IN THE SUPREME COURT OF OHIO

SCT NO. 2019-0621

IN RE: M.H.	:
Appellant	:
	:
	:

MERIT BRIEF OF APPELLANT M.H.

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MERIT BRIEF OF THE CHILD-APPELLANT, M.H.

I. STATEMENT OF THE FACTS

A case file with M.H.'s name on it arrived on Detective Cottom's desk on October 20, 2015. Tr. 74, 75. The mother of J.M., M.H.'s "half-sister," was the complaining witness.[1] Tr. 59. The two were close in age; M.H. was 13 and J.M. was a few months younger and 12 years old.

The police report on Detective Cottom's desk recounted that sometime in August 2015 J.M. spent the night at M.H.'s home. Tr. 63. According to the report, once J.M. believed everyone was asleep, J.M. sent M.H. a text message from her Kik messaging account, and the two ultimately engaged in some sexual activity but did not have intercourse. Tr. 63, 69-70.

According to the report, J.M. and M.H. kept that night between the two of them for approximately one month. Tr. 5. It was then that J.M. became nervous and thought that she might be pregnant. Tr. 5. This fear, impossible as it were, prompted J.M. to tell her mother, Tracey, about that evening in August with M.H.

Tracey has never expressed any concerns about her daughter's safety. Tr. 47. Even after hearing J.M.'s allegations about that August night, Tracey did not call police. Instead, she called children and family services. The report in Detective Cottom's hands was filed because a social worker with the Cuyahoga County Department of Children and Family Services ("CCDFS") "instructed [Tracey] to make a police report." Tr. 59. That social worker was Ester Bradley – herself a former homicide detective.

Detective Cottom has been a sex crimes detective for 17 years. Tr. 71. In the ordinary course of business, Detective Cottom would take the lead in all aspects of the criminal

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[1] M.H. and J.M. are not biological siblings. M.H.'s mother's boyfriend is the father of the J.M. Eighth District Opinion at ¶10, fn2 (hereinafter, "Opinion").

investigation to which she is assigned. This includes interviews with the accuser and the accused. Cottom did not do either in this case.

In this case, like all cases where the alleged victim is less than 18 years old, Detective Cottom works "hand-in-hand" with the CCDFS social workers and child protection specialists like Ms. Bradley. Tr. 72. In such cases, Detective Cottom completes what she calls a "basic follow-up investigation." Tr. 71. Cottom explains the social worker will do a "write up" on a case following the social worker's investigation. Tr. 72. After the "write up" is received by Cottom she will "review the case with the prosecutor, file charges, get warrants and search warrants." Tr. 72. When possible, Cottom will coordinate her schedule so that "[she and the social worker] can interview victims together so that the victim doesn't have to repeat her or his story over and over." Tr. 72. That did not happen in this case because CCDFS Child Protection Specialist Bradley ran the entire investigation from start to finish.

When Detective Cottom received the case file on October 20, 2015, she chose to let Bradley complete the interview of M.H., and she chose not to coordinate her schedule to participate in the interview.

M.H.'s mother, Marcia, never had "an open file" with the Cuyahoga County Department of Children and Family Services ("DCFS") prior to this case in the Fall 2015. Thus she was surprised when she received a letter from DCFS in the Fall of 2015. Tr. 15, 23. This was unchartered territory for the concerned mother. Like a court summons, the letter directed Marcia to bring her 13 year old son for an interview at an already scheduled time and date. Tr. 15.

The letter was silent as to the purpose of the interview and Marcia did not know why she was being summoned to appear. Tr. 15.

Marcia called DCFS and spoke with Esther Bradley after receiving the letter. Tr. 16, 43, 57. Ms. Bradley simply confirmed the time and place of the interview and did not

provide any additional details. Tr. 16. At this point in time, Marcia maintains that no one with DCFS explained that her 13 year old son was the suspect in a sexual assault complaint that did not involve intercourse.

Meanwhile, in her office at the Jane Edna Hunter building, Bradley knew there was a "strong possibility" that M.H. was on the cusp of facing criminal charges. Tr. 49. Bradley knew that Tracey filed a police report. Tr. 51. In fact, Bradley testified that she "instructed the mother to make the police report." Tr. 68. Bradley also knew Detective Cottom was assigned to the case and had been on the case since October 20, 2015. Tr. 51, 67, 73. Indeed, Bradley and Cottom had exchanged voicemails regarding the case. Tr. 74.

Marcia met Ms. Bradley upon her arrival at the Jane Edna Building where the interview was scheduled to take place. Tr. 16. It was December 2, 2015. Ms. Bradley greeted Marcia then "told us that she would have to take my son away to interview him." Tr. 16, 25, 48. M.H. was then taken to a private room for the interrogation. Id. Marcia was never told that cooperating with DCFS was optional. Tr. At 20, 35. She was never told that she had a right to be present when her son was interrogated by Bradley. Tr. 20, 48. She was never told that Bradley was attempting to confirm a sexual assault allegation and to obtain an incriminating statement from Marcia's 13 year old son. Tr. 20. In fact, when the interrogation began in a private room across the building from where Marcia sat, Marcia was still being held in the dark about the purpose of the interview. Tr. 16-17.

Marcia stayed behind because "[she] thought [she] couldn't go with" her young son. Tr. 17, 20. Neither Marcia, nor M.H., were ever told point of the interview or that M.H. did not have to answer questions. On cross-examination by the prosecutor, Marcia explained that she would have "had an attorney present" had she known the nature of the interrogation Tr. 35.

When Bradley returned M.H. to his mother, M.H. was not himself. Marcia noticed that he was "quiet" and "kind of nervous." Tr. 29-30. It was then, after the child had been interrogated, that Marcia finally learned the nature of the investigation. Tr. 17. If that was not enough, Marcia was then told that Bradley "had to report it to the police station because she has to do that" Tr. 17.

Following the interrogation of M.H., Bradley formulated an investigative report following her questioning of M.H. and provided a copy of her interrogation to Detective Cottom. Tr. 17, 51. That report was provided as a matter of policy and in the ordinary course of business. Tr. 17, 51. The same report was not given to M.H. or his mother. Tr. 54. When asked, "why not?" Bradley pointed-out, "That's against policy. We can't do that." Tr. 54.

Marcia was a 33 year old mother who never completed high school. Her oldest child, M.H. was 13 years old at the time of the investigation.

In April 2017, Esther Bradley had been working with the DCFS for only two and one-half years and, at the time of the hearing, worked as a "child protection specialist." Tr. 38. However, Bradley was a police officer for ten and one-half years including four to four and one-half years as a police detective before switching to DCFS. Tr. 55, 66.

In the instant case, Bradley testified that she was required to "notify [M.H.] or his parent that he's been named as an alleged perpetrator "because he is a minor." Tr. 40. Bradley testified that she fist made contact with Marcia "in October or somewhere around that time in 2015." Tr. 41. Bradley told the court that she informed Marcia about the nature of the allegations in a sealed envelope that was left at the Marcia's home at some point in time. Tr. 42-43. During a subsequent phone call, Bradley believes she told Marcia that "it [was to be] a private interview with just me and the child." Tr. 48-49. According to Bradley, this moment in time, is the only "the opportunity" "for the parent to say 'I don't want you to speak to my child alone' and so we'll just disregard with the interview process." Tr. 49, 57.

Parents like Marcia are never informed that they have a right to decline the interview. Parents are never told they have a right to be present with or without counsel should they choose to go forward with the interview. They are also never told that the fruits of the interrogation will automatically be forwarded to law enforcement. Thirteen year old M.H., the government's target in the investigation, was never informed about the purpose of the questioning. Tr. 53, 62. Bradley also never advised him that he had the right to refuse the interview. Tr. 53-54. M.H. was never told that he could leave at any time. Tr. 54. He was also not informed of his *Miranda* rights. Tr. 53.

II. STATEMENT OF THE CASE

Nine months after the interrogation, on August 24, 2016, M.H. was charged with two counts of gross sexual imposition on August 24, 2016. M.H. filed a motion to suppress the un-*Mirandized* statements he made during that interview.

The investigation was carried out, pursuant to state law, by the state's child protection specialist. The Court granted the motion to suppress "not only in light of the child's due process, Constitutional guarantees, but also in light of Evidence Rule 403(A) whereby, although relevant, the evidence will not be found to be admissible as its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues." Tr. 94.

The state timely appealed and raised a single assignment of error challenging only whether *Miranda* warnings were required at the time M.H. was interrogated. Oral argument was held on November 14, 2017. The following day, the court issued a stay and removed the case from the active docket pending this Court's decision in *State v. Jackson*, Case No. 2017-0145.

This Court released is decision in *State v. Jackon*, 2018-Ohio-2169, on June 7, 2018. This matter was subsequently returned to the active docket. Each party filed supplemental briefs by August 2, 2018.

The court of appeals finally issued its decision on December 6, 2018. M.H. filed a motion for reconsideration and for a hearing en banc. The court of appeals denied each motion on March 20, 2019.

M.H. filed a timely notice of appeal and memorandum in support of jurisdiction, and this Court accepted review of 3 propositions of law on July 10, 2019.

Through this case, and those 3 propositions of law, the Court is called to examine the constitutional rights afforded a juvenile suspect during an interrogation and the constitutional limitations that safeguard those rights. More precisely, the case asks whether a 13-year child loses his Miranda rights and Due Process rights under the voluntariness doctrine when the government structures its investigative process so that a non-police officer interrogates the child-suspect.

III. LAW AND ARGUMENT

Three different doctrines impose Constitutional limits on the admissibility of confessions in criminal cases and juvenile adjudications: *Miranda* doctrine under the Fifth Amendment, *Massiah* doctrine under the Sixth Amendment, and voluntariness doctrine under the Due Process Clauses of the Fifth and Fourteenth Amendments. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Massiah v United States*, 377 U.S. 201 (1964). The first and third Constitutional doctrines are going to be explored in this case. More specifically, this case explores the three-way intersection of the *Miranda* doctrine, the voluntariness doctrine and jurisprudence of juvenile rights.

First, M.H. will discuss the special solicitude afforded juveniles under the Constitutions of the United States and the State of Ohio. M.H. will also examine how and

why these special protections came to be. Second, M.H. will explore the Supreme Court's decision of *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394 (2011). In that watershed case, the Supreme Court made clear that juveniles cannot be held to the same standard as adults and that courts must account for the age of the accused when determining whether one is "in custody" for *Miranda* purposes. Finally, M.H. will discuss each of his three propositions of law being mindful of the special protections afforded juveniles and applying the changes that *J.D.B.* demands of the *Miranda* analysis and the commensurate impact of the voluntariness inquiry.

A. Children are Constitutionally Different than Adults

The Ohio and federal constitutions provide the foundation for robust constitutional protections for youth during interrogations. Underpinning these protections is the now widely accepted scientific fact that children require special care. As early as 1948, the Supreme Court recognized the need for special protections for youth. In *Haley v. Ohio*, 332 U.S. 596 (1948), the plurality acknowledged that police interrogations that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." Id. at 599. Over a decade later in 1962, the Court again noted that "'[n]o matter how sophisticated,' a juvenile suspect of police interrogation 'cannot be compared' to an adult subject." *Gallegos v. Colorado*, 370 U.S. 49 (1962).

The entire juvenile justice system was born of the idea that kids are not merely miniature adults and that kids may and often will change. Indeed, this Court has remarked, "[c]onsidered 'a monument to the enlightened conviction that wayward boys may become good men,' *In re Agler* (1969), 19 Ohio St.2d 70, 71, juvenile courts were lauded as 'one of the most significant advances in the administration of justice since the Magna Carta.' *Cox v. Turley* (C.A.6, 1974), 506 F.2d 1347, 1354, quoting *Roscoe Pound*, Guide for Juvenile Court Judges (1957) 127." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶ 68

The due process interests introduced in *Haley v. Ohio*, supra, were ultimately "crystallized in *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527." *In re C.S.*, 115 at ¶ 71. In *In re Gault*, ibid, the Court held that a juvenile and his parents must be informed of certain rights, including the juvenile's right to be represented by counsel and to have counsel appointed if his family cannot afford an attorney, the right not to be forced to incriminate himself, the right to written notice of the specific charges against him, and the right to confront and cross-examine witnesses. Id. at 31-56. "In the wake of *Gault* and its progeny, [this Court] also found that 'numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings," *State v. Walls*, 96 Ohio St.3d 437, 446, 2002-Ohio-5059, ¶26, and overruled prior decisions that held to the contrary, see *In re Agler*, 19 Ohio St.2d at 76 (1969).

Although courts have viewed children as needed special protections, the foundation for recognizing the neurological and psychological differences between adolescents and adults in the criminal context was not laid until *Roper v. Simmons*, 543 U.S. 551, 569-70. *Roper* was the first of a progression of cases relying on the age of the juvenile offender as grounds for a distinct approach toward the application of constitutional protections. Then, in *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010) Justice Kennedy elaborated on the universal differences between children and adults.

