Ohio v. Clark*, Brief of Richard D. Friedman and Stephen J. Ceci as Amici Curiae in Support of Respondent.

These are issues that this Court has not yet addressed, but they are important, this is Mr. Clark's first opportunity to raise them, and they are ripe for consideration now. Under the circumstances, this Court should grant Mr. Clark's request for further briefing and oral argument to address whether this court's holding on October 30, 2013 should be reaffirmed on independent and/or purely state constitutional grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response was served upon TIMOTHY J. MCGINTY, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 3rd day of August, 2015.

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