

**In the
Supreme Court of the United States**

DEMETRIUS JACKSON,

Petitioner,

v.

OHIO,

Respondent.

**On Petition for a Writ of Certiorari
to the Ohio Supreme Court**

REPLY BRIEF FOR PETITIONER

JONATHAN N. GARVER
The Brownhoist Building
4403 Saint Clair Ave.
Cleveland, OH 44103

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

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REPLY BRIEF FOR PETITIONER

Ohio concedes (BIO 8, 11) that the lower courts are divided on the questions presented. Ohio does not dispute that both questions are very important because they can arise so often—any time the victim of a crime is a child.

Instead, Ohio (1) argues that the splits on both questions are no longer worth resolving in light of *Ohio v. Clark*, 135 S. Ct. 2173 (2015); (2) suggests that a few of the lower-court Fifth Amendment cases do not truly conflict; and (3) contends that the decision below is correct.

Ohio is mistaken in all three respects.

First, *Ohio v. Clark* has no bearing on either of the questions presented, because it is a case about the Confrontation Clause, not the Fifth Amendment or the right to counsel.

Second, the lower-court Fifth Amendment cases *do* conflict. They apply two different rules to the recurring fact situation present in our case.

Third, the decision below is indefensible. It renders the Fifth Amendment and the right to counsel virtually meaningless in any case with a child victim.

ARGUMENT

I. *Ohio v. Clark* has no relevance to either question presented.

Ohio asserts (BIO 4-5, 12) that the lower-court conflicts on both questions presented have been superseded by *Ohio v. Clark*, 135 S. Ct. 2173 (2015). Ohio badly misunderstands *Clark*.

The question in *Clark* was whether out-of-court statements by a 3-year-old to his preschool teachers were “testimonial” for purposes of the Confrontation Clause. *Id.* at 2181. The Court held that the statements were not testimonial, because their purpose was not to gather evidence for the prosecution. *Id.* *Clark* has nothing to do with the questions presented in our case, which do not involve the Confrontation Clause.

In *Clark*, the defendant relied upon the teachers’ mandatory reporting obligations to argue, unsuccessfully, that the teachers *were* trying to gather evidence for a prosecution. *Id.* at 2182-83. The Court rejected this contention, because it was clear that “[t]he teachers’ pressing concern was to protect” the child, not to gather evidence. *Id.* at 2183. “Like all good teachers,” the Court explained, “they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse.” *Id.* The Court added that “mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.” *Id.*

Ohio seizes on this last sentence as somehow relevant to our case, apparently because CPS caseworkers, like preschool teachers, are required by state law to report crimes against children to the police. But this one point of similarity does not change the fact that *Clark* is a Confrontation Clause case. Ohio also forgets that in *Clark* the Court was discussing classroom conversations with small children thought to be crime *victims*, not jail-cell interrogations of in-

carcerated *suspects*. *Clark* simply has no relevance to our case.

II. The lower courts apply two conflicting rules to the Fifth Amendment issue.

Ohio suggests (BIO 8-11) that on Question 1, the lower courts are all applying the same general standard to determine whether an interrogation by a CPS caseworker is governed by the Fifth Amendment. But Ohio discusses only a few of the many cases constituting the split. And Ohio is wrong in any event. As we showed in our certiorari petition, the lower courts are applying two conflicting rules. Where a CPS caseworker conducts a custodial interrogation, most lower courts hold that the interrogation is governed by the Fifth Amendment. Pet. 13-19. By contrast, a handful of lower courts, like the Ohio Supreme Court below, hold that the interrogation is not governed by the Fifth Amendment unless it is ordered or controlled by a police officer. *Id.* at 19-22.

These two rules produce conflicting results in the common fact pattern presented by our case, in which the police do not order the caseworker to conduct the interrogation or tell her what to ask. In most jurisdictions, this interrogation is governed by the Fifth Amendment, because the caseworker is obliged to share the fruits of the interrogation with the police. In Ohio and three other states, by contrast, this interrogation is not governed by the Fifth Amendment.

III. The decision below is indefensible.

Ohio's sole argument on the merits (BIO 5-8, 11-12) is that the Fifth and Sixth Amendments apply only to law enforcement officers and their agents,

and that a CPS caseworker is neither. Ohio errs twice.

First, the Fifth and Sixth Amendments govern interrogations by any “agent of the State,” *Estelle v. Smith*, 451 U.S. 454, 467 (1981), not merely by individuals designated as law enforcement officers. For instance, a psychiatrist who testifies for the state in a criminal trial is surely not a law enforcement officer, but the Fifth and Sixth Amendments apply to questioning by the psychiatrist. *Id.* at 467-71; *see also Mathis v. United States*, 391 U.S. 1, 4 (1968) (same for an IRS agent). The Bill of Rights constrains *states*, not “law enforcement officers.” A state cannot evade the Fifth and Sixth Amendments simply by using employees not designated as law enforcement officers to conduct interrogations. *Cf. Maine v. Moulton*, 474 U.S. 159, 176 (1985) (emphasis added) (“The Sixth Amendment guarantees the accused . . . the right to rely on counsel as a ‘medium’ between him and *the State*.”).

Second, in any event, a CPS caseworker like the one in our case *is* an agent of law enforcement. Holly Mack had been conducting custodial interrogations of suspects for seventeen years, probably longer than many of the police officers to whom she was required to report incriminating information. Mack certainly knew of her reporting obligation when she interrogated Demetrius Jackson. The police knew it too. Under any normal conception of agency, Mack was acting as an agent of the police. They did not need to request the interrogation, because they knew Mack would show up. They did not need to tell her what to ask, because she already knew.

The decision below is indefensible. Where the defendant has asserted his *Miranda* rights, the decision below allows the state to interrogate him anyway. Where the defendant is represented by counsel, the decision below allows the state to bypass counsel and interrogate the defendant directly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN N. GARVER
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Cleveland, OH 44103

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
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banner@law.ucla.edu