In *Roper v. Simmons*, ibid, the Supreme Court held that the death penalty is a disproportionate punishment for persons under the age of eighteen, and therefore violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Roper* at 578. The decision established that, as a categorical matter, juveniles are less culpable than adults and thus less deserving of the most severe punishment. Id. at 568-70, The Court relied on social science research and common life experience in declaring the presence of "signature qualities of youth" to support its abolition of the death penalty for juveniles. Id. at 570,

quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993). The majority, therefore, held the view that age renders certain characteristics salient regardless of the particular idiosyncrasies of an individual child. Hillary B. Farber, *J.D.B. v. North Carolina: Ushering in a New "Age" of Custody Analysis Under Miranda*, 20 J. L. & POL'Y 117, 126-127 (2011).

"To illustrate that the High Court views these traits as universal, when pressed to reject a per se rule in favor of a case-by-case assessment of an individual defendant's psychological and social maturity, the Court responded that '[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.' [*Roper*] at 572-73." (Farber, at 128).

Five years later, in *Graham v. Florida*, the Court held that life without parole sentences for juveniles who did not commit a homicide was unconstitutional. *Graham*, 130 S.Ct. 2011, 2026 (2010) The Court in *Graham* relied on the Court's earlier reasoning in *Roper* that recognized juveniles as less culpable and thereby less deserving of the most severe punishments. Id. at 68-71. The Court in *Miller v. Alabama* also relied on the rationale in *Roper* and *Graham* that juveniles are less culpable and held that mandatory life without parole sentences for juveniles were unconstitutional. *Miller v. Alabama*, 567 U.S. 460, 469–70 (2012).

Justice Kennedy, writing for the majority in *Graham*, found that specific immutable characteristics of youth require their categorical exclusion from a particular punishment. *Graham* at 2026. *Graham v. Florida* bolsters *Roper*'s findings about youth by acknowledging that scientific research has furthered our understanding of the cognitive differences (variations in reasoning and understanding) and psychosocial differences (disparities in social and emotional functioning) between juveniles and adults. Id. *Graham* is a logical extension of Justice Kennedy's approach in *Roper*, finding that the well-

documented and understood traits of adolescence mitigate a youth's culpability. Id. at 2026-27. In other words, by virtue of age alone, a juvenile's culpability cannot be equal to that of an adult. Id. at 2027. *Graham* carries *Roper*'s rationale regarding the general character of a juvenile's psychosocial immaturity and cognitive abilities a step further by articulating additional distinctions between adults and juveniles in the context of the penological goals. *Graham* points out that because of a juvenile's "limited understanding of the criminal justice system," and their tendency toward impulsive decision making, "they are less likely . . . to work effectively with their lawyers to aid in their own defense." *Graham* at 2032.

This line of cases involving the special care required for children begins with *Haley v. Ohio* and ending with *J.D.B.*, and has brought the Courts in line with social science research. See, Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie Schuck, Editors, NATIONAL RESEARCH COUNCIL, *Reforming Juvenile Justice: A Developmental Approach*, 2:2 (2013). "Adolescents differ from adults and children in three important ways that lead to differences in behavior. First, adolescents have less capacity for regulation in emotionally charged contexts, relative to adults. Second, adolescents have a heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives, relative to children and adults. Third, adolescents show less ability than adults to make judgments and decisions that require future orientation. The combination of these three cognitive patterns accounts for the tendency of adults to prefer and engage in risky behaviors that have a high probability of immediate reward but can have harmful consequences." Id.

B. The Significance and Reach of *J.D.B. v. North Carolina.*

One year after *Graham*, the Court handed down *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), completing a trilogy of Supreme Court cases that forged a new approach to

youth status in our justice system. For the first time, the Supreme Court applied *Roper*, *Graham*, and recent adolescent development research to a context other than the Eighth Amendment. In *J.D.B.*, the Court acknowledged the social science and cognitive science confirms "what experience bears out," and thus "citation to social science and cognitive science authorities is unnecessary to establish these common sense propositions." *J.D.B.*, 131 S.Ct. at 2403 n.5. In *J.D.B.*, the Court announced the significance of age in its approach to *Miranda* custody determinations.

J.D.B. and its "common sense" holding informs each of M.H.'s propositions of law. As such, a discussion of J.D.B. precedes a discussion of each of M.H.'s propositions of law.

Scholars say that *J.D.B.* has the potential to be "a game changer in delinquency and criminal cases involving minor suspects...." Martin Guggenheim and Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession and Suppression Law*, 38 WASH. U.J.L. & POL'Y 109 (2012).[2] Professor Farber with the University of Massachusetts School of Law writes that J.D.B. has the "great potential to ensure a meaningful delivery of constitutional protections to children in the investigative and adjudicatory phases of proceedings." Hillary B. Farber, *J.D.B. v. North Carolina: Ushering in a New "Age" of Custody Analysis Under Miranda*, 20 J. L. & POL'Y 117, 121 (2011).[3] While *J.D.B.* may ultimately prove transformative, its application in this case is straightforward and should not be controversial.

J.D.B. was a thirteen-year-old student interrogated by a police detective after being pulled from class. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011). After J.D.B. entered the conference room, the door was closed behind him. Id. at 2399. In the presence of the administrators, the detective asked J.D.B. to explain where he had been at the time

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[2] Available at http://openscholarship.wustl.edu/law_journal_law_policy/vol38/iss1/5
[3] Available at: https://brooklynwo117rks.brooklaw.edu/jlp/vol20/iss1/4

that the break-ins occurred. Id. J.D.B. confirmed that he was in the neighborhood then, but informed the police that he had been looking for work. Id. The detective pressed J.D.B. further and pulled out the stolen camera. Id. Eventually, J.D.B. confessed to breaking into his neighbor's house and stealing the camera. Id. at 2400. He wrote a full statement detailing the theft. Id. By this time, roughly forty-five minutes had passed since the interrogation had begun. Id. at 2399.

As the Court noted, if it were to ignore J.D.B.'s age in the custody analysis, as precedent mandated, it would be forced to evaluate how a reasonable adult would feel when removed from his seventh grade social studies class, brought to the principal's office, interrogated by a police detective, and warned of detention in a juvenile facility if he failed to cooperate. Id. at 2407. That makes little sense, as either a practical or legal matter.

In *J.D.B.*, the Court held that age is a relevant factor in determining whether a juvenile is in custody for *Miranda* purposes. Id. at 2399. Drawing from prior cases, including *Roper* and *Graham*, both premised on the "understanding that the differentiating characteristics of youth are universal," a majority of the Court agreed that failing to consider age in the custody analysis would be nonsensical. Id. at 2404-05. The majority explained that age is far more "than a chronological fact"; it informs behavior and perception. Id. at 2402, citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). The *J.D.B.* Court explained:

> A child's age, however, is different. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are "most susceptible to influence," and "outside pressures"—considering age in the custody analysis in no way involves a determination of how youth "subjectively affect[s] the mindset" of any particular child.

J.D.B. at 2404-05.

J.D.B. v. North Carolina approached the question of age and its relevance to the *Miranda* custody analysis relying on past precedent, social science, and common sense. Id.

at 2394. As Justice Sotomayor opined, common sense conclusions about behavior and perception may be based upon age. Id. at 2407. One need not possess a degree in child development to appreciate that children behave and perceive events differently from adults. Id.

The characteristics unique to adolescent brain development and psychosocial development make a juvenile's perception of a restraint on his freedom fundamentally distinct from an adult's perception of that restraint. As Justice Sotomayor explained, "[n]either officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child...."

These truths are self-evident. "[A] child's age, when known or apparent, is hardly an obscure factor to assess. . . . [O]fficers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7–year–old is not a 13–year–old and neither is an adult." Id. at 2407.

While *Roper* and *Graham* relied on social scientific data to establish the fact that children are fundamentally distinct, the *J.D.B.* Court concluded that the many developmental distinctions between children and adults are "commonsense propositions" for which "citation to social science and cognitive authorities is unnecessary." *J.D.B.* at 2403 n.5. "Such conclusions," *J.D.B.* teaches, "apply broadly to children as a class." Id. at 2403.

Looking to the future, with the specific attributes of children now firmly acknowledged in Supreme Court precedent, a qualitatively different analysis is reserved for juveniles in a variety of contexts not yet considered by the Court. This case considers *J.D.B.*, in the context of the voluntariness doctrine and the Due Process Clause.

C. M.H.'s Propositions of Law

This Court accepted three propositions of law for review. There is significant overlap between each of the propositions of law; as a result, the arguments in support of one proposition of law will likely inform the discussion of each of the other two propositions.

Proposition of Law I:

The Statement of a child to a government social worker may be involuntary and violate due process even when the government social worker was not required to give *Miranda* warnings.

It is widely accepted that the voluntariness of a confession presents an issue analytically separate from those issues surrounding custodial interrogations and *Miranda* warnings. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 304, 105 S.Ct. 1285, 84 L. Ed. 2d 222 (1985) ("Prior to *Miranda*, the admissibility of an accused's in custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause."); *State v. Jenkins*, 15 Ohio St.3d 164, 231 (1984) (noting that "due process provisions of the federal Constitution dictate that the state must meet by a preponderance of the evidence its burden of proving that any inculpatory statement was made voluntarily".)

While the proposition of law may not be controversial, M.H.'s application of the underlying facts to that proposition of law will likely invite a challenge. Indeed, the government is expected to argue that M.H.'s statement in this case was voluntary.[4] It was not.

M.H.'s rights under the Fifth and Fourteenth Amendments of the U.S. Constitution and Section 10, Article I of the Ohio Constitution were violated in this case. "It is now commonly recognized that courts should take 'special care' in scrutinizing a purported confession or waiver by a child." *In re C.S.*, 115 Ohio St.3d at ¶ 106, quoting *In re Manuel*

[4] The state never appealed the lower court's decision to grant suppression under on due process grounds and as a violation of Evidence Rule 403. As a result, the appellee's brief before this Court will be the first time the State-appellee addresses the issue of due process.

R., 207 Conn. 725, 737-738, 543 A.2d 719 (1988), citing *Haley*, 332 U.S. at 599. When an admission is obtained from a juvenile without counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, *but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.*" (Emphasis added) *In re Gault*, 387 U.S. at 55, see also, *State v. Barker*, 149 Ohio St.3d 1, 2016-Ohio-2708, ¶ 41.

In this case, M.H.'s statement was involuntarily obtained through a combination of circumstances and a product of M.H.'s ignorance of his rights. The totality of the circumstances from which a court must determine the voluntariness of a juvenile's statement includes not only the details of the interrogation but also the juvenile's unique characteristics. That analysis here would necessarily include consideration of factors such as M.H.'s age, M.H.'s grade level and level of comprehension, the fact that he was driven to interrogation by his mother, the circumstance of being left alone and separated from his mother, the power of CCDFS to separate families, the absence of an attorney, the failure to advise M.H. that he was free to leave, the fact that M.H. was never advised of any of his *Miranda* rights, and "common sense" differences between children and adults as explained in *J.D.B.*, supra.

While most of these facts and circumstances are self-evident several will be discussed on greater detail below. Indeed, the totality of the circumstances in this case include all the small and large things that troubled the Eighth District and compelled each judge to write separate opinions. M.H. will start his discussion with the last factor: the *J.D.B.* factors.

A. Children as a class are to entitled to general presumptions that weigh against voluntariness.

In *J.D.B.*, the majority demonstrated through its use of *Haley v. Ohio* and *Gallegos v. Colorado* that voluntariness cases should be treated as recognizing "commonsense proposition[]" that "events that 'would leave a man cold and unimpressed can overawe and

overwhelm a lad in his early teens...." *J.D.B.*, 131 S.Ct. at 2403, n.5. "J.D.B. further shows that *Roper v. Simmons* should be read as establishing that it is the "common 'nature of juveniles'" that 'they "are more vulnerable or susceptible to . . . outside pressures" than adults.'" (Guggenheim, 2012) While *Roper* relied on social scientific data to establish these propositions, the Court concluded in *J.D.B.* that these are "commonsense propositions" for which "citation to social science and cognitive authorities is unnecessary." *J.D.B.*, at 2403 n.5. "Such conclusions," *J.D.B.* teaches, "apply broadly to children as a class." Id. at 2403.

J.D.B., communicates no less than four general presumptions about children that must be factored into every totality of the circumstances test. First, that "children as a class" are "more vulnerable or susceptible to... outside pressures than adults." *J.D.B.*, at 2403, quoting *Roper*, 543 U.S. at 569. Second, Children "often lack experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them...." *J.D.B.*, at 2403. Third, children are more likely to succumb to interrogation by giving statements that are "the product of ... adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. at 55. Fourth, the risk of a false confession climbs intolerably when the target of the interrogation is a juvenile. *J.D.B.*, at 2401 (Citations omitted).

Remembering that the Constitution places the burden of proof on the government to show voluntariness, the question becomes whether the government overcame these generally accepted common sense presumptions. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). There is nothing on this record that shows that these presumptions about children as a class were overcome. That failure of the government to demonstrate voluntariness is only made clearer when the circumstances of the interrogation are taken into account.

