No. 18-

In the Supreme Court of the United States

DEMETRIUS JACKSON,

Petitioner,

v.

OHIO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the victim of a crime is a child, a Child Protective Services ("CPS") caseworker employed by the state normally investigates the incident in close cooperation with the police. The caseworker is typically required by law to share any information obtained during her investigation with the police and the prosecutor. During these investigations, caseworkers routinely interrogate arrested suspects and convey incriminating information to the police. These interrogations are exactly like interrogations conducted by the police, with the single exception that the interrogator is a CPS caseworker rather than a police officer.

The Questions Presented are:

I. Whether an interrogation that would violate the Fifth Amendment if conducted by a police officer also violates the Fifth Amendment if conducted by a state-employed CPS caseworker, where the caseworker is required by law to share information obtained in the interrogation with the police and the prosecutor.

II. Whether an interrogation that would violate the Sixth Amendment if conducted by a police officer also violates the Sixth Amendment if conducted by a state-employed CPS caseworker, where the caseworker is required by law to share information obtained in the interrogation with the police and the prosecutor.

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Demetrius Jackson respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The opinion of the Ohio Supreme Court (App. 1a) is published at 154 Ohio St. 3d 542, 116 N.E.3d 1240. The opinion of the Ohio Court of Appeals (App. 27a) is published at 75 N.E.3d 922. The opinion of the Ohio Court of Appeals on remand (App. 48a) is available at 2018 WL 4182269. The order of the Ohio Supreme Court denying review after the remand (App. 58a) is published at 154 Ohio St. 3d 1431, 111 N.E.3d 1192 (table).

JURISDICTION

The judgment of the Ohio Supreme Court was entered on November 21, 2018. On January 2, 2019, Justice Sotomayor extended the time to file a certiorari petition to March 21, 2019. No. 18A672. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person … shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence."

STATEMENT

The lower courts are deeply divided over two questions that often arise when the victim of a crime is a child. Because a single incident can be both a criminal offense and an act of child abuse, Child Protective Services ("CPS") caseworkers employed by the state normally investigate the incident in close cooperation with the police. CPS caseworkers often interrogate suspects. The caseworkers are typically required by statute to report information obtained in these interrogations to the police and the prosecutor. These interrogations are exactly like interrogations by the police, with one exception—the person conducting the interrogation is not a police officer, but is rather a CPS caseworker who is obliged to share the results of the interrogation with law enforcement.

Do the Fifth and Sixth Amendments apply to these interrogations as they would if the interrogations were conducted by a police officer? Under the Fifth Amendment, is the defendant's statement during such an interrogation admissible if the defendant has asserted his right to remain silent under *Miranda*? Under the Sixth Amendment, is the defendant's statement admissible if the interrogation took place without his attorney? These are the issues on which the lower courts are divided. They both reduce to a single question: Are these interrogations similar enough to interrogations by the police to be subject to the same rules, or are they so different that they should be exempt from the normal constitutional scrutiny?

This case presents the issues as sharply as they could possibly be presented. Demetrius Jackson was arrested, charged with raping a minor, and taken to

jail, where he asserted his *Miranda* rights and refused to speak to the police. He was arraigned and assigned an attorney. A few days later, a CPS caseworker employed by the state visited the jail to interrogate Jackson. Jackson's attorney was not present. There is no dispute that this interrogation would have violated the Fifth and Sixth Amendments had it been conducted by a police officer, rather than by a caseworker under a statutory obligation to share the results of the interrogation with the police and the prosecutor. During the interrogation, Jackson made a damaging statement which became a crucial piece of evidence at his trial. The Ohio Supreme Court held that the admission into evidence of Jackson's statement did not violate the Fifth or Sixth Amendments, because Jackson's interrogator was a CPS caseworker rather than a police officer.

The decision below gives the states an obvious way of circumventing the privilege against self-incrimination and the right to counsel in any case in which the victim is a child. Where the defendant has invoked his *Miranda* rights and has refused to speak with the police, the decision below allows the defendant to be interrogated instead by a CPS caseworker, a state employee who is required to share the fruits of the interrogation with the police and the prosecutor. Where the defendant is represented by counsel, the decision below allows the government to interrogate the defendant without his lawyer present, so long as the caseworker is the one who conducts the interrogation.

This cannot be right. The privilege against self-incrimination and the right to counsel cannot be

side-stepped so easily. The Court should grant certiorari and reverse.

1. Ohio has a typical statutory scheme governing cases of child abuse. When a county's "public children services agency" receives a report of child abuse, the agency "shall investigate" the incident, to determine "the cause of the injuries" and "the person or persons responsible." Ohio Rev. Code § 2151.421(G)(1). As part of this investigation, a caseworker employed by the agency "shall conduct and document face-to-face interviews with the alleged perpetrator." Ohio Admin. Code § 5101:2-36-03(O).

Any information the children services agency discovers during its investigation, including during its interrogation of the suspect, must be shared with the police and the prosecutor. The children services agency's "investigation shall be made in cooperation with the [local] law enforcement agency." Ohio Rev. Code § 2151.421(G)(1). The children services agency "shall submit a report of its investigation, in writing, to the law enforcement agency." *Id.* The children services agency must also "make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children." *Id.* § 2151.421(G)(2). Information the children services agency obtains during the investigation must be entered into a statewide database to which the police and prosecutors have access. *Id.* §§ 5101.13 (A)(1), 5101.132(A)(1); Ohio Admin. Code § 5101:2-33-21(F)(2), (3).

