

IN THE SUPREME COURT OF OHIO
CASE NO. 2012-0215

STATE OF OHIO

Plaintiff-Appellant,

v.

DARIUS CLARK

Defendant-Appellee.

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District Court of Appeals
CA 96207

STATE OF OHIO'S BRIEF IN OPPOSITION TO 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

ROBERT L. TOBIK.
Cuyahoga County Public Defender
JEFFREY M. GAMSO (0043869)
ERIKA CUNLIFFE (0075580)
Assistant Public Defenders
310 Lakeside Ave., Suite 200
Cleveland, Ohio 44113
(216) 443-7583
(216) 443-6119 *fax*

Counsel for Defendant-Appellee

TIMOTHY J. MCGINTY
Cuyahoga County Prosecutor
MATTHEW E. MEYER (0075253)
Assistant Prosecuting Attorney
1200 Ontario St., 8th Floor
Cleveland, Ohio 44113
(216) 443-7800
(216) 443-7602 *fax*
mmeyer@prosecutor.cuyahogacounty.us
email

Counsel for Plaintiff-Appellant

BRIEF IN OPPOSITION TO 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

Following remand from the United States Supreme Court in *Ohio v. Clark*, --- U.S. ----, 135 S.Ct. 2173 (2015), Defendant-Appellee Darius Clark asks that this Court reopen this case to argument, claiming that Section 10, Article I of the Ohio Constitution provides criminal defendants greater protection than the Sixth Amendment's Confrontation Clause. The State opposes the request.

Clark argues that this Court's decision in *State v. Storch*, 66 Ohio St. 3d 280, 315, 612 N.E.2d 305 (1993) stands for the proposition that O. Const. Sec. 10, Article I is "broader than the construction the US Supreme Court has accorded the Sixth Amendment's Confrontation Clause." (Motion at 2). *Storch* dealt with whether Evid. R. 807, allowing the out of court statements of child victims under certain conditions, violated the Confrontation Clauses of the United States Constitution and the Ohio Constitution. *Id.* at 285-286. In its discussion, the court acknowledged, in dicta, that there may be some circumstances where the admission of a firmly rooted hearsay exception "may violate our state constitutional right of confrontation." *Id.* at 291.

Storch itself, however, does not support Clark's argument. In *Storch*, the Court simply held that a trial court must hold a pretrial hearing and find that the child victim was unavailable before admitting an out-of-court statement under Evid. R. 807. When a trial court finds that the child is unavailable to testify, *Storch* explained that a child may be found unavailable "without doing violence to Section 10, Article I, assuming Evid. R. 807 is otherwise satisfied." *Id.* at 293. In Clark's case, the trial court held a pretrial hearing in which the State brought the victim to Court and the trial court found him incompetent to

testify. Given that the State attempted to present live, in-person testimony and could not do so because the victim was legally unavailable, the State satisfied the threshold requirements of *Storch*, Evid. R. 807, and Section 10, Article I of the Ohio Constitution.

Additionally, this Court has cast doubt on the viability of Clark's reliance on *Storch* for the proposition he advances. Both before and after *Storch*, this Court has held that "Section 10, Article I provides no greater right of confrontation than the Sixth Amendment." *State v. Self*, 56 Ohio St.3d 73, 79, 564 N.E.2d 446 (1990); *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 12, quoting *Self*. *Self* held that the introduction of videotaped deposition testimony of a child sexual abuse victim did not violate a defendant's confrontation rights under Article I, Section 10. *Self* at paragraph one of the syllabus. *Arnold* dealt with statements made by child abuse victims to a social worker at a child-advocacy center. The *Arnold* Court held that where the purpose of the child's statement was for medical diagnosis and treatment, the statement is nontestimonial and admissible without offending the Confrontation Clause. *Arnold* at paragraph two of the syllabus. In *Arnold*, this Court did not cite to or distinguish *Storch*.

Accordingly, the State submits that this Court should reject Clark's motion. The facts of this case quite readily satisfy the requirements of *Storch* and Section 10, Article I of the Ohio Constitution because the child victim in this case was incompetent to testify and therefore unavailable for purposes of Evid. R. 807. Additionally, *Arnold's* quotation of *Self* for the proposition that "Section 10, Article I provides no greater right of confrontation than the Sixth Amendment" demonstrates that Clark's position warrants no further discussion or argument. *Id.* at ¶ 12, quoting *Self*.

Respectfully submitted,
TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney

/S/ Matthew E. Meyer
MATTHEW E. MEYER (0075253)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7821
(216) 443-7602 *fax*
mmeyer@prosecutor.cuyahogacounty.us *email*

CERTIFICATE OF SERVICE

A copy of the foregoing Brief In Opposition To Motion For Further Briefing And Oral Argument To Address Whether This Court's Holding Should Be Reaffirmed Based On Independent and/or Purely State Constution Grounds has been served this 6th day of August, 2015 to Counsel for Defendant-Appellee Darius Clark, Erika Cunliffe, Esq., and Jeffrey Gamso, Esq., 310 Lakeside Ave., Cleveland, Ohio 44113.

/S/ Matthew E. Meyer
MATTHEW E. MEYER (0075253)
Assistant Prosecuting Attorney