B. M.H.'s statement in this case was involuntary and made under highly coercive circumstances.

1. <u>Developmental psychology tells us that M.H., at the age of 13 years old, provided an involuntary statement.</u>

While J.D.B. identified at least 4 common sense propositions that are known to be true about children, social science tells us children of particularly young age, like M.H., developmentally at-risk to provide a statement involuntarily. "Psychosocial maturity has been operationalized in slightly different ways but generally involves the development of adolescent judgment in socioemotional domains. The construct is typically defined and measured as some combination of (a) peer influence; (b) reward sensitivity; (c) sensation seeking; (d) impulse control or self-regulation; and (e) future orientation. It is often assessed using either global measures or self-report or behavioral measures of individual factors." (Citations omitted) Cleary, Hayley M.D., *Applying Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research*, POLICY, AND PRACTICE, PSYCHOLOGY, PUBLIC POLICY AND LAW, Vo.23, No.1, 118-130 (2017).

"Not all elements of adolescent neurobiological or psychosocial development are necessarily directly relevant to decision making during police interrogation." (Cleary, 2017). However, three factors—reward sensitivity, self-regulation, and future orientation are particularly applicable to the juvenile interrogation context. Id.

a. Reward Sensitivity

"Research has indicated that developmental factors such as reward sensitivity may drive adolescent decision making and that these developmental influences on decision making are temporary. Ignoring such developmental incapacities effectively "penalizes" adolescents for making poor decisions influenced by transitory characteristics that they will likely outgrow. (Cleary, 2017, p.110)

Behavioral evidence from juvenile interrogation studies provides clues that adolescents' preference for immediate rewards may manifest in police interrogations. One application involves youths' proclivity to make decisions that would hasten the conclusion of an interrogation—in essence, the notion that confessing allows one to "go home." Most

often this idea is discussed in reference to juvenile false confessions, and real-world examples abound. Drizin, S. A., & Colgan, B. A., *Tales from the juvenile confession front: A guide to how standard police interrogation tactics can produce coerced and false confessions from juvenile suspects*. In G. D. Lassiter (Ed.), INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT (pp. 127–162). New York, NY: Kluwer (2004). One study reported that among the adolescent cases in its sample of documented false confessions, getting to go home was one of the most common reasons cited for falsely confessing. Id. The impact of a child's reward sensitivity is heightening by the fact that interrogators intentionally imply leniency as a minimization tactic, "making confession seem like an expedient means of escape" Kassin, S. M., Drizin, S. A., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D., *Police-induced confessions: Risk factors and recommendations*, LAW AND HUMAN BEHAVIOR, 3–38, 18 (2010).

b. Self-Regulation

"Reward sensitivity can be tempered by the ability to control one's impulses and self-regulate behavior. [Scholars] consider[] the development of self-regulation the 'central task of adolescence' .... Self-regulation involves capacities such as impulse control, response inhibition, resistance to peer influence, and ability to delay gratification." (Citations omitted) (Cleary 2017, p.120-21). "[A] adolescents' emergent abilities to exercise restraint and manage stress are particularly vulnerable during police interrogation. Regarding stress, it is reasonable to presume that typical adolescents would perceive an interrogation interaction as stressful and that youths' anxieties may differ from adults' in type and degree. Anticipating a parent's reaction, the worry of "getting in trouble," mounting pressure from police, or simply being an unfamiliar environment without a support system could all contribute to feelings of stress." Id.

c. Future Orientation

Future orientation also plays a role in a child's ability to withstand the pressures of interrogation and make a voluntary statement. "Davis and Leo (2012) argued that in order to successfully resist interrogator persuasion one must continually prioritize long-term interests over short-term impulses in the process of constant self-monitoring. Adolescents' relative deficits in future orientation likely combine with their heightened reward sensitivity and limited self-regulatory abilities to render youth especially vulnerable to poor interrogation decision making. Youth with underdeveloped time perspective may feel that even a brief encounter with police is painfully long. What is a routine half-hour information-gathering interview to a police officer may seem like eternity to a youth sitting alone and nervous in an interrogation room. These youth may comply with interrogators' requests to whatever extent necessary for them to be released, even to their legal detriment." (Citation omitted) (Cleary, 2017, p.121).

Taken together, research on psychosocial development and its neurological underpinnings demonstrates that "youth as a class are disadvantaged because their developing cognitive capacities are tempered by differences in values and judgment that are unique to adolescence as a developmental period." (Cleary, 2017, p.122).

2. <u>The child's mother took him to the interview at issue</u>.

The lead opinion in the Eighth District called the circumstances surrounding the interrogation of M.H. as "troubling."

Implicit, if not explicit, in the mother's involvement in this case is that she expected her child, M.H., to cooperate with the interrogation. This Court has recognized the inherent power differential unique to a filial relationship. The *Eskridge* court explained that, "[t]he youth and vulnerability of children, coupled with the power inherent in a parent's position of authority creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the [parent's] purpose."

In the case at-hand, M.H.'s mother held a clear position of authority over him. The child's mother arranged for the interview to take place. The child's mother took him to the predetermined location at the predetermined time. The child had no control or voice in the time or location of the interrogation. The mother's child told him to go with the social worker. Inherent in all of this is also the expectation that the child cooperate with the social worker and her investigation. This difference in power between the mother and child coupled with the expectations thrust upon M.H. under these circumstances are precisely the type of subtle and psychological coercion that is unique to parent-child relationships. It is also this subtle and psychological coercion that compelled the child to cooperate with his interrogator, who like his mother is also an authority figure.

Moreover, from a conceptual standpoint, scholars have argued that it is unfair to place parents in this intermediary position. Scholars have noted the conflicting roles parents face, wanting to protect their children against accusations and legal harm on the one hand but desiring to serve as educator and moral guide on the other. Farber, H. B., *The role of the parent/guardian in juvenile custodial interrogations: Friend or foe?* THE AMERICAN CRIMINAL LAW REVIEW, 41, 1277–1312 (2004). Parents may also have a conflict of interest with their child or financial disincentives (Drizin & Luloff, 2007; Feld, 2013).

3. **The Social Worker Initiated and Directed an Inherently Coercive Interrogation.**

This factor will be discussed more fully later. For purposes of voluntariness and due process analysis, the Eight District was right to be "troubled by [the] social worker's typically close working relationship with law enforcement...." Opinion at ¶31. It is precisely the closeness of this relationship that offends due process. Here, the child protection specialist –a former homicide detective- is an agent of the government even if not an agent of law enforcement. The social worker manipulated the child's mother in this case to secure

the mother's cooperation, which ultimately proved critical in securing M.H.'s cooperation in this state initiated interrogation.

Interrogations have been described as a "process of social influence . . . a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measures success by the ability to extract an admission from that target." Kassin, S. M., & Gudjonsson, G. H., *The psychology of confessions: A review of the literature and issues*, PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST, 5, 41 (2004). This characterization illustrates the social psychological dynamics that render the interrogation process "inherently coercive" as explained by the Court in *Miranda v. Arizona*. Interrogation strategies, procedures, and environments are structured so as to maximize the imbalance of power between interrogator and suspect (Inbau, F.E., Reid J.E., Buckley, J.P., & Jayne, B.C., *Criminal Interrogations and Confessions* (5th Ed.), Burlington, MA: Jones & Bartlett Learning (2013). Interrogators are trained to exploit the power of their position and of the situation to obtain information from even the most recalcitrant suspects. Id. The *Miranda* Court—in reference to adult suspects—recognized that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals" *Miranda v. Arizona*, at 455.

"While adults are also vulnerable to social influence, the magnitude of situational interrogation pressures may be intensified when the suspect is a youth. Youth are socialized to respect authority and obey adults." (Citations omitted) (Cleary, 2017, p.122). In this case, Bradley, a former homicide detective- appears to have conducted her interview consistent with a police interrogation protocol.

The social worker testified that (1) she did not advise M.H. of the purpose of the interview; (2) she did not advise M.H. that the interview was voluntary or he was free to leave; and (3) she never told M.H. or his mother that the information he shared with her

could be shared with law enforcement – also go against the voluntariness of M.H.'s statements.

The social worker testified that she started out her interview with M.H. by asking him questions to build rapport and "didn't tell him anything to do with why he was there." Rapport development such as this is a hallmark of police interrogation techniques and designed to increase psychological pressure on the target. Cleary, H.M.D. & Vidal S., *Miranda in Actual Juvenile Interrogations: Delivery, Waiver, and Readability*, CRIMINAL JUSTICE REVIEW, 41, 98-115 (2016), (Inbau, et al., 2013) F.E., Reid J.E., Buckley, J.P., & Jayne, B.C., *Criminal Interrogations and Confessions* (5th Ed.), Burlington, MA: Jones & Bartlett Learning (2013).

M.H.'s mother testified that had she known about the purpose and nature of the meeting, she would have had an attorney present. Opinion at ¶60.

4. The Interrogation Occurred at a Place Outside of a Child's Comfort Zone

The setting of the state initiated interrogation, the Jane Edna Hunter building, was not neutral territory. The building is a typical government building. There are armed security guards at the front doors, everyone who passes into the building must pass through metal detectors, and the building houses CCDFS. The power of CCDFS to separate a child from his mother is widely known and frightening to a young child.

While there was no direct police presence in the interview room, there is nothing on this record that suggest M.H. new the difference between a CCDFS social worker and a police detective. In reality, there is likely no difference in the mind of a 13 year old child.

The social worker and Detective Cottom work "hand in hand" and there is a longstanding institutional relationship between them. The social worker was a former homicide detective who testified that her purpose in interviewing M.H. was "to determine

whether or not some inappropriate sexual behavior happened between the two of them and if anything criminal happened, then I pass that on to law enforcement."

C. The facts in this case are the norm in Cuyahoga County.

Judge Keough cuts to heart of the due process problem in this case in her concurring opinion: "Absolutely no procedural safeguards are in place during," what she coined, "this 'non-custodial, but yet, your words can be used against you' interrogation." Concurring Opinion at ¶50.

Particularly disturbing in this case is that this case is not remarkable. This case is not exceptional. This case *is* the standard operating procedure in Cuyahoga County. The interrogation of the 13 year old child in this case was done as a matter of routine. The offensive nature of the interrogation and the deceitful tactics employed by the social worker are precisely what the due process clause is intended to guard against.

Proposition of Law II:

A child does not feel free to leave when he is driven to a government agency for questioning by a parent and separated from that parent and interrogated in a private interrogation room without being told he is free to leave free to not cooperate.

This proposition of law straddles the line between the *Miranda* doctrine and the voluntariness doctrine and directly impacts both. Whether M.H. believed he was free to leave informs both this Court's analysis of whether *Miranda* warnings were required and whether M.H.'s statement was "voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. at 55, see also, *State v. Barker*, 149 Ohio St.3d 1, at ¶41.

Children have the "unique experience of perpetual custody — always subject to parents, teachers, or other authorities — means they can never choose to walk free." *Juvenile*

Miranda Waiver and Parental Rights, Harvard Law Review, Vol. 126:2359 (June 2013)[5], discussing, *In re Gault*, 387 U.S. 1, 17 (1967) (describing the traditional view that "a child, unlike an adult, has a right 'not to liberty but to custody'"). In extending due process rights to juveniles, the *Gault* Court set limits on the power of the state acting under *parens patriae*, undercutting the discretionary practices of juvenile court judges.

Social science and common sense demonstrate that children have a tendency to comply with authority figures. The "voluntary" nature of any child's confession at the hands of an adult, state-actor is inherently dubious, due to youth's propensity to make decisions based on authoritative demands, rather than exercise of independent judgment. *See, e.g.*, Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U.PA.J.L. & SOC.CHANGE 285, 291 (2012).

The circumstances of M.H.'s confession demonstrate the coercive environment that is created when one couples the idea that a child is always in the custody of someone with a child's desire to comply with adult authority. M.H.'s mother brought him to Ms. Bradley's office. M.H. was never told that he could decline to answer Ms. Bradley's questions, rely on an adult or lawyer for support and guidance, or get up and leave when he wanted to. Opinion at ¶ 49. To most 13-year-old children, when their mother takes them to a meeting with another adult and shuts the door, there is no meaningful choice but to continue. This case is no exception.

As the Second District Court of Appeals has recognized, "[p]robably, and hopefully, most children confronted by an adult authority figure asking about an incident at school would not feel free just to walk away. A legitimate concern is that any thirteen-year-old who

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[5] Available at: http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol126_the_province_of_the_jurist.pdf

is questioned by an authoritative figure in school will always reasonably believe that he or she is not free to leave and will always be considered 'in custody' — thus, conjuring up images of *Miranda* warnings being constitutionally required every time a teacher, a school nurse, or a principal, let alone a "security guard" or "resource officer," interacts with the student." *In re L.G.*, 2017-Ohio-2781, ¶ 16 (2d Dist.), discretionary appeal allowed by 151 Ohio St. 3d 1502, 2018-Ohio-365, appeal dismissed by 2018-Ohio-3750.

The fact that the interrogation of M.H. occurred outside of the schoolhouse and inside another government building only amplifies the fact that M.H. did not feel free to leave. The surroundings were less familiar, less comforting and more intimidating. M.H. a 13 year old child was significantly deprived of his freedom was he was taken to the offices of CCDFS by his mother, abandoned by his mother –under dubious circumstances, and interrogated in a room without the benefit of a lawyer or support person and without any knowledge of his Constitutional Rights.