The children services agency must also enter into a "memorandum of understanding" with the police

and with the prosecutor. Ohio Rev. Code § 2151.421(K)(1). The memorandum must include procedures for "coordinating investigations of reported cases of child abuse" between the agency and the police. *Id.* § 2151.421(K)(3)(b).

Every state has a similar statutory scheme requiring CPS caseworkers to investigate and report on cases of child abuse. U.S. Dep't of Health & Human Servs., *Making and Screening Reports of Child Abuse and Neglect* 1 (2017).[1] "Typically, reports are shared among social services agencies, law enforcement departments, and prosecutors' offices." U.S. Dep't of Health & Human Servs., *Cross-Reporting Among Responders to Child Abuse and Neglect* 1 (2016); *see also id.* at 3-25 (collecting and summarizing statutes).[2] Throughout the country, where there is an incident that could be both a crime and an act of child abuse, CPS caseworkers conduct investigations in close cooperation with the police and prosecutors.

2. On August 5, 2015, petitioner Demetrius Jackson was arrested by the Cleveland police after a 14-year-old girl named C.H. reported that Jackson had raped her earlier that day. App. 2a. The police placed Jackson in custody in the county jail. They attempted to interrogate him, but Jackson invoked his right to remain silent under *Miranda* and refused to answer any questions. App. 2a. Jackson was unable to post bail and thus remained in jail throughout the investigation and the trial.

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[1] https://www.childwelfare.gov/pubPDFs/repproc.pdf.
[2] https://www.childwelfare.gov/pubPDFs/xreporting.pdf.

On August 7, two days after being taken into custody, Jackson was arraigned and assigned an attorney. App. 40a.

Four days later, on August 11, Jackson was visited in jail by Holly Mack. App. 3a. Mack was a CPS caseworker employed by the Cuyahoga County Division of Children and Family Services, which is the children services agency for Cuyahoga County. App. 3a. The purpose of Mack's visit was to interrogate Jackson, as part of the agency's statutorily-required investigation. App. 3a. One of Mack's primary job duties was to conduct jailhouse interviews of alleged perpetrators of offenses against minors. App. 3a, 33a. She had been employed in this work for seventeen years. App. 21a.

Mack identified herself, advised Jackson of the allegation against him, and told Jackson that anything he said to her could be "subpoenaed by the courts." App. 3a. Although Jackson was represented by an attorney, Mack did not contact the attorney or ask Jackson whether he wished to have his attorney present. App. 33a. She did not administer *Miranda* warnings. App. 33a. She did not obtain any waiver of Jackson's Fifth or Sixth Amendment rights. App. 33a. She simply began asking questions about the offense with which Jackson was charged.

In response to Mack's questions, Jackson told Mack that he had oral sex with C.H. and that afterwards she had requested money. App. 3a.

At trial, the prosecutor called Mack as a witness to testify as to what Jackson told her in jail. App. 3a. Defense counsel objected to this testimony, on the ground that it violated Jackson's Fifth Amendment privilege against self-incrimination and his Sixth

Amendment right to counsel. App. 3a. The trial court overruled the objection. App. 3a.

Mack's testimony was crucial. There was no DNA or other evidence indicating that Jackson was the person responsible for the seminal material found during an examination of C.H. App. 29a-30a. There were no witnesses to the alleged rape other than C.H. Apart from Mack's testimony, the only evidence of physical contact between Jackson and C.H. was C.H.'s own report. But the admission of Jackson's statement to Mack changed everything. Now Jackson had to concede at trial that he indeed had sex with C.H. App. 30a (noting that Jackson testified "only because the court admitted the testimony concerning what was allegedly said to the child advocate, over objection"). Before Jackson's statement to Holly Mack was admitted into evidence, this was a close case. Afterwards, it was not.

Jackson was convicted of two counts of rape and one count of kidnapping. App. 4a. He was sentenced to three concurrent eleven-year terms of imprisonment. App. 4a, 31a.

3. The Ohio Court of Appeals reversed. App. 27a-47a.

The Court of Appeals observed that Holly Mack

> testified that one of her primary job duties at the jail is to interview alleged perpetrators connected to abuse and neglect cases. These interviews occur in the county jail while defendants, such as appellant, are awaiting trial. As this case evidences, those interviews are occurring after counsel has been appointed for defendants at arraignment, without any notifica-

> tion to said counsel and without obtaining any waiver of the defendant's Fifth or Sixth Amendment rights. The child advocate does not administer *Miranda* warnings. It is absolutely undisputed that if sworn law enforcement officers conducted interviews in this manner, the practice would violate defendants' Fifth and Sixth Amendment rights.

App. 33a. The Court of Appeals also observed that the child advocate is required by statute to share all the information obtained in these interviews with the police. App. 33a.

The Court of Appeals held that under the Fifth and Sixth Amendments, Mack was "acting as an agent of law enforcement when she interrogated" Jackson. App. 32a. "We can find no legitimate purpose for the child advocate's interview," the court noted, "other than to directly assist the investigation of law enforcement." App. 33a. The court found that law enforcement and the Division of Children and Family Services "have a systematic procedure in place to interview jailed defendants in a manner that blatantly attempts to evade the constrictions of the Fifth and Sixth Amendments." App. 34a. In this case, the court determined, Mack "conducted an unconstitutional interrogation of appellant, documented and shared the results with law enforcement and testified against appellant at trial regarding the admissions he made during the interrogation." App. 34a. "As the interview would have been illegal had it been conducted by law enforcement," the court concluded, "we cannot see how it becomes legal when it is accomplished by a separate state actor who conducts the interrogation under the direction of a for-

mal agreement with law enforcement and who is legally required to forward the collected information to law enforcement." App. 34a-35a.