The Court of Appeals held that M.H.'s statements were voluntary and that M.H. was not subject to a custodial interrogation in part because it found M.H. was free to leave the closed-door interrogation room where Ms. Bradley asked M.H. to implicate himself in a sex offense. Opinion at ¶ 33. In reaching this conclusion, the Court of Appeals relies on the fact that M.H.'s mother voluntarily brought him to the interview, allowed Ms. Bradley to isolate M.H, and failed to convey the purpose or consequence of interrogation to M.H. Opinion at ¶¶ 32-34. This position ignores the common sense presumptions about children as class discussed in *J.D.B.* and the developmental characteristics that would leave M.H. with no meaningful choice but to participate in the interrogation. The court also applied a reasonable adult standard and evaluated the freedom to leave through the eyes of M.H.'s mother and not through the eyes of M.H. The position also fails to consider the reality that children are always

in some form of custody and are accustomed to limited freedom of movement, to obeying their parents, and to complying with adult authority generally. See *Gault*, 387 U.S. 1, 17.

Miranda's core ruling is that "unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson v. United States*, 530 U.S. 428, 443–444 (2000). This description of *Miranda*, especially the emphasis on the prohibition against "unwarned statements ... in the prosecution's case in chief," makes clear the Court's continued focus on the protections of the Self–Incrimination Clause. *United States v. Patane*, 542 U.S. 630, 642 (2004). In *J.D.B. v. North Carolina*, the Supreme Court took a significant step toward bringing the first branch of *Miranda* doctrine — custody analysis — in line with juvenile reality. 564 U.S. 261, 131 S. Ct. 2394 (2011). Before *J.D.B.*, youth was immaterial to the question of whether one was "in custody" for purposes of *Miranda*. See *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004), see also, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (asking whether circumstances would have made "a reasonable person [feel] he or she was not at liberty to terminate the interrogation and leave").

Through *J.D.B.* the Supreme Court of the United States stated the real-world truth that "in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age." *J.D.B.* at 275. North Carolina courts admitted statements made without *Miranda* warnings by thirteen-year-old J.D.B. during an in-school police interview, finding he had not been in custody when questioned. 131 S. Ct. at 2399–2400. The Supreme Court reversed, recognizing the inadequacy of viewing children "simply as miniature adults," *Id.* at 2404, and instead endorsing a "reasonable child" standard. See *id.* at 2403. In situations such as an in-school interview, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.*

At 13 years old, M.H. was unquestionably a child when he was interrogated in this matter. Children have the "unique experience of perpetual custody — always subject to parents, teachers, or other authorities — means they can never choose to walk free." *In re Gault*, 387 U.S. 1, 17 (1967) (describing the traditional view that "a child, unlike an adult, has a right 'not to liberty but to custody'"). Thus, M.H. was in custody when he was questioned by the DCFS agent.

The pitfalls of a custodial interrogation, which are heightened when a juvenile is involved, were documented by the *J.D.B.* Court when it explained:

> By its very nature, custodial police interrogation entails "inherently compelling pressures." *Miranda*, 384 U.S., at 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely." Ibid. Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303, 321, 129 S. Ct. 1558, 173 L. Ed. 2d 443, 458 (2009) (citing Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906-907 (2004)); see also *Miranda*, 384 U.S., at 455, n. 23, 86 S. Ct. 1602, 16 L. Ed. 2d 694. That risk is all the more troubling--and recent studies suggest, all the more acute--when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae 21-22 (collecting empirical studies that "illustrate the heightened risk of false confessions from youth").

Id. at 268-269. In the instant matter, there are circumstances beyond those inherent in a formal interrogation that demonstrate the interrogation was custodial.

"[I]solation may contribute to a coercive atmosphere by preventing family members, friends, and others who may be sympathetic from providing either advice or emotional support. And without any such assistance, the person who is questioned may feel overwhelming pressure to speak and to refrain from asking that the interview be terminated." *Howes v. Fields*, 565 U.S. 499, 512-13 (2012). The situation contemplated by the Supreme Court in *Howes* is just the position M.H. found himself in when he was questioned. M.H. did not go to the DCFS office on his own. He was taken there by his mother. He was then

separated from his mother. The alleged abuse happened in his home, which belonged to the parents of M.H. – his mother and his mother's boyfriend, who is also the father of the alleged victim. M.H. and his mother were not informed until after the interrogation that M.H. was the target in a child sexual abuse investigation. In light of these circumstances, it is clear that M.H. was in custody within the scope of *Miranda* and did not feel free to terminate the interrogation and walk away.

Proposition of Law III:

A child-suspect must be provided *Miranda* warnings when that child is interrogated by a social worker who is exercising her statutory duty to investigate child abuse allegations and does so cooperatively with the police on a regular and institutional basis.

DCFS obviously exists to advocate for child victims. That is not in question here. The question before this Court is whether a suspect, who is also a child, and who allegedly took advantage of another child is entitled to due process throughout the state's investigation. Any holding to the contrary would violate Section Ten, Article I of the Ohio Constitution, "no person shall be compelled, in any criminal case, to be a witness against himself," which echoes a virtually identical right guaranteed by the Fifth Amendment to the United States Constitution.

Regardless of whether police directed the interrogation of M.H., the deep institutionalized relationship between the two demonstrates that in the case Bradley was acting as an agent of law enforcement. Police officers and DCFS agents know that as a matter of law and as a matter of standard operating procedure the DCFS agent's interview will always be supplied to police to be used as evidence in the prosecution's case. "[T]he prohibition against state-compelled self-incrimination has been interpreted to extend well beyond the confines of the courtroom. It extends to a person's privilege "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers

might incriminate him in future criminal proceedings." *State v. Evans*, 144 Ohio App. 3d 539, 549-50 (2001). Statements made by an accused when being interrogated by an agent of the state demand *Miranda* warnings. And when the accused are not provided *Miranda*, such "unwarned statements may not be used *as evidence* in the prosecution's case in chief." *United States v. Patane*, 542 U.S. 630, 642 (2004), quoting *Dickerson v. United States*, 530 U.S. 428, 443–444 (2000).

Social Worker Bradley –herself a former homicide detective- was acting as an agent of law enforcement when she initiated an interrogation of M.H.

This Court's resolution of *State v. Jackson*, 2018-Ohio-2169, is not determinative in this case. As recognized by the Jackson Court, "'whether someone is acting as an agent of law enforcement is dependent upon the unique circumstances of each case.'" *Jackson*, at ¶ 17, quoting *State v. Bernard*, 31 So.3d 1025, 1033 (La.2010). Where, however, the social worker performs as an agent of law enforcement, the social worker may be required to provide *Miranda* warnings. *State v. Jones*, 2004-Ohio-5205 (8th Dist.), citing *State v. Evans*, 144 Ohio App.3d 539 (1st Dist.2001), citing *Watson*, 28 Ohio St.2d 15. A social worker is an agent of law enforcement where the social worker acts under the direction or control of law enforcement. *Bolan*, 27 Ohio St.2d at 18.

The DCFS agent Ms. Bradley, while serving as an advocate for the alleged victim in this case, was also a state actor investigating the criminal allegations made against M.H. pursuant to Ohio law and the standard operating procedures of DCFS and Cleveland Police. Everyone involved, except M.H. and his mother, knew that the unwarned statements of M.H. would become part of law enforcement's investigation and the state's prosecution. In her concurring opinion, Judge Keough explained:

> My concern is evidenced by the facts in this case that although Detective Cottom was assigned to investigate the allegation of abuse on October 20, 2015, she did not have any contact with CCDCFS until December 4, 2015 (conveniently two days after M.H.'s interview with the social worker) when she

> left a message on the social worker's voicemail requesting her write-up on the case. As Detective Cottom admitted, she did not have to interview M.H. because "it had already been done" by the social worker at CCDCFS. (Tr. 75.) That, to me, leaves me no doubt that law enforcement use social workers as their agents to obtain information that they otherwise would not be able to obtain so freely.

Concurring Opinion at ¶ 52

The DCFS social worker was acting as an agent of law enforcement when she interviewed M.H. as the alleged perpetrator in a child sexual abuse investigation pursuant to a "memorandum of understanding" required by Ohio law. R.C. 2151.421(F), (J).[6] *Miranda* requirements apply to admissions made to law enforcement officers and their agents. *State v. Clark,* 8th Dist. Cuyahoga No. 44015, 1982 Ohio App. LEXIS 11323 (1982), citing *State v. Watson,* 28 Ohio St.2d 15 (1971). Pursuant to *State v. Bolan,* 27 Ohio St.2d 15 (1971), a state agent acts as an agent of law enforcement when they act under the direction or control of a law enforcement agency. *Id.* at 18. The Ohio Supreme Court further clarified this rule in *State v. Evans,* "We believe," the Court explained, "that the better rule requires *a duty to report* to law enforcement officials, or at least a solicitation or recruitment by law enforcement, as a predicate for holding that a questioner is an agent for purposes of giving a suspect the *Miranda* warnings." (Emphasis added) 144 Ohio App. 3d 539, 553-55 (2001). Consistent with *Evans,* this Court recently held that "[i]n certain circumstances a social worker may be required to provide *Miranda* warnings, i.e., when acting as an agent of the police." *State v. Jones,* 8th Dist. Cuyahoga No. 83481, 2004-Ohio-5205, at ¶40.

This Court has held that a probation officer, though not necessarily a "law enforcement officer," will cause certain psychological pressure when interviewing probationers such that "the better rule is ... to require a probation officer to give *Miranda* warning prior to questioning an in-custody probationer." *State v. Roberts,* 32 Ohio St. 3d 255, 231 (1987).

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[6] Ohio R.C. 2151.421(F) has been amended at least two times since the initial interrogation of M.H. The subsections discussed on this brief are from the version of the statute that was in effect on the day M.H. was interrogated.

Similarly, this Court has held that statements made to a parole office without Miranda warnings are subject to suppression since a parolee is under heavy pressure to cooperate with a parole officer. *State v. Gallagher*, 46 Ohio St. 2d 225 (1976). Here, 13 year old M.H. was questioned by a police-trained social worker. The social worker is undoubtedly a state actor, and she initiated the interrogation "to determine whether or not some inappropriate sexual behavior happened... then I pass that on to law enforcement." Tr. at 64. This situation certainly created a similar, if not greater, psychological pressure as that created in *Roberts* and *Gallagher*.

This is truism is only bolstered by the fact that in Ohio a social worker with DCFS has a statutory mandate to report to law enforcement. R.C. 2151.421(F) requires DCFS and its employees to investigate reports they receive of alleged abuse. R.C. § 2151.422(B) specifically requires a public children services agency to conduct an investigation of the allegations of suspected abuse over the course of thirty days. At the end of the investigation, *the public children services agency shall submit a written report of its investigation to law enforcement*. R.C. § 2151.421(F). Similarly, if an allegation of abuse is made to the police, R.C. §2151.421(D)(1) provides that the police "*shall refer the report to the appropriate public children services agency.*"

Even if the police receive a report of suspected abuse, the statute requires the police to report the report to DCFS. R.C. § 2151.421 (D)(1). Conversely, the statute does not require DCFS to inform police when they receive a report of suspected abuse. Such a reciprocal burden was not drafted or intended by the legislature. Rather, after DCFS completes its investigation, the statute requires DCFS to provide a copy of its *investigation* to law enforcement agencies so that further criminal prosecution, if necessary, can proceed. R.C. § 2151.421 (F)(1).

In the instant case, M.H. was interviewed by the DCFS agent pursuant to Ohio law, and under the direction, and for the benefit of law enforcement. When asked the purpose of the interview, social worker Bradley explained:

> The purpose is to determine whether or not some type of inappropriate sexual behavior happened between the two of them and if anything criminal happened, then I pass that on to law enforcement.

Tr. 64. Further evidence that the interrogation was for the benefit of law enforcement is evidence by the fact that Detective Cottom never interviewed M.H. "because it had already been done" by the social. Tr. 75. From the perspective of the social worker, Bradley testified:

> We share information with law enforcement. It's just a part of what we do. There had already been a police report made by [the mother of the victim]. And I knew there was a detective that was assigned. So we share information with law enforcement all the time.

Tr. 51. Thus, this DCFS social worker was inarguably working as an agent of law enforcement when she interviewed M.H. as the target suspect in a criminal investigation.

In *Jackson*, Justice O'Donnell, writing for the majority, focused on the power to arrest as a hallmark of who may be considered law enforcement for purposes of *Miranda*. Id. at ¶27. The question of whether DCFS agents have the power to arrest is a red herring on these facts. Although DCFS agents do not have the power to arrest in the traditional respect, taking someone into custody of the State is not limited to what is seen on *Cops,* or similar reality television shows. To arrest means "to keep a person in lawful custody. A warrant, crime, or statute can authorize this." *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* DCFS agents absolutely have the statutory authority to take custody of juveniles. And when responding to allegations of child sexual abuse or neglect, DCFS agents may take custody of a juvenile with or without police assistance. See O.R.C. 2919.22, Ohio Juv.R. 6. In light of these revelations, Ms. Bradley wielded a different and much more coercive type of power – the power to separate a child from his home.

Finally and perhaps most importantly, M.H.'s status as a juvenile differentiates this case from Jackson in a significant way. There is no evidence that M.H., or any typical 13 year old would know the difference between a detective and an investigative social worker. This coupled with juvenile's eagerness to comply with authority, as discussed above, distinguished this case from *Jackson*. More, the hand in hand cooperation of Detective Cottom and the CCDFS along with the statutory obligation to cooperatively investigate also distinguished this case from *Jackson*.

The child advocate is required by Ohio law not only to conduct an investigation in cooperation with law enforcement but also to submit a report of the advocate's investigation, in writing, to law enforcement. R.C. 2151.421(F). The aforementioned "memorandum of understanding" required by R.C. 2151.421(F), (J) formalizes and structures the investigatory relationship between CCDCFS and the law enforcement agency. The child advocate in this instance took notes of her interview with appellant and recorded the interview in CCDCFS's computer system.

Here, there is no legitimate purpose for the social worker's interview of appellant in this case other than to directly assist the investigation of law enforcement pursuant to R.C. 2151.421(F). See, *In Re L.G.*, 2017-Ohio-2781 (2nd Dist.), *In Re: K.W.*, 2009-Ohio-3152 (3rd Dist.).

Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381, 1968-2 C.B. 903 (1968), and *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), are instructive. Mathis involved an Internal Revenue Service ("IRS") agent who questioned an inmate in prison where the inmate was serving a state sentence. The inmate was ultimately charged with and convicted of violations of the federal false-claims statute. On appeal, the Supreme Court concluded that statements and information gathered by the agent should not have been admitted at the defendant's trial because the agent had failed to provide him

Miranda warnings. Implicit in the court's decision was a determination that the IRS agent was the functional equivalent of law enforcement.

In *Estelle*, the Supreme Court held that *Miranda* applied to a psychiatric examination conducted by a court-appointed psychiatrist, concluding that the fact that the defendant "was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial." Id. at 467. The Supreme Court observed that under these circumstances, the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution." Id. At that point, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." Id. See also, State v. Graves, 114 N. J. Super. 222, 275 A.2d 760 (App. Div. 1971) (Welfare investigator required to give Miranda.)

This then shifts the Court's attention to whether 13 year old M.H. was in custody for purposes of *Miranda*. That issue was discussed above under proposition of law II, and answered in the affirmative. The United States Supreme Court established a simple two-prong test to determine whether a suspect is in custody during a state initiated interrogation: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person, in this case a reasonable child, felt free to terminate the interrogation and walk away. *J.D.B.*, supra. As discussed at length above, M.H. who was 13 years old at the time would not have and did not feel free to terminate the interrogation and walk away.

CONCLUSION

A thorough review of the record demonstrates that the trial court appropriately determined that M.H.'s unwarned statement should be suppressed and the trial court's ruling should be affirmed.

Respectfully submitted,

s/ Paul A. Kuzmins
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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was hand delivered upon Michael O'Malley, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this September 16, 2019.

s/ Paul A. Kuzmins
PAUL A. KUZMINS
Assistant Public Defender Counsel for Appellant

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105742

IN RE: M.H.
A Minor Child

[Appeal by State of Ohio]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL-16105732

BEFORE: McCormack, P.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: December 6, 2018

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TIM McCORMACK, J.:

{¶1} Plaintiff-appellant state of Ohio appeals from the judgment of the Cuyahoga County Court of Common Pleas granting defendant-appellee M.H.'s motion to suppress his statements made to a social worker who was employed with the Cuyahoga County Department of Children and Family Services ("CCDCFS"). For the reasons that follow, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶2} On August 24, 2016, M.H. was charged in a delinquency complaint with one count of rape in violation of R.C. 2907.02(A)(2). The charge stems from an incident that occurred on or about August 18, 2015. At the time of the alleged rape, M.H. was 13 years old and the alleged victim was 12 years old.[1]

{¶3} In response to a referral to the CCDCFS regarding the alleged rape, a social worker from the CCDCFS interviewed M.H., the alleged perpetrator on December 2, 2015. During this interview, M.H. made certain admissions. On March 14, 2017, the state filed a motion in limine to use M.H.'s admissions to the

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[1] We note that the record in this case includes conflicting information concerning M.H.'s birthdate, specifically the birth year. The complaint and various pleadings filed by both M.H.'s trial counsel and the prosecutor identify M.H.'s birthdate as June 26, 2001. The complaint, however, which was filed in August 2016, also identifies M.H.'s age as 14 years at the time the complaint was filed, which would place his birth year at 2002 and his age at the time of the alleged offense in August 2015 at 13 years. Additionally, the juvenile court's intake fact sheet, home detention report, and the warrant identify M.H.'s birthdate as June 26, 2002. Moreover, M.H.'s mother testified at the suppression hearing held in April 2017 that her son was 14 years old at the time of the hearing, which places M.H.'s birth year at 2002. Using June 26, 2002, as the correct birthdate, M.H. would have been 13 years old at the time of the alleged incident that occurred in August 2015.

social worker. Thereafter, M.H. filed a motion to suppress his statements, arguing the statements were "barely probative" and would cause significant confusion and delay. He also argued that the statements were obtained in violation of both due process and his right against self-incrimination. In its opposition, the state asserted that M.H.'s statements are relevant, probative, and not unfairly prejudicial. The state also offered that M.H.'s statements were voluntarily made and the rights afforded by the Fifth Amendment do not apply here because M.H. was not in a custodial interrogation.

{¶4} On April 6, 2017, the court held a suppression hearing, during which the following individuals testified: M.H.'s mother; Esther Bradley, the social worker; and Christina Cottom, a Cleveland police detective.

{¶5} M.H.'s mother testified that she received a letter at home sometime between October and November 2015 from Esther Bradley, a social worker with CCDCFS, requesting she bring M.H. to the Jane Edna Hunter Building for an interview. In response, M.H.'s mother phoned Bradley, who confirmed the time and place of the interview. She stated that Bradley did not tell her the reason for the interview, but M.H.'s mother had her "suspicions," stating that she "knew the situation that was going on." M.H.'s mother brought M.H. to the interview at the scheduled time and place. The mother testified that Bradley met them in the lobby and advised her that Bradley would be taking M.H. to a different location for a private interview. M.H.'s mother never asked to be present for her

son's interview, nor did she advise Bradley that M.H. was not permitted to be interviewed without her. The mother stated that M.H. never asked for his mother to accompany him. She testified that M.H. was in the private room with Bradley for approximately 40 minutes.

{¶6} Esther Bradley is a child protection specialist in the Sexual Abuse Unit of the CCDCFS. She conducts child sexual abuse investigations based upon referrals made to the agency. Bradley testified that her role in this position is to "ensure safety" and ensure that "families and individuals receive services that they need regarding any issues that the family or the individual may be having."

{¶7} Bradley testified that she went to M.H.'s home in October 2015 to complete a home assessment; however, she found no one home. She left a letter informing M.H.'s mother who she is, that M.H. "had been named as an alleged perpetrator in an open sex abuse investigation," and that she needed to speak to M.H. regarding the allegations. Bradley stated that the letter was "very general" and noted that the recipient may call the department "if they choose to."

{¶8} When M.H.'s mother did, in fact, phone Bradley on December 1, 2015, Bradley advised M.H.'s mother of the allegations against M.H. Bradley testified that she "extended an opportunity to see if [M.H.'s mother] would allow [her] to interview [M.H.]." Bradley informed the mother that the interview with M.H. would be private. Bradley testified that it is common for parents of alleged perpetrators to tell Bradley that they do not want to meet with her upon

learning that the interview would be private; however, M.H.'s mother did not voice an objection at that time to the private interview.

{¶9} On December 2, 2015, M.H.'s mother brought M.H. to the Jane Edna Hunter Building where Bradley interviewed M.H. for approximately 40 minutes. Bradley testified that she did not believe she informed M.H. about the nature of the interview, and she never told M.H. that he could leave at any time. She also stated that M.H. never told her that he did not wish to speak with her, nor did M.H.'s mother tell Bradley that she wished to be in the room with her son. Bradley stated that there was no police presence at the interview; there was no police interaction with M.H. or Bradley at the time of the interview; the interview room had windows; the door to the interview room was not locked; and there were no restraints.

{¶10} Bradley testified that her purpose for interviewing M.H. was twofold: to determine whether any inappropriate sexual behavior occurred between M.H. and the alleged victim and to ensure the safety of the alleged victim. Bradley explained that because M.H. and the alleged victim are considered family, she needed to determine whether a safety plan, "or something of that nature," was required to ensure that "nothing else inappropriate happens."[2]

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[2] The record demonstrates that M.H.'s mother's boyfriend is the father of the victim and is also the father of M.H.'s half-sister. M.H. lives with his mother and her boyfriend (along with M.H.'s other siblings), and the alleged victim often visited their

{¶11} Bradley began the interview with M.H. by asking general questions, building up to the purpose of her interview. When she asked M.H. if he was sexually active, M.H. disclosed that he was sexually active and his only sexual partner was the alleged victim, whom he identified as his half-sister. M.H. told Bradley that they had sex when the alleged victim spent the night at his house.

{¶12} After the interview, Bradley advised M.H.'s mother of M.H.'s disclosures and informed her that Bradley would be making a referral to the OhioGuidestone PROTECT program. Bradley then prepared a report based upon her interview with M.H. and provided the report to her supervisor as well as Detective Cottom. Bradley explained that she is required to share her information with law enforcement. Because a police report had previously been made by the alleged victim, Bradley was aware that Detective Cottom had been assigned the case.

{¶13} Detective Cottom is a detective in the Sex Crimes Unit of the Cleveland police department, whose role is conducting follow-up investigations to reports of child abuse or child sexual abuse. Detective Cottom testified that she was assigned to M.H.'s case on October 20, 2015, regarding an incident that occurred in August 2015. On December 4, 2015, the detective reached out to CCDCFS to determine in what stage the social worker was with the case. Detective Cottom stated that typically the police and the agency attempt to

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home where her father resided. M.H. refers to the alleged victim as his half-sister.

conduct joint interviews of the victim. In this case, however, because the police report was not made until months after the incident, the social worker had already interviewed the victim. And because the interview with M.H. had already been conducted, Detective Cottom did not separately interview M.H. The detective therefore requested Bradley's written report, through a December 4, 2015 voicemail message left for Bradley. The detective received the report on December 17, 2015. Detective Cottom testified that she and Bradley never spoke concerning the case, and the detective did not instruct Bradley as to how to conduct the interview with M.H. or what questions to ask. The detective stated that she was not aware of M.H.'s interview until after Bradley completed the interview. Detective Cottom included Bradley's report in the "juvenile package." On August 24, 2016, M.H. was formally charged.

{¶14} Immediately after hearing the testimony, the trial court granted M.H.'s motion to suppress his statements to the social worker "in light of the child's due process, Constitutional guarantees, [and] Evid.R. 403(A)." The court stated that "the relationship between [CCDCFS and] the state [is] a little close for comfort."

{¶15} The state now appeals the trial court's decision, asserting that the trial court erred in suppressing M.H.'s statements to the social worker because the interview did not constitute a custodial interrogation and the social worker was not acting as an agent of law enforcement.

{¶16} This court reviews a trial court's ruling on a motion to suppress under a mixed standard of review that involves questions of law and fact. *Cleveland v. Giering*, 2017-Ohio-8059, 98 N.E.3d 1131, ¶ 12 (8th Dist.), citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In a motion to suppress, "the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility." *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994). The reviewing court must therefore accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by competent, credible evidence. *Giering*; *Burnside*. The reviewing court, however, must independently determine whether those facts satisfy the applicable legal standard. *Id.*

{¶17} The Fifth Amendment to the United States Constitution provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, 991 N.E.2d 1116, ¶ 19. Pursuant to *Miranda v. Arizona*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.E.2d 694 (1966).

{¶18} Under *Miranda*, law enforcement officers and their agents must inform a suspect that: (1) he has the right to remain silent; (2) his statements

may be used against him at trial; (3) he has the right to have an attorney present during questioning; and (4) if he cannot afford an attorney, one will be appointed. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶67, citing *Miranda* at 478-479. "Once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver or himself renews communication with the police." *State v. Knuckles*, 65 Ohio St.3d 494, 605 N.E.2d 54 (1992), paragraph one of the syllabus.

{¶19} *Miranda* warnings are required only when a suspect is subjected to custodial interrogation. *State v. Jones*, 8th Dist. Cuyahoga No. 83481, 2004-Ohio-5205, ¶ 39. "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444. The *Miranda* requirements do not apply when admissions are made to persons who are not law enforcement officers or their agents, even if an individual's efforts aid in law enforcement. *State v. Jackson*, Slip Opinion No. 2018-Ohio-2169, ¶ 15, citing *State v. Watson*, 28 Ohio St.2d 15, 271 N.E.2d 153 (1971), and *State v. Bolan*, 27 Ohio St.2d 15, 271 N.E.2d 839 (1971).