The Court of Appeals thus held that Mack's interview of Jackson was an unlawful custodial interrogation in violation of the Fifth Amendment, App. 35a-39a, and an interview outside the presence of Jackson's attorney in violation of the Sixth Amendment, App. 40a.

Judge Sean Gallagher dissented. App. 40a-47a. In his view, "[a]lthough the child advocate's report might have aided law enforcement, the record does not demonstrate that the child advocate was acting as an agent of law enforcement." App. 44a-45a.

Because the Court of Appeals reversed on Fifth and Sixth Amendment grounds, the court did not address Jackson's other assignments of error. App. 40a.

4. A divided Ohio Supreme Court reversed. App. 1a-26a.

The court held that "a social worker's statutory duty to cooperate and share information with law enforcement … does not render the social worker an agent of law enforcement for purposes of the Fifth and Sixth Amendments … unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement." App. 12a. Applying this standard, the court found "no evidence that law enforcement asked Mack to interview Jackson … or that law enforcement influenced Mack's interview of Jackson in any way." App. 13a.

The court deemed inapposite *Mathis v. United States*, 391 U.S. 1 (1968), which held that questioning by an IRS agent conducting a civil tax investigation was governed by the Fifth Amendment. App. 13a. The court reasoned that in *Mathis* this Court "was *not* called upon to decide whether the IRS employee was a 'law enforcement agent.'" App. 13a (citation omitted). The court also deemed inapposite *Estelle v. Smith*, 451 U.S. 454 (1981), which held that questioning by a court-appointed psychiatrist was governed by the Fifth and Sixth Amendments. App. 14a. The court reasoned: "This case is distinguishable because it does not involve a court ordered examination." App. 14a.

The Ohio Supreme Court relied instead, App. 12a, on *Ohio v. Clark*, 135 S. Ct. 2173 (2015), which held that a child's statement to a teacher is not testimonial for purposes of the Confrontation Clause.

Justice DeGenaro dissented. App. 16a-26a. In her view, "Mack was the functional equivalent of a law-enforcement agent." App. 24a. Justice DeGenaro noted that the majority's decision created a conflict with the Second Circuit. App. 23a-24a (citing *Jackson v. Conway*, 763 F.3d 115 (2d Cir. 2014)). She quoted with approval the admonition of the Iowa Supreme Court that the view taken by the majority "would allow the State to ignore a defendant's constitutional rights merely by having the interrogation conducted by someone who lacks the title 'law enforcement officer' but who is otherwise performing the interrogation of such an officer." App. 25a (quoting *State v. Deases*, 518 N.W.2d 784, 790 (Iowa 1994)).

The Ohio Supreme Court remanded the case to the Court of Appeals so that court could consider the remaining assignments of error it had not addressed. App. 16a.

On remand, the Court of Appeals resolved all remaining issues in favor of the state and thus affirmed Jackson's conviction. App. 48a-57a. The Ohio Supreme Court denied review. App. 58a.[3]

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. There are entrenched lower court conflicts over whether interrogations conducted by CPS caseworkers are governed by the Fifth and Sixth Amendments, where, as here, the caseworkers are obliged by law to share the results of the interrogations with the police and with prosecutors. Both issues are important because they arise so often—potentially in any case involving a child victim. This case is a perfect vehicle for resolving both. And the decision below is blatantly wrong. It is contrary to this Court's precedents and it allows the states to circumvent the Fifth and Sixth Amendments whenever the victim of a crime is a child.

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[3] These proceedings on remand were necessary for there to be a final judgment from the state courts. *Johnson v. California*, 541 U.S. 428, 429-32 (2004) (per curiam). Now that the state courts have decided the remaining issues, the Court has jurisdiction. *Johnson v. California*, 545 U.S. 162, 167-68 (2005).

I. The Court should decide whether the Fifth Amendment governs interrogations by CPS caseworkers the same way it governs interrogations by police officers, where the caseworkers are required by law to share the results of the interrogation with the police and the prosecutor.

The Fifth Amendment privilege against self-incrimination, as enforced in *Miranda v. Arizona*, 384 U.S. 436 (1966), applies to interrogation by any "agent of the State," not merely to interrogation by police officers. *Estelle v. Smith*, 451 U.S. 454, 467 (1981) (holding that the privilege applies to questioning by a psychiatrist who testifies for the state); *see also Mathis v. United States*, 391 U.S. 1, 3-4 (1968) (same for questioning by an IRS agent). The reason for this principle is obvious: Otherwise, the state could easily circumvent the requirements of the Fifth Amendment simply by using employees who are not formally designated as police officers to conduct interrogations.

A. The lower courts are deeply divided on this issue.

What about state-employed CPS caseworkers who interrogate suspects about offenses against minors, and who are obliged by statute to share information obtained in these interrogations with the police and the prosecutor? Are they agents of the state for purposes of the Fifth Amendment? The lower courts are deeply divided on this question.

The Second Circuit and the highest courts of Kentucky, Maine, Oklahoma, and Rhode Island hold that these CPS caseworkers *are* agents of the state for

purposes of the Fifth Amendment. *Jackson v. Conway*, 763 F.3d 115, 135-40 (2d Cir. 2014) (holding on habeas review that this view is clearly established law); *Buster v. Commonwealth*, 364 S.W.3d 157, 164-65 (Ky. 2012); *State v. Harper*, 613 A.2d 945, 947-49 (Me. 1992); *Blanton v. State*, 172 P.3d 207, 210-11 (Okla. Crim. App. 2007); *State v. Gouin*, 182 A.3d 28, 33 (R.I. 2018). The Third Circuit and the New Jersey Supreme Court have taken the same view in dicta. *Saranchak v. Beard*, 616 F.3d 292, 304 (3d Cir. 2010); *State v. P.Z.*, 703 A.2d 901, 910-11 (N.J. 1997).