{¶20} When determining whether an individual is in custody for *Miranda* purposes, we must consider whether there was a formal arrest or the functional equivalent of "a restraint of an individual's freedom of movement commensurate

with that of a formal arrest." *Jones* at ¶ 39, citing *Miranda*. In so doing, we examine the totality of the circumstances and how a reasonable person would have understood the circumstances. *State v. Montague*, 8th Dist. Cuyahoga No. 97958, 2012-Ohio-4285, ¶ 8, citing *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

{¶21} Generally, courts have held that social workers do not have a duty to advise suspects of their *Miranda* rights because they are private citizens with no power to arrest. *Jones* at ¶ 40; *State v. Coonrod*, 12th Dist. Fayette No. CA2009-08-013, 2010-Ohio-1102, ¶ 9; *State v. Thoman*, 10th Dist. Franklin No. 04AP-787, 2005-Ohio-898, ¶ 7; *State v. Dobies*, 11th Dist. Lake No. 91-L-123, 1992 Ohio App. LEXIS 6361 (Dec. 18, 1992); *State v. Simpson*, 4th Dist. Ross No. 1706, 1992 Ohio App. LEXIS 818 (Feb. 21, 1992).

{¶22} Where, however, the social worker performs as an agent of law enforcement, the social worker may be required to provide *Miranda* warnings. *Jones*, 8th Dist. Cuyahoga No. 83481, 2004-Ohio-5205, citing *State v. Evans*, 144 Ohio App.3d 539, 760 N.E.2d 909 (1st Dist.2001), citing *Watson*, 28 Ohio St.2d 15, 26, 275 N.E.2d 153. A social worker is an agent of law enforcement where the social worker acts under the direction or control of law enforcement. *Bolan*, 27 Ohio St.2d at 18, 271 N.E.2d 839. "'[W]hether someone is acting as an agent of law enforcement is dependent upon the unique circumstances of each case.'"

Jackson, Slip Opinion No. 2018-Ohio-2169, at ¶ 17, quoting *State v. Bernard*, 31 So.3d 1025, 1033 (La.2010).

{¶23} Nevertheless, the "ultimate inquiry" is whether the suspect was in custody at the time of the interrogation, i.e. "whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *Jones* at ¶ 40.

{¶24} In considering whether an individual is in custody for *Miranda* purposes, "courts must first inquire into the circumstances surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave." *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 27, citing *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

{¶25} In resolving the issue of custody, courts consider certain factors relevant to this determination: (1) the location of the questioning; (2) the duration of the questioning; (3) statements made during the interview; (4) the presence or absence of physical restraints; and (5) whether the individual was released at the end of the interview. *Howes v. Fields*, 132 S.Ct. 1181, 1189, 182 L.Ed.2d 17 (2012); *In re J.S.*, 3d Dist. Marion No. 9-15-26, 2016-Ohio-255, ¶ 13.

Moreover, a juvenile's age may be considered for purposes of *Miranda*, "so long as the juvenile's age was known to the officer at the time of questioning or would have been objectively apparent to a reasonable officer." *In re R.S.*, 3d Dist. Paulding No. 11-13-10, 2014-Ohio-3543, ¶ 18, citing *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). However, "[w]hile 'a juvenile's age may be considered in the *Miranda* custody analysis, the Supreme Court cautioned that 'this does not mean that a child's age will be a determinative, or even a significant, factor in every case * * *.'" *Id.*, quoting *J.D.B.* at syllabus.

{¶26} The state contends that M.H. was not subjected to a custodial interrogation because the social worker conducting the interview was not acting as an agent of law enforcement and M.H. was not in custody when he was interviewed by the social worker. The state argues, therefore, that the trial court erred in suppressing M.H.'s statements. While we find, as did the trial court, the totality of the circumstances of this case troubling, we are constrained to find that M.H. was not subjected to a custodial interrogation as contemplated by *Miranda*.

{¶27} We first address the question whether Esther Bradley, the social worker, was an agent of law enforcement. In light of the case law in Ohio, including the Ohio Supreme Court's recent decision concerning a social worker's

duty in child abuse investigations, as well as the record in this case, we must answer this question in the negative.

{¶28} In *Jackson, supra*, the Ohio Supreme Court held that a social worker's statutory duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution when the social worker interviews an alleged perpetrator unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement. Slip Opinion No. 2018-Ohio-2169, at syllabus. The Supreme Court determined that although the children services agency is statutorily obligated to cooperate with and provide information to law enforcement regarding child abuse investigations, the statute "does not mandate that agency employees interview alleged perpetrators of child abuse at the direction or under the control of law enforcement." *Jackson*, Slip Opinion No. 2018-Ohio-2169, at ¶ 21. The Court then concluded that the social worker in *Jackson* did not act as an agent of law enforcement when interviewing the defendant where: the only evidence of contact between the social worker and law enforcement about the investigation was testimony that the social worker contacted law enforcement to coordinate a joint interview of the victim; there was no evidence that law enforcement asked the social worker to interview the defendant; and there was no evidence

that law enforcement influenced the social worker's interview of the defendant in any way. *Id.* at ¶ 23.

{¶29} Here, the record demonstrates that Bradley performed her customary duties as a child protection specialist with CCDCFS. Bradley testified that she conducts child sexual abuse investigations based upon referrals made to the agency. She stated that her role in sexual abuse investigations is to ensure the safety of the children and ensure that individuals and families receive any services they may need. Specifically, she testified that her purpose for interviewing M.H. was to investigate the abuse allegations as well as to ensure the victim's safety. Bradley explained that in this case, the alleged perpetrator and the alleged victim were considered family, because M.H. and his mother lived with the alleged victim's father with whom the alleged victim often visited, and a familial relationship could necessitate a need for a safety plan.

{¶30} Thus, in this case, Bradley received a referral concerning child sexual abuse allegations that named M.H. as the alleged perpetrator, and she went to M.H.'s home to investigate. Bradley then conducted her interview of M.H. to determine whether any inappropriate sexual behavior occurred and whether a safety plan was required. The fact that M.H. was the subject of the investigation "'does not trigger the need for *Miranda* warnings in a noncustodial setting.'" *State v. Smith*, 10th Dist. Franklin No. 96APA10-1281, 1997 Ohio App.

LEXIS 2426, 7 (June 3; 1997), quoting *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

{¶31} We are troubled by a social worker's typically close working relationship with law enforcement, where a child-abuse investigation seemingly moves along an official conveyor belt — from interview to sharing the findings with police to an arrest. And in this case, that is exactly what happened. However, as the Ohio Supreme Court recently declared, this duty to report did not make Bradley an agent of law enforcement for *Miranda* purposes. *Jackson*, Slip Opinion No. 2018-Ohio-2169, at syllabus. In considering the record in this case, along with Bradley's duty, we find there is no evidence that law enforcement requested the interview, provided instructions to Bradley on how to conduct the interview or what questions to ask M.H., or influence the interview in any way. In fact, the detective assigned to the case testified that she never actually spoke with Bradley regarding this case, leaving only a voicemail requesting a copy of the social worker's report. And although the detective and the social worker typically conduct joint interviews of the victim, Detective Cottom testified that Bradley had conducted the interview independently by the time the detective had contacted Bradley. We therefore find that in interviewing M.H. and reporting her findings to law enforcement, Bradley was not acting under the direction or control of the police, but rather,

she was performing her customary duties as a child protection specialist. *See Coonrod*, 12th Dist. Fayette No. CA2009-08-013, 2010-Ohio-1102, at ¶ 12.

{¶32} Next, we consider whether M.H. was in custody at the time of the interview. In reviewing the relevant factors outlined above, we note that M.H. was only 13 years old at the time he was interviewed. Although we recognize there is no evidence that M.H. asked why he was brought to the social services center, became confused, contested to being there, or behaved immaturely or in a manner demonstrating he was not able to comprehend what was being said to him, we question how any child of this young age could understand or appreciate the circumstances. Equally troubling is the fact that M.H.'s mother likely felt compelled to respond to the social worker's "request" and did not fully appreciate that she could, in fact, refuse to deliver M.H. to Bradley as requested in the letter or sit in on the interview.

{¶33} We note, however, that the majority of the factors weigh against a finding that M.H. was in custody. First, no charges had been filed and M.H. was not under arrest. M.H.'s mother brought M.H. to the social services center in response to the social worker's letter requesting an interview; M.H. was not ordered to appear at the police station. M.H. was also free to leave the building after the interview. *See In re T.W.*, 3d Dist. Marion No. 9-10-63, 2012-Ohio-2361, ¶ 30 (factor weighing against finding custody is that juvenile was not escorted by a police officer); *Jones*, 8th Dist. Cuyahoga No. 83481,

2004-Ohio-5205, at ¶ 41, citing *Oregon*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (holding that defendant was not in custody if he voluntarily appeared for questioning and was free to leave afterward).

{¶34} Additionally, the interview, which lasted 40 minutes, was conducted in a private room at the social services center while M.H.'s mother waited in the lobby. *In re B.J.*, 11th Dist. Lake No. 2013-L-091, 2014-Ohio-5701, ¶ 19 (finding the interview of approximately 30 minutes "a short duration"); *In re T.W.* at ¶ 30 (finding parents waiting in lobby during interview, suggesting the interview would be brief). The interview did not occur at the police station, nor was there any direct police involvement or police presence at any time during the interview. *See In re D.B.*, 10th Dist. Franklin Nos. 17AP-83 and 17AP-85, 2018-Ohio-1247, ¶ 26 (factors suggesting no custodial interrogation include the interview being conducted at a social services station rather than a police station, an unlocked room, and the juvenile leaves with his parent). Bradley was the only adult present during the interview. The door to the interview room was closed but not locked, the room had windows, and M.H. was not physically restrained. M.H. never told the social worker that he did not wish to speak with her or express reluctance or hesitation in answering Bradley's questions. Finally, there is no evidence of overt intimidation or coercion exerted over M.H. at any point that day.

{¶35} Accordingly, under the dictates of the current law in Ohio and the totality of the circumstances in this case, we find the record establishes that the child protection specialist was conducting her customary duties as an investigator for CCDCFS, and there is no evidence that she was acting under the direction or control of law enforcement when she interviewed M.H., despite her cooperation with law enforcement. Additionally, we find that M.H. was not restrained, and a reasonable juvenile in his circumstances would have felt free to leave the interview. Thus, M.H. was not in custody or otherwise deprived of his freedom of action in any significant way at the time he made the incriminating statements. The trial court therefore erred in determining that M.H.'s statements should have been suppressed because M.H. was not informed of his *Miranda* rights prior to being questioned.

{¶36} M.H. contends that even if this court does not find a violation of *Miranda*, M.H.'s statements were obtained in violation of the due process clause and Evid.R. 403, asserting that M.H.'s statements were not freely or voluntarily made, and they are prejudicial because the admission of the statements would cause significant confusion and delay. M.H. further argues that because the state failed to address these arguments, this court should affirm the trial court's decision granting the motion to suppress. We find no merit to this argument.

{¶37} Following the suppression hearing, the trial court granted the defense motion, stating that it granted the motion to suppress "in light of the

child's due process, Constitutional guarantees, [and] Evid.R. 403(A) * * *." However, the transcript reveals that immediately after its ruling, the trial court explained that the relationship between CCDCFS and the state was "a little close for comfort," thus suggesting that the social worker was acting as an agent of law enforcement when she interviewed M.H. We therefore find the trial court reasoned that M.H.'s statements were obtained in violation of *Miranda*.

{¶38} Nevertheless, even if we do not find that the court's statement was the basis for the trial court's decision, we likewise do not find that M.H.'s statements were otherwise improperly obtained.

{¶39} First, we do not find the statements were obtained in violation of M.H.'s due process rights. Whether a defendant made a statement voluntarily and whether the defendant voluntarily, knowingly, and intelligently waived his right to counsel and against self-incrimination are separate and distinct issues. *See State v. Dennis*, 79 Ohio St.3d 421, 425, 683 N.E.2d 1096 (1997); *State v. Chase*, 55 Ohio St.2d 237, 246, 378 N.E.2d 1064 (1978). "'The Due Process Clause requires an inquiry, separate from custody considerations, concerning whether a defendant's will was overborne by the circumstances surrounding the giving of his confession.'" *State v. Johnson*, 12th Dist. Warren No. CA2015-09-086, 2016-Ohio-7266, ¶ 76, quoting *State v. Kelly*, 2d Dist. Greene No. 2004-CA-20, 2005-Ohio-305, ¶ 10. Both issues, however, are measured under the totality of the circumstances. *Dennis* at 425. Under this standard, a

court should consider "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, *vacated on other grounds*, 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978).

{¶40} For reasons similar to those discussed above, we conclude that M.H.'s statements were not involuntary. Here, M.H. was brought to the social services center by his mother, where he was interviewed by a social worker. The interview, which was conducted solely by the social worker, was relatively brief, lasting 40 minutes, and lacked any direct police presence. There is no evidence — or allegations — of any threats, coercion, suggestions, restraints, or physical deprivation or harm to M.H. Nor is there evidence that M.H. told the social worker that he did not wish to speak to her or that he conducted himself in a manner suggesting he did not wish to be interviewed. M.H. provided his statement in answer to Bradley's question regarding whether he was "sexually active." Given the circumstances, we find the evidence demonstrates that M.H.'s will was not overcome by the circumstances surrounding the giving of his statements to the social worker.

{¶41} Secondly, we do not find the record supports M.H.'s generic contention that his statements are "more prejudicial than probative" in violation

of Evid.R. 403. Evid.R. 401 provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 403(A) states that, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶42} In his motion to suppress, M.H. argues, without explanation or support, that his statements are "barely probative" and would cause significant confusion and delay "in these already arduous proceedings." An admission that he had sex with his 12-year-old "half-sister" is clearly relevant to the social worker's investigation into allegations that M.H. did indeed engage in inappropriate sexual conduct with an individual under 13 years of age. His admission is likewise probative of the allegations. However, M.H. has failed to demonstrate how his statements are *unfairly* prejudicial or how his admission would cause confusion or delay. Moreover, we find nothing in the record supporting his argument.

{¶43} The state's sole assignment of error is sustained.

{¶44} Judgment reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 06 2018

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

TIM McCORMACK, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS (WITH SEPARATE OPINION ATTACHED);
LARRY A. JONES, SR., J., DISSENTS (WITH SEPARATE OPINION ATTACHED)

KATHLEEN ANN KEOUGH, J., CONCURRING:

{¶45} Based on the testimony provided at the suppression hearing, it is clear that the social worker interviewed M.H. during the normal course of her investigation and not at the request or direction of law enforcement. These facts put this case squarely within the Ohio Supreme Court's holding in *Jackson*. Accordingly, I must concur with the lead opinion and agree with the lead opinion's concerns regarding the relationship between the social worker and law enforcement, and the lack of understanding M.H. and his mother demonstrated regarding the interview process with the social worker.

{¶46} I feel compelled, however, to write separately because this case involves a 13-year-old juvenile who was interviewed outside the presence of his

mother. My concern in this case falls on the role of the social worker and what information should be provided to the parent or guardian of a child suspected of child abuse. In this case, the social worker testified that she told M.H.'s mother that the interview would be "private." According to the social worker, this advisement was the mother's opportunity to decide whether to bring M.H. to the interview knowing that it would be conducted without a parent or guardian present. To me, the word "private" indicates that the nature and substance of the interview would not be shared. I believe this was the mother's understanding and find that a reasonable person in mother's situation would not have understood the circumstances surrounding the interview.

{¶47} M.H.'s mother stated that she did not know that the meeting with the social worker was voluntary and she did not ask to be present during the interview because she thought it was not permissible. Although mother stated that she had suspicions about what the interview was about, she further stated that had she known about the purpose and nature of the meeting, and potential consequences, she would have had an attorney present.

{¶48} The record is clear that at no time was mother apprised that the interview was voluntary, she could request to be present, or have any attorney present. She did not understand that the statements her son made could be used against him or would be provided to law enforcement. In fact, the social worker admitted that she kept the information given to mother "very general."

{¶49} Additionally, the social worker admitted that at no time did she advise M.H. of the purpose for the interview, that the interview was voluntary, he was free to leave, and the information he shared would be not be private, but shared with law enforcement. According to the social worker, she did not have to advise M.H. of any rights or this additional information because she is not law enforcement. I believe that because the social worker was a former seasoned law enforcement officer, she understood the legal consequences of the interview, admissions the child made, and information that was necessary to assist in a criminal investigation. Despite the fact that the social worker initially testified that the investigation and interview is to ensure the "safety of the victim," she subsequently stated that her purpose when interviewing M.H. was "to determine whether or not some type of inappropriate sexual behavior happened between the two of them and if anything criminal happened, then I pass that on to law enforcement." (Tr. 64.) Based on that answer, the social worker was asked to explain how "interviewing M.H. has to do at all, if at all, with the safety of the victim?" Therefore, it is questionable if victim safety was her primary concern.

{¶50} I can appreciate the trial court's position that the role of the CCDCFS social worker and law enforcement is "a little close for comfort" in these circumstances. While the law protects CCDCFS records as confidential, thus arguably not subject to discovery by the defense, the law allows the records to be shared with law enforcement and included in the "juvenile package" that

is presented to the prosecutor to determine whether a complaint should be brought against the juvenile. These reports contain statements made by the juvenile who was not *Mirandized*, and whose interview was not recorded. Absolutely no procedural safeguards are in place during this "non-custodial, but yet, your words will be used against you" interrogation.

{¶51} I am troubled by the circumstances of this case and see potential abuse by law enforcement when handling these types of cases when juveniles are the alleged perpetrators. I feel that the holding in *Jackson* allows law enforcement to sit on their hands and not conduct their own investigation when an allegation of child abuse occurs because they know that CCDCFS will interview the juvenile and provide a copy of their report to law enforcement. The *Jackson* holding makes it clear that as long as law enforcement keeps an arm length's distance from CCDCFS during its investigative stage, then the social worker will not be classified as law enforcement; thus, no constitutional safeguards need to be implemented to protect an alleged perpetrator's rights.

{¶52} My concern is evidenced by the facts in this case that although Detective Cottom was assigned to investigate the allegation of abuse on October 20, 2015, she did not have any contact with CCDCFS until December 4, 2015 (conveniently two days after M.H.'s interview with the social worker) when she left a message on the social worker's voicemail requesting her write-up on the case. As Detective Cottom admitted, she did not have to interview M.H. because

"it had already been done" by the social worker at CCDCFS. (Tr. 75.) That, to me, leaves me no doubt that law enforcement use social workers as their agents to obtain information that they otherwise would not be able to obtain so freely.

LARRY A. JONES, SR., J., DISSENTING:

{¶53} Respectfully, I dissent. I would affirm the trial court's judgment suppressing statements M.H. made to the CCDCFS social worker.

{¶54} While the majority opinion finds *Jackson* controlling of this case, despite its concerns of the social worker's conduct, I find the Ohio Supreme Court's recent decision in *Jackson*, Slip Opinion No. 2018-Ohio-2169, distinguishable from this case.

{¶55} The issue in *Jackson* was

> whether a social worker's statutory duty to cooperate and share information with law enforcement regarding a child abuse investigation renders the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution if the social worker interviews an alleged perpetrator.

Id. at ¶ 1.

{¶56} As the court stated in *Jackson*, "'whether someone is acting as an agent of law enforcement is dependent upon the unique circumstances of each case.'" *Id.* at ¶ 17, quoting *State v. Bernard*, 31 So.3d 1025, 1033 (La.2010). The *Jackson* court concluded that the social worker, based in part on the record in

the case, was not acting as an agent of law enforcement when she interviewed the defendant. *Id.* at ¶ 21. The court explained,

> a social worker's statutory duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments to the United States Constitution when the social worker interviews an alleged perpetrator *unless* other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement.

(Emphasis added.)

{¶57} As the dissent in *Jackson* noted (in agreeing with the majority) "R.C. 2151.421(G) and related statutory provisions do not categorically transform a children's services investigator into a law-enforcement agent." *Id.* at ¶ 41 (DeGenaro, J., dissenting). The specific facts of this case, however, lead to the conclusion that the social worker was acting as the functional equivalent of law enforcement. Those facts include: M.H.'s age, what was said (or more importantly not said) to M.H. and M.H.'s mother prior to questioning, and the social worker herself.

{¶58} The trial court's decision in this case was not based solely on whether the social worker was an agent of law enforcement or acted at the direction or under the control of law enforcement. The trial court also found that M.H.'s due process rights were violated and his statements were inadmissible

under Evid.R. 403. I believe there was competent credible evidence in the record to support these findings.

{¶59} The defendant in *Jackson* was 31 years old at the time of the alleged rape; here, M.H. had just turned 13 years old at the time of the alleged incident and was still only 13 when he was interviewed by the social worker. The social worker testified that she told M.H.'s mother that the interview with M.H. would be "private" but that mother would not be allowed to be in the interview room with M.H. As the concurring opinion notes, "the word 'private' indicates that the nature and substance of the interview would not be shared."

{¶60} The other facts noted by the concurring opinion, specifically that the social worker testified that (1) she did not advise M.H. of the purpose of the interview; (2) she did not advise M.H. that the interview was voluntary or he was free to leave; and (3) she never told M.H. or his mother that the information he shared with her could be shared with law enforcement — also go against the voluntariness of M.H.'s statements. In fact, the social worker testified that she started out her interview with M.H. by asking him questions to build rapport and "didn't tell him anything to do with why he was there." M.H.'s mother testified that had she known about the purpose and nature of the meeting, she would have had an attorney present. Compare *Jackson*, where the social worker told the 31-year-old defendant that anything he said could be subpoenaed by the

courts. *Id.* at ¶ 3. The social worker did not advise 13-year-old M.H. of the same.

{¶61} As mentioned, the investigating detective did not interview M.H. Detective Cottom was assigned to investigate the case a month and a half before the social worker interviewed M.H. The detective testified that she did not separately interview M.H. because the social worker had already interviewed him. This allowed the detective to circumvent normal procedural safeguards that an accused offender would usually have. In other words, this allowed the detective to "use" the social worker to do the detective's investigation without ensuring the rights of the child.

{¶62} The social worker testified that she told the victim and her mother to make a police report. They made a police report and the social worker followed up by interviewing M.H. The social worker, who spent ten years working for the Atlanta police department as a patrol officer, general investigator, and homicide detective, additionally admitted that she would be interviewing M.H. on what could be criminal allegations. The social worker stated that because there was a "strong possibility" that the allegations were criminal in nature, she would turn over her report to the police. The detective, on the other hand, did not interview M.H. because the detective knew she could just use the report generated by the social worker.

{¶63} The state argued that M.H.'s age was relevant in that it alters the CCDCFS investigator's role in this case from investigating allegations, as in *Jackson*, to assessing the safety of both M.H. and the alleged victim. Perhaps that's true in some cases, but here the social worker testified that her purpose in interviewing M.H. was "to determine whether or not some inappropriate sexual behavior happened between the two of them and if anything criminal happened, then I pass that on to law enforcement." More troubling is the admission by the social worker that when she interviewed the alleged victim — prior to interviewing M.H. — neither the alleged victim nor the alleged victim's mother communicated any concerns about the alleged victim's safety.

{¶64} The trial court also excluded M.H.'s statements based on Evid.R. 403, which states that exclusion of relevant evidence is mandatory "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Again, there was competent, credible evidence that supports the trial court's findings.

{¶65} In light of the above and the specific facts of this case, I find the facts of *Jackson* distinguishable and would affirm the decision of the trial court.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

IN RE: M.H.

COA NO.	LOWER COURT NO.
105742	DL-16105732

JUVENILE COURT DIVISION

MOTION NO. 523899

Date 03/20/19

Journal Entry

Under App.R. 26(A)(1)(a), the test for whether to grant a motion for reconsideration is "'whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.'" State v. Robinson, 8th Dist. Cuyahoga No. 103559, 2016-Ohio-2931, ¶ 2, quoting State v. Dunbar, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-3261, ¶ 182. Appellee has not demonstrated an "obvious error" in our decision, nor has he identified an issue this court failed to consider that should have been considered. Appellee's motion for reconsideration is therefore denied.

Presiding Judge Larry A. Jones, Sr., Concurs

Judge Kathleen Ann Keough, Concurs

Michelle J. Sheehan
Michelle J. Sheehan
Judge

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

IN RE: M.H.

COA NO.	LOWER COURT NO.
105742	DL-16105732

JUVENILE COURT DIVISION

MOTION NO. 523900

Date 03/20/19

Journal Entry

Application by appellee, M.H., for en banc consideration is denied, pursuant to App.R. 26(A)(2)(b) and Loc.App.R. 26(C), for failure to set forth a conflicting decision from this District.

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MAR 20 2019

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

Mary Eileen Kilbane
Administrative Judge

CA17105742 107935293

United States Constitutional Provisions

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment IV
Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Article I, Section 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

2151.421 Reporting child abuse or neglect.

(A)

(1)

(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age, or a person under twenty-one years of age with a developmental disability or physical impairment, has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as otherwise provided in this division or section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. If the person making the report is a peace officer, the officer shall make it to the public children services agency in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; health care professional; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp, child day camp, or private, nonprofit therapeutic wilderness camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; peace officer; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107. or 5103. of the Revised Code; third party employed by a public children services agency to assist in providing child or family related services; court appointed special advocate; or guardian ad litem.

(c) If two or more health care professionals, after providing health care services to a child, determine or suspect that the child has been or is being abused or neglected, the health care professionals may designate one of the health care professionals to report the abuse or neglect. A single report made under this division shall meet the reporting requirements of division (A)(1) of this section.

(2) Except as provided in division (A)(3) of this section, an attorney or a physician is not required to make a report pursuant to division (A)(1) of this section concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding.

(3) The client or patient in an attorney-client or physician-patient relationship described in division (A)(2) of this section is deemed to have waived any testimonial privilege under division (A) or (B) of section 2317.02 of the Revised Code with respect to any communication the attorney or physician receives from the client or patient in that attorney-client or physician-patient relationship, and the attorney or physician shall make a report pursuant to division (A)(1) of this section with respect to that communication, if all of the following apply:

(a) The client or patient, at the time of the communication, is a child under eighteen years of age or is a person under twenty-one years of age with a developmental disability or physical impairment.