On the other side of the split, three state high courts agree with the Ohio Supreme Court's decision below. In these states, CPS caseworkers are *not* considered agents of the state, even where they are obliged to share the information learned during an interrogation with the police, unless a police officer requests and controls the interrogation, such as by telling the caseworker what to ask. *State v. Bernard*, 31 So. 3d 1025, 1035-36 (La. 2010); *Hennington v. State*, 702 So. 2d 403, 408-09 (Miss. 1997); *Wilkerson v. State*, 173 S.W.3d 521, 528-33 (Tex. Crim. App. 2005).

Ohio, to its credit, acknowledged the existence of this conflict in its briefing in the state supreme court. Appellant's Merit Brief at 14-15, *State v. Jackson*, No. 2017-0145. A conflict this deep and this long-lasting will never be resolved until this Court intervenes.

1. Most of the lower courts that have addressed this issue have held that these interrogations by state-employed CPS caseworkers are governed by

the Fifth Amendment, in the same manner as interrogations by police officers, where the caseworker is required by law to share information obtained during the interrogation with law enforcement.

Second Circuit: In *Jackson v. Conway*, 763 F.3d 115, 122 (2d Cir. 2014), a CPS caseworker interviewed the defendant in jail, after the defendant had invoked his *Miranda* rights and refused to speak with the police. The caseworker was under a statutory obligation to report the results of her investigation to the police. *Id.* at 139. During this interview, the defendant made an incriminating statement. *Id.* at 122-23. The Second Circuit, applying the deferential habeas standard of review, held that under clearly established law, the admission into evidence of the defendant's statement violated the Fifth Amendment. *Id.* at 138-40. The Second Circuit rejected the state's contention that the Fifth Amendment did not apply because the caseworker "was not engaged in law enforcement activity." *Id.* at 138 (internal quotation marks omitted).

Kentucky: In *Buster v. Commonwealth*, 364 S.W.3d 157, 160 (Ky. 2012), a CPS caseworker named Bell interviewed the defendant at the police station, after the defendant had invoked her *Miranda* rights and refused to speak with the police. The Kentucky Supreme Court observed that "Bell's investigation appears to have been indistinguishable from the police investigation because Bell was turning over all his information to the police." *Id.* at 164-65. The court thus held: "this Court considers Bell to be a government actor in this case, and he was subject to the same constraints as a police officer in what he could do or say to Appellant." *Id.* at 165. *See*

also Buster v. Commonwealth, 406 S.W.3d 437, 440 (Ky. 2013) (reaffirming that the caseworker "was a state actor for purposes of *Miranda*").

Maine: In *State v. Harper*, 613 A.2d 945, 948-49 (Me. 1992), a CPS caseworker interviewed the defendant without administering *Miranda* warnings, and then testified at trial about what the defendant had said during the interview. The Maine Supreme Court found it "inescapable that in the circumstances of this case, there was, in addition to a Sixth Amendment violation, either a *Miranda* or an *Edwards* violation." *Id.* at 949. The court concluded that the caseworker "is clearly a government agent," *id.*, and that her "interrogation of defendant was in blatant disregard of both of defendant's Fifth and Sixth Amendment right[s]," *id.* at 948.

Oklahoma: In *Blanton v. State*, 172 P.3d 207, 209 (Okla. Crim. App. 2007), a CPS caseworker interviewed the defendant in jail. During the interview, the defendant admitted acts constituting child sexual abuse. *Id.* at 210. The caseworker was under a statutory obligation to report her findings to the district attorney. *Id.* at 211. The Oklahoma Court of Criminal Appeals held that the caseworker "was acting as an agent of law enforcement while investigating the allegations of child sexual abuse." *Id.* Therefore, the court held, the caseworker's "questioning amounted to custodial interrogation without the benefit of *Miranda* warnings, just as if the police were conducting the interrogation." *Id.*

Rhode Island: In *State v. Gouin*, 182 A.3d 28, 30-31 (R.I. 2018), the defendant made incriminating statements under questioning by a CPS caseworker. The caseworker "communicated with the police

about defendant and was statutorily obligated to report any incriminating information to them." *Id.* at 33. The Rhode Island Supreme Court concluded that the caseworker "acted as a police agent during the interview." *Id.* The court reasoned: "The fact that she interviewed defendant for reasons other than prosecutorial purposes does not convince us … that she was not acting as an agent of the police." *Id.*

The Third Circuit has indicated in strongly-worded dicta that it agrees. In *Saranchak v. Beard*, 616 F.3d 292, 303-304 (3d Cir. 2010), the defendant met with a CPS caseworker in jail—not about his own offense but about his children, who were in foster care as a result of his incarceration. During this interview, the defendant confessed to murder. *Id.* at 304. The Third Circuit held that the interview did not violate the Fifth Amendment, because it was not conducted "with the purpose of soliciting information from Appellant about the crimes." *Id.* (internal quotation marks omitted). But the Third Circuit hastened to add—in italics—that the result would be different where a caseworker interviewed "a person *charged with offenses involving children*." *Id.* Such an interview, the court noted, *would* violate the Fifth Amendment, because the interview would have "a high probability of leading to informant testimony at a criminal trial." *Id.*

The New Jersey Supreme Court has taken the same view, also in dicta. In *State v. P.Z.*, 703 A.2d 901, 905 (N.J. 1997), CPS caseworkers interviewed the defendant at his home. The defendant admitted injuring his child. *Id.* at 905-06. The New Jersey Supreme Court held that *Miranda* warnings were not required because the defendant was not in custody.