(b) The attorney or physician knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in similar position to suspect that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(c) The abuse or neglect does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(4)

(a) No cleric and no person, other than a volunteer, designated by any church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith who is acting in an official or professional capacity, who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that a child under eighteen years of age, or a person under twenty-one years of age with a developmental disability or physical impairment, has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, and who

knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that another cleric or another person, other than a volunteer, designated by a church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith caused, or poses the threat of causing, the wound, injury, disability, or condition that reasonably indicates abuse or neglect shall fail to immediately report that knowledge or reasonable cause to believe to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Except as provided in division (A)(4)(c) of this section, a cleric is not required to make a report pursuant to division (A)(4)(a) of this section concerning any communication the cleric receives from a penitent in a cleric-penitent relationship, if, in accordance with division (C) of section 2317.02 of the Revised Code, the cleric could not testify with respect to that communication in a civil or criminal proceeding.

(c) The penitent in a cleric-penitent relationship described in division (A)(4)(b) of this section is deemed to have waived any testimonial privilege under division (C) of section 2317.02 of the Revised Code with respect to any communication the cleric receives from the penitent in that cleric-penitent relationship, and the cleric shall make a report pursuant to division (A)(4)(a) of this section with respect to that communication, if all of the following apply:

(i) The penitent, at the time of the communication, is a child under eighteen years of age or is a person under twenty-one years of age with a developmental disability or physical impairment.

(ii) The cleric knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, as a result of the communication or any observations made during that communication, the penitent has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the penitent.

(iii) The abuse or neglect does not arise out of the penitent's attempt to have an abortion performed upon a child under eighteen years of age or upon a person under twenty-one years of age with a developmental disability or physical impairment without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(d) Divisions (A)(4)(a) and (c) of this section do not apply in a cleric-penitent relationship when the disclosure of any communication the cleric receives from the penitent is in violation of the sacred trust.

(e) As used in divisions (A)(1) and (4) of this section, "cleric" and "sacred trust" have the same meanings as in section 2317.02 of the Revised Code.

(B) Anyone who knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in similar circumstances to suspect, that a child under eighteen years of age, or a person under twenty-one years of age with a developmental disability or physical impairment, has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child may report or cause reports to be made of that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the public children services agency or to a peace officer. In the circumstances described in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the entity specified in that section.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;

(2) The child's age and the nature and extent of the child's injuries, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information, including, but not limited to, results and reports of any medical examinations, tests, or procedures performed under division (D) of this section, that might be helpful in establishing the cause of the injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist.

(D)

(1) Any person, who is required by division (A) of this section to report child abuse or child neglect that is known or reasonably suspected or believed to have occurred, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically necessary for the purpose of diagnosing or treating injuries that are suspected to have occurred as a result of child abuse or child neglect, perform or cause to be performed radiological examinations and any other medical examinations of, and tests or procedures on, the child.

(2) The results and any available reports of examinations, tests, or procedures made under division (D)(1) of this section shall be included in a report made pursuant to division (A) of this section. Any additional reports of examinations, tests, or procedures that become available shall be provided to the public children services agency, upon request.

(3) If a health care professional provides health care services in a hospital, children's advocacy center, or emergency medical facility to a child about whom a report has been made under division (A) of this section, the health care professional may take any steps that are reasonably necessary for the release or discharge of the child to an appropriate environment. Before the child's release or discharge, the health care professional may obtain information, or consider information obtained, from other entities or individuals that have knowledge about the child. Nothing in division (D)(3) of this section shall be construed to alter the responsibilities of any person under sections 2151.27 and 2151.31 of the Revised Code.

(4) A health care professional may conduct medical examinations, tests, or procedures on the siblings of a child about whom a report has been made under division (A) of this section and on other children who reside in the same home as the child, if the professional determines that the examinations, tests, or procedures are medically necessary to diagnose or treat the siblings or other children in order to determine whether reports under division (A) of this section are warranted with respect to such siblings or other children. The results of the examinations, tests, or procedures on the siblings and other children may be included in a report made pursuant to division (A) of this section.

(5) Medical examinations, tests, or procedures conducted under divisions (D)(1) and (4) of this section and decisions regarding the release or discharge of a child under division (D)(3) of this section do not constitute a law enforcement investigation or activity.

(E)

(1) When a peace officer receives a report made pursuant to division (A) or (B) of this section, upon receipt of the report, the peace officer who receives the report shall refer the report to the appropriate public children services agency, unless an arrest is made at the time of the report that results in the appropriate public children services agency being contacted concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child.

(2) When a public children services agency receives a report pursuant to this division or division (A) or (B) of this section, upon receipt of the report, the public children services agency shall do both of the following:

(a) Comply with section 2151.422 of the Revised Code;

(b) If the county served by the agency is also served by a children's advocacy center and the report alleges sexual abuse of a child or another type of abuse of a child that is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, comply regarding the report with the protocol and procedures for referrals and investigations, with the coordinating activities, and with the authority or responsibility for performing or providing functions, activities, and services stipulated in the interagency agreement entered into under section 2151.428 of the Revised Code relative to that center.

(F) No peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 of the Revised Code.

(G)

(1) Except as provided in section 2151.422 of the Revised Code or in an interagency agreement entered into under section 2151.428 of the Revised Code that applies to the particular report, the public children services agency shall investigate, within twenty-four hours, each report of child abuse or child neglect that is known or reasonably suspected or believed to have occurred and of a threat of child abuse or child neglect that is known or reasonably suspected or believed to exist that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (K) of this section. A representative of the public children services agency shall, at the time of initial contact with the person subject to the investigation, inform the person of the specific complaints or allegations made against the person. The information shall be given in a manner that is consistent with division (I)(1) of this section and protects the rights of the person making the report under this section.

A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to the uniform statewide automated child welfare information system that the department of job and family services shall maintain in accordance with section 5101.13 of the Revised Code. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(H)

(1)

(a) Except as provided in divisions (H)(1)(b) and (I)(3) of this section, any person, health care professional, hospital, institution, school, health department, or agency shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of any of the following:

(i) Participating in the making of reports pursuant to division (A) of this section or in the making of reports in good faith, pursuant to division (B) of this section;

(ii) Participating in medical examinations, tests, or procedures under division (D) of this section;

(iii) Providing information used in a report made pursuant to division (A) of this section or providing information in good faith used in a report made pursuant to division (B) of this section;

(iv) Participating in a judicial proceeding resulting from a report made pursuant to division (A) of this section or participating in good faith in a proceeding resulting from a report made pursuant to division (B) of this section.

(b) Immunity under division (H)(1)(a)(ii) of this section shall not apply when a health care provider has deviated from the standard of care applicable to the provider's profession.

(c) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(1)

(1) Except as provided in divisions (I)(4) and (O) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. Nothing in this division shall preclude the use of reports of other incidents of known or suspected abuse or neglect in a civil action or proceeding brought pursuant to division (N) of this section against a person who is alleged to have violated division (A)(1) of this section, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker of the report is not the defendant or an agent or employee of the defendant, has been redacted. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2)

(a) Except as provided in division (I)(2)(b) of this section, no person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(b) A health care professional that obtains the same information contained in a report made under this section from a source other than the report may disseminate the information, if its dissemination is otherwise permitted by law.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the report is made, but before the child attains eighteen years of age, the public children services agency or peace officer to which the report was made or referred, on the request of the child fatality review board or the director of health pursuant to guidelines established under section 3701.70 of the Revised Code, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the deceased child resided at the time of death or to the director. On the request of the review board or director, the agency or peace officer may, at its discretion, make the report available to the review board or director. If the county served by the public children services agency is also served by a children's advocacy center and the report of alleged sexual abuse of a child or another type of abuse of a child is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, the agency or center shall perform the duties and functions specified in this division in accordance with the interagency

agreement entered into under section 2151.428 of the Revised Code relative to that advocacy center.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section, including a report alleging sexual abuse of a child or another type of abuse of a child referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

(J) Any report that is required by this section, other than a report that is made to the state highway patrol as described in section 5120.173 of the Revised Code, shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 of the Revised Code.

(K)

(1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

(a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;

(b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;

(c) The county peace officer;

(d) All chief municipal peace officers within the county;

(e) Other law enforcement officers handling child abuse and neglect cases in the county;

(f) The prosecuting attorney of the county;

(g) If the public children services agency is not the county department of job and family services, the county department of job and family services;

(h) The county humane society;

(i) If the public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, each participating member of the children's advocacy center established by the memorandum.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(4) If a public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, the agency shall incorporate the contents of that memorandum in the memorandum prepared pursuant to this section.

(5) The clerk of the court of common pleas in the county may sign the memorandum of understanding prepared under division (K)(1) of this section. If the clerk signs the memorandum of understanding, the clerk shall execute all relevant responsibilities as required of officials specified in the memorandum.

(L)

(1) Except as provided in division (L)(4) or (5) of this section, a person who is required to make a report pursuant to division (A) of this section may make a reasonable number of requests of the public children services agency that receives or is referred the report, or of the children's advocacy center that is referred the report if the report is referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, to be provided with the following information:

(a) Whether the agency or center has initiated an investigation of the report;

(b) Whether the agency or center is continuing to investigate the report;

(c) Whether the agency or center is otherwise involved with the child who is the subject of the report;

(d) The general status of the health and safety of the child who is the subject of the report;

(e) Whether the report has resulted in the filing of a complaint in juvenile court or of criminal charges in another court.

(2) A person may request the information specified in division (L)(1) of this section only if, at the time the report is made, the person's name, address, and telephone number are provided to the person who receives the report.

When a peace officer or employee of a public children services agency receives a report pursuant to division (A) or (B) of this section the recipient of the report shall inform the person of the right to request the information described in division (L)(1) of this section. The recipient of the report shall include in the initial child abuse or child neglect report that the person making the report was so informed and, if provided at the time of the making of the report, shall include the person's name, address, and telephone number in the report.

Each request is subject to verification of the identity of the person making the report. If that person's identity is verified, the agency shall provide the person with the information described in division (L)(1) of this section a reasonable number of times, except that the agency shall not disclose any confidential information regarding the child who is the subject of the report other than the information described in those divisions.

(3) A request made pursuant to division (L)(1) of this section is not a substitute for any report required to be made pursuant to division (A) of this section.

(4) If an agency other than the agency that received or was referred the report is conducting the investigation of the report pursuant to section 2151.422 of the Revised Code, the agency conducting the investigation shall comply with the requirements of division (L) of this section.

(5) A health care professional who made a report under division (A) of this section, or on whose behalf such a report was made as provided in division (A)(1)(c) of this section, may authorize a person to obtain the information described in division (L)(1) of this section if the person requesting the information is associated with or acting on behalf of the health care professional who provided health care services to the child about whom the report was made.

(M) The director of job and family services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department of job and family services may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(N) Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made. A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceeding reports of other incidents of known or suspected abuse or neglect, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker is not the defendant or an agent or employee of the defendant, has been redacted.

(O)

(1) As used in this division:

(a) "Out-of-home care" includes a nonchartered nonpublic school if the alleged child abuse or child neglect, or alleged threat of child abuse or child neglect, described in a report received by a public children services agency allegedly occurred in or involved the nonchartered nonpublic school and the alleged perpetrator named in the report holds a certificate, permit, or license issued by the state board of education under section 3301.071 or Chapter 3319. of the Revised Code.

(b) "Administrator, director, or other chief administrative officer" means the superintendent of the school district if the out-of-home care entity subject to a report made pursuant to this section is a school operated by the district.

(2) No later than the end of the day following the day on which a public children services agency receives a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall provide written notice of the allegations contained in and the person named as the alleged perpetrator in the report to the administrator, director, or other chief administrative officer of the out-of-home care entity that is the subject of the report unless the administrator, director, or other chief administrative officer is named as an alleged perpetrator in the report. If the administrator, director, or other chief administrative officer of an out-of-home care entity is named as an alleged perpetrator in a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved the out-of-home care entity, the agency shall provide the written notice to the owner or governing board of the out-of-home care entity that is the subject of the report. The agency shall not provide witness statements or police or other investigative reports.

(3) No later than three days after the day on which a public children services agency that conducted the investigation as determined pursuant to section 2151.422 of the Revised Code makes a disposition of an investigation involving a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall send written notice of the disposition of the investigation to the administrator, director, or other chief administrative officer and the owner or governing board of the out-of-home care entity. The agency shall not provide witness statements or police or other investigative reports.

(P) As used in this section:

(1) "Children's advocacy center" and "sexual abuse of a child" have the same meanings as in section 2151.425 of the Revised Code.

(2) "Health care professional" means an individual who provides health-related services including a physician, hospital intern or resident, dentist, podiatrist, registered nurse, licensed practical nurse, visiting nurse, licensed psychologist, speech pathologist, audiologist, person engaged in social work or the practice of professional counseling, and employee of a home health agency. "Health care professional" does not include a practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code, licensed school psychologist, independent marriage and family therapist or marriage and family therapist, or coroner.

(3) "Investigation" means the public children services agency's response to an accepted report of child abuse or neglect through either an alternative response or a traditional response.

(4) "Peace officer" means a sheriff, deputy sheriff, constable, police officer of a township or joint police district, marshal, deputy marshal, municipal police officer, or a state highway patrol trooper.

Ohio Rules of Evidence Provisions

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.