Id. at 910-11. But the court added that *Miranda* warnings *would* have been required "[h]ad defendant been in custody at the time of the interview." *Id.* at 910. In support of this proposition, the court cited two New Jersey cases holding that CPS caseworkers "were acting as law enforcement officers when they questioned defendants who were incarcerated." *Id.*

Courts in several more jurisdictions have held that state employees other than police officers are governed by *Miranda* in parallel circumstances. *See Battie v. Estelle*, 655 F.2d 692, 699 (5th Cir. 1981) ("[T]he particular office that the official who performs the custodial interrogation represents is inconsequential because *Miranda* was not concerned with the division of responsibility between the various state investigatory agencies but was concerned with official custodial interrogations of an accused and the use of statements obtained from an accused without an attorney in such circumstances to prove the State's case against the accused."); *United States v. D.F.*, 63 F.3d 671, 683-84 (7th Cir. 1995) (holding that state medical personnel take on a "dual prosecutorial/healer role," and are thus governed by the Fifth Amendment, where "there is a specific arrangement between law enforcement and medical personnel to collaborate in the prosecution of an individual"), vacated on other grounds, 517 U.S. 1231 (1996) (mem.), reaff'd, 115 F.3d 413 (7th Cir. 1997); *People v. Robledo*, 832 P.2d 249, 251 (Colo. 1992) (holding that a state-employed counselor was governed by *Miranda* where he "was paid by the state, he was aware that his questioning was likely to elicit an incriminating response, and he was obligated to inform the district attorney of the information he

learned"); *State v. Deases*, 518 N.W.2d 784, 790 (Iowa 1994) ("[W]hen a state official conducts a custodial interrogation that would require a *Miranda* warning if undertaken by a police officer, then the official is similarly required to give a *Miranda* warning. Any other conclusion would allow the State to ignore a defendant's constitutional rights merely by having the interrogation conducted by someone who lacks the title 'law enforcement officer' but who is otherwise performing the interrogation of such an officer."); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988) (holding that a youth home director "was functioning as an instrument of the police" where "he had a duty to report to the police if he learned a juvenile had committed a crime"); *State v. Heritage*, 95 P.3d 345, 348 (Wash. 2004) (holding that state employees were governed by *Miranda* where "their duties included the investigation or reporting of crimes," and "information elicited during interrogation was used to prosecute").

Lower courts in several other states have reached the same holding regarding CPS caseworkers obliged to share information with the police. *See In re Timothy C.*, 978 P.2d 644, 648 (Ariz. Ct. App. 1998) (caseworker a state actor where mandated by law to reports results of interrogation to police); *People v. Kerner*, 538 N.E.2d 1223, 1225 (Ill. App. Ct. 1989) (caseworker required by law to share fruits of interview with police "was an agent of the prosecution for purposes of *Miranda*"); *State v. Helewa*, 537 A.2d 1328, 1331 (N.J. Super. Ct. App. Div. 1988) ("we are convinced that *Miranda* applies to a custodial interview conducted by a DYFS caseworker"); *State v. Morrell*, 424 S.E.2d 147, 153 (N.C. Ct. App. 1993)

(holding that caseworker's role was "essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting") (citation and internal quotation marks omitted); *Commonwealth v. Ramos*, 532 A.2d 465, 468 (Pa. Super. Ct. 1987) (where statute "required the CYS worker to forward his report of the case, including notes of the interview, to the police … *Miranda* warnings were required" before caseworker's interview); *State v. Nason*, 981 P.2d 866, 870 (Wash. Ct. App. 1999) (where caseworker "was required to disclose incriminating evidence to law enforcement officials," caseworker "acted as a state agent and was required to give Mr. Nason his *Miranda* warnings prior to questioning him").

The outcome of our case would have been different had it arisen in any of these jurisdictions. Holly Mack, the CPS caseworker who questioned Demetrius Jackson in jail, was a state employee who was required by statute to share the results of the questioning with the police and the prosecutor. She would have been deemed an agent of the state, subject to the Fifth Amendment in the same manner as a police officer, had our case arisen in the Second, Third, Fifth, or Seventh Circuits, or in Arizona, Colorado, Illinois, Iowa, Kentucky, Maine, Massachusetts, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, or Washington.

2. In our case, the Ohio Supreme Court became the fourth state high court on the other side of the split. These courts have erroneously concluded that even where a CPS caseworker is obliged by law to share the fruits of an interrogation with the police,

the caseworker is an agent of the state for purposes of the Fifth Amendment only where the social worker's interrogation is ordered or controlled by a police officer.

Louisiana: In *State v. Bernard*, 31 So. 3d 1025, 1026-27 (La. 2010), a CPS caseworker interviewed the defendant in jail. The defendant admitted that he had used cocaine. *Id.* at 1027. The caseworker was required by statute to share this information with the prosecutor. *Id.* at 1028. The Louisiana Supreme Court nevertheless held that the jailhouse interview was not governed by *Miranda*, because the caseworker "did not work for the police department and had no authority to make an arrest. The police did not ask her to interview defendant." *Id.* at 1035. "Most importantly," the court observed, "there is no evidence the police purposefully used, manipulated, or were in cahoots with [the caseworker] for purposes of conducting the interview on their behalf." *Id.* The court thus concluded that the caseworker was not "acting as an agent of law enforcement when she interviewed defendant." *Id.*

Mississippi: In *Hennington v. State*, 702 So. 2d 403, 406 (Miss. 1997), under questioning by a CPS caseworker, the defendant confessed to the crime. The Mississippi Supreme Court held that *Miranda* warnings were not required before this questioning, for two independent reasons. First, the court held that although the caseworker "was under a duty to report any suspected sexual abuse that he uncovered as a result of his investigation to law enforcement authorities," nevertheless "a social worker … is not a law enforcement official. He had no authority to arrest Hennington." *Id.* at 409. The second and inde-

pendent reason was that the interview took place in the caseworker's office, which was not a custodial setting. *Id. See also Clark v. State*, 40 So. 3d 531, 541 (Miss. 2010) (*Miranda* warnings not required where caseworker interrogates defendant, because "a social worker is not a law enforcement officer and has no power to arrest, although the social worker was under a duty to investigate child abuse and report it to law enforcement officials").

Texas: In *Wilkerson v. State*, 173 S.W.3d 521, 524 (Tex. Crim. App. 2005), the defendant was interviewed in jail by a CPS caseworker. The Texas Court of Criminal Appeals held that *Miranda* does not apply to interrogations by all state agents, but only to interrogations by "law-enforcement 'state agents.'" *Id.* at 528. "Nor does the fact a CPS worker is statutorily required to report suspected child abuse to law enforcement authorities transform a CPS worker into an agent of law enforcement," the court reasoned. *Id.* The court held that caseworkers are governed by *Miranda* only where the "police and state agent are investigating a criminal offense in tandem," and "where one of them is acting for or on behalf of the other." *Id.* at 529. In making this determination, the court continued, the relevant questions include: "Did the police know the interviewer was going to speak with the defendant? Did the police arrange the meeting? Were the police present during the interview? Did they provide the interviewer with the questions to ask?" *Id.* at 530. "At bottom," the court concluded, "the inquiry is: Was this custodial interview conducted (explicitly or implicitly) on behalf of the police[?]" *Id.* at 531. "Most simply: is the interviewer 'in

cahoots' with the police?" *Id. See also Berry v. State*, 233 S.W.3d 847, 854-56 (Tex. Crim. App. 2007).

Below, the Ohio Supreme Court took this same view. The 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." App. 12a. For an interrogation conducted by a caseworker to be subject to the Fifth Amendment, the court concluded, there must be "other evidence" that "demonstrates that the social worker acted at the direction or under the control of law enforcement." App. 12a.

In these four states, the Fifth Amendment places no limits on interrogations conducted by CPS caseworkers who are obliged to share the results of the interrogations with the police, unless the police direct or control the interrogation. Caseworkers in these states can interrogate defendants who have invoked their *Miranda* rights and refused to speak with the police. These interrogations can take place even though caseworkers and the police know full well that by statute the caseworkers must transmit any statement the defendants make during these interrogations to the police and to prosecutors. So long as the police refrain from requesting the interrogation and telling the caseworkers what to ask, these interrogations are exempt from the ordinary constitutional limits on custodial interrogation.

The conflict encompasses so many jurisdictions on both sides that it will never be resolved until this Court decides which side is right.

B. The issue is important and this case is an ideal vehicle for deciding it.

Our case presents the issue as sharply as it could ever be presented. Both sides agree that the jailhouse interrogation conducted by Holly Mack would have violated the Fifth Amendment had it been conducted by a police officer, because Demetrius Jackson was in custody and had invoked his *Miranda* rights. App. 25a-26a ("The state does not dispute that Jackson was subjected to a custodial interrogation. Mack's interview with Jackson took place after he had been arraigned and after he had invoked his *Miranda* rights."), 33a ("It is absolutely undisputed that if sworn law enforcement officers conducted interviews in this manner, the practice would violate defendants' Fifth and Sixth Amendment rights."). The only issue in dispute is whether the interrogation is exempt from the normal constitutional scrutiny on the ground that Mack is not a police officer, but is rather a CPS caseworker required by law to interrogate suspects and report her findings to the police.

The lower court opinions demonstrate that the resolution of this issue will determine the outcome of this case. The Ohio Court of Appeals agreed with our view of the law and reversed Jackson's convictions. The Ohio Supreme Court agreed with the state's view of the law and reinstated Jackson's convictions. The admission of Holly Mack's testimony completely changed the nature of the trial, because without it there would have been no evidence of any physical contact between Jackson and the victim apart from the victim's own words.

There is nothing to be gained from waiting for more lower courts to chime in. So many courts have already addressed the issue that there is nothing new to say on either side of the conflict.

The issue is important because it affects so many people. Every state requires CPS caseworkers to investigate crimes against children. U.S. Dep't of Health & Human Servs., *Making and Screening Reports of Child Abuse and Neglect* 1 (2017). These investigations are of course intended in part to identify who harmed the child. *See, e.g.*, Ala. Code §§ 26-14-7(a), (b)(2) (requiring the State or County Department of Human Resources to "make a thorough investigation" of all such incidents, including a determination of "[t]he identity of the person responsible therefor"). One obvious way to identify the perpetrator is for the CPS caseworker to interrogate a person who is suspected of having committed the offense. *See, e.g.*, Ariz. Admin. Code § R21-4-103(B)(5) (requiring the State Department of Child Safety to "[i]nterview the alleged perpetrator"). Any information the caseworker learns during this interrogation will be useful to law enforcement officials, so caseworkers are typically required to share this information with the police and the prosecutor. U.S. Dep't of Health & Human Servs., *Cross-Reporting Among Responders to Child Abuse and Neglect* 1 ("In most States, these procedures include requirements for cross-system reporting and/or information sharing among professional entities. Typically, reports are shared among social services agencies, law enforcement departments, and prosecutors' offices.").

The issue in this case can thus arise in virtually any case where the victim is a child. In Ohio, as the

Court of Appeals below found, jailhouse interrogations by CPS caseworkers are a "systematic procedure" that takes place in many cases. App. 34a. Holly Mack, the caseworker who interrogated Demetrius Jackson, testified that "one of her primary job duties at the jail is to interview alleged perpetrators." App. 33a. Ohio does not differ from other states in using its CPS caseworkers to interrogate arrested suspects and requiring the caseworkers to share the fruits of the interrogation with the police. Similar jailhouse interrogations by CPS caseworkers take place all over the country.

C. The decision below gives the police an obvious way to circumvent the privilege against self-incrimination.

Review is also warranted because the decision below is wrong. The Ohio Supreme Court believed it dispositive that Mack's interrogation was not "at the direction or under the control of law enforcement." App. 12a. Because Mack interrogated Jackson pursuant to her statutory obligation rather than at the behest of the police, the court believed, she was not acting "as an agent of law enforcement when she interviewed Jackson." App. 12a. The Fifth Amendment did not govern the interrogation, the court concluded, because "[t]here is no evidence that law enforcement asked Mack to interview Jackson before or after the detective's failed attempt to interview him or that law enforcement influenced Mack's interview of Jackson in any way." App. 13a.

This holding is contrary to common sense, contrary to this Court's precedents, and dangerous.

First, it is contrary to common sense. Mack knew, and the police knew, that Mack was required by state law to interrogate Jackson. Mack knew, and the police knew, that under state law any information she obtained during the interrogation would have to be turned over to the police. Mack had been doing her job for seventeen years. App. 21a. In light of her long experience and the statutory requirements governing her work, the police had no need to tell Mack to interrogate Jackson. They had no need to tell Mack what to ask him. They could simply usher her into the jail, confident in the knowledge that Mack would tell them whatever Jackson confessed to her, as she had done so many times before with other defendants. Mack's statutory responsibility to interrogate Jackson and report to the police made her an agent of law enforcement without the police having to utter a word. When CPS caseworkers conduct custodial interrogations in these circumstances, they are essentially police officers without the uniform and badge.

Second, the decision below is contrary to this Court's precedents. In *Estelle v. Smith*, 451 U.S. 454, 467 (1981), the defendant was questioned "by a psychiatrist designated by the trial court to conduct a neutral competency examination." Law enforcement did not request the examination or tell the psychiatrist what to ask the defendant. But when the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution," the Court held, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* Because the psychi-

atrist was an agent of the state, the Court concluded, the Fifth Amendment governed his interrogation of the defendant. *Id.* at 467-68. It is just the same with CPS caseworkers who testify for the prosecution.

Likewise, in *Mathis v. United States*, 391 U.S. 1, 2-3 (1968), the defendant was questioned by an IRS agent as part of a routine civil tax investigation. Law enforcement did not request the examination or tell the IRS agent what to ask the defendant. But the Court held that the questioning was governed by the Fifth Amendment, because "tax investigations frequently lead to criminal prosecutions, just as the one here did." *Id.* at 4. Because "there was always the possibility during his investigation that his work would end up in a criminal prosecution," the Court rejected "the contention that tax investigations are immune from the *Miranda* requirements." *Id.* It is just the same with CPS caseworkers who conduct custodial interrogations of suspects. There is a possibility—indeed, a strong likelihood—that their work will "end up in a criminal prosecution." These interrogations are thus governed by the Fifth Amendment.

Below, App. 12a-14a, the Ohio Supreme Court dismissed the relevance of *Smith* and *Mathis* and relied instead on *Ohio v. Clark*, 135 S. Ct. 2173 (2015). But *Clark* addressed a completely different question. The issue in *Clark* was whether the Confrontation Clause rendered inadmissible a three-year-old's statement at school to his preschool teacher, where the child was not available to be cross-examined. *Id.* at 2177. The Court held that the statement was admissible because it was not "testimonial" in nature under the line of cases commenc-

ing with *Crawford v. Washington*, 541 U.S. 36 (2004). *Clark*, 135 S. Ct. at 2179-83. The Court reasoned that the child's statement was not testimonial because the purpose of the teacher's conversation with the child was not to gather evidence of the defendant's guilt, *id.* at 2181, because the conversation was "informal and spontaneous," *id.*, and because "the relationship between a student and his teacher is very different from that between a citizen and the police," *id.* at 2182.

Clark simply has no bearing on the question presented in our case. Our case has nothing to do with the Confrontation Clause. And CPS caseworkers, unlike preschool teachers, have a statutory obligation to interrogate arrested suspects and share the fruits of the interrogation with the police and with prosecutors.

Third, the decision below is dangerous. It gives states a glaringly obvious way to circumvent the privilege against self-incrimination. Where the defendant has invoked his right to refuse to speak with the police, the police cannot continue interrogating him. But under the decision below, a CPS caseworker can conduct the interrogation and report the defendant's words to the police. The decision below cuts a big hole out of the Fifth Amendment in any case where the victim is a child.

II. The Court should decide whether the Sixth Amendment governs interrogations by CPS caseworkers the same way it governs interrogations by police officers, where the caseworkers are required by law to share the results of the interrogation with the police and the prosecutor.

When Holly Mack interrogated Jackson, Jackson had already been arraigned. He was represented by counsel. App. 40a. The Sixth Amendment obviously barred the police from bypassing Jackson's attorney and interrogating Jackson directly. *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (observing that the Sixth Amendment right to counsel "extends to having counsel present at various pretrial 'critical' interactions between the defendant and the State, including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge") (citation omitted); *Maine v. Moulton*, 474 U.S. 159, 171 (1985) ("[T]he prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.").

A. The lower courts are divided on this issue as well.

What about state-employed CPS caseworkers who interrogate suspects and who are required by statute to share information obtained during these interrogations with the police and the prosecutor? Do they likewise violate the Sixth Amendment when they bypass defense counsel and interrogate the defend-

ant directly? The lower courts are divided on this issue as well.

1. The Maine, Massachusetts, and Rhode Island Supreme Courts have held that interrogation by a CPS caseworker after arraignment violates the Sixth Amendment, because the caseworker is an agent of the government. *State v. Harper*, 613 A.2d 945, 947-49 (Me. 1992); *Commonwealth v. Howard*, 845 N.E.2d 368, 372-73 (Mass. 2006); *State v. Oliveira*, 961 A.2d 299, 307-11 (R.I. 2008).

In *Harper*, 613 A.2d at 948, the Maine Supreme Court concluded that the caseworker's interrogation "qualified as 'government initiated' interrogation and was commenced after [the defendant's] Sixth Amendment rights had attached." The court held that the interrogation was "plainly in violation of the Sixth Amendment." *Id.* at 949.

In *Howard*, 845 N.E.2d at 371, a CPS caseworker interviewed the defendant in jail after the defendant had been assigned an attorney. The caseworker was required by law to share the results of the interview with law enforcement. *Id.* The Massachusetts Supreme Court held that the interview violated the Sixth Amendment, because the caseworker "is a government official, and there can be no question" that her interview, "even though conducted in furtherance of her responsibilities for the care and protection of children, was prohibited governmental interrogation and constituted the equivalent of direct police interrogation." *Id.* at 372-73.

In *Oliveira*, 961 A.2d at 307, a CPS caseworker interviewed the defendant in jail. The caseworker was under a statutory obligation to forward information

obtained in the interview to the appropriate law enforcement agency. *Id.* During the interview, the defendant confessed to the crime. *Id.* The Rhode Island Supreme Court held that the interview violated the defendant's right to counsel. "It is clear to us," the court concluded, "that [the caseworker] deliberately intended to elicit incriminating evidence from defendant, which she knew she would then be required to turn over to the police." *Id.* at 311. "We hold, therefore, that Mr. Oliveira was denied the basic protection of the right to the assistance of counsel when there was used against him at trial evidence of his own incriminating words." *Id.* (citation, brackets, and internal quotation marks omitted).

Lower courts in other jurisdictions have reached the same holding. *State v. Dixon*, 916 S.W.2d 834, 837 (Mo. Ct. App. 1996) (caseworker who "worked jointly, exchanging reports, with the police … had become a governmental agent" for Sixth Amendment purposes); *People v. Wilhelm*, 822 N.Y.S.2d 786, 793 (N.Y. App. Div. 2006) ("we are satisfied that the CPS caseworkers involved here had a 'cooperative working arrangement' with and were acting as agents of the police and prosecutor in interviewing defendant and relaying her incriminating statements").

2. In the decision below, the Ohio Supreme Court joined the Court of Military Appeals in reaching the opposite holding. *See United States v. Moreno*, 36 M.J. 107, 120 (C.M.A. 1992) ("If a child abuse investigator-social worker or other non-law enforcement official is not serving the 'prosecution team,' it logically follows that such person is not a member of the 'prosecutorial forces of organized society' and thus is

not barred from contacting an accused … whose Sixth Amendment rights may have ripened.").

B. This issue is also important and this case is again an ideal vehicle.

This issue is cleanly presented in our case. Both sides agree that the interrogation conducted by Holly Mack would have violated the Sixth Amendment if it had been conducted by a police officer, because Demetrius Jackson had been arraigned and was represented by counsel. App. 25a-26a, 33a. The only issue in dispute is whether the interrogation is exempt from the normal Sixth Amendment scrutiny on the ground that Mack is not a police officer, but is rather a CPS caseworker required by statute to interrogate suspects and report her findings to the police.

The issue is important for the same reason the Fifth Amendment issue is important—it can arise whenever the victim of a crime is a child. Every state requires CPS caseworkers to help the police investigate crimes against children. The post-arraignment interrogation that took place in our case can take place in virtually any case involving a child victim.

C. The decision below gives the police an obvious way to circumvent the right to counsel.

The Ohio Supreme Court's treatment of the Sixth Amendment issue is wrong for all the same reasons its treatment of the Fifth Amendment issue is wrong.

First, the police had no need to tell Mack what to ask during her interrogation. She had been interrogating defendants in precisely this situation for

years—probably for longer than some of the police officers. She knew, and the police knew, that if Jackson said anything incriminating she would promptly convey his statement to the police, because a statute required her to. If Mack was not an agent of law enforcement, no one is.

Second, the decision below is contrary to this Court's cases. In *Estelle v. Smith*, the Court held that the psychiatrist's interview of the defendant violated the Sixth Amendment as well as the Fifth. *Smith*, 451 U.S. at 469-71. The Court found that the defendant's "Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him," but that defense counsel had not been notified in advance of the interview. *Id.* at 470-71. The Court concluded that the defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471. *See also Moulton*, 474 U.S. at 176 ("[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."). So too here.

The Ohio Supreme Court purported to distinguish these cases on the ground that our case "does not involve a court ordered examination." App. 14a. But the principle of these cases is that once the defendant has been formally charged and is represented by counsel, the government may not bypass defense counsel and interrogate the defendant directly. The

government, like any other litigant, must speak to the opposing party through his attorney.

Finally, the decision below is dangerous. It licenses the government to ignore defense lawyers and interrogate the defendant directly by the simple expedient of using a CPS caseworker as the interrogator. The Sixth Amendment is not worth much if it can be evaded that easily.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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