No. 18-1241

In the
Supreme Court of the United States

DEMETRIUS JACKSON,
Petitioner,
v.
STATE OF OHIO,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. 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.

2. 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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STATEMENT OF THE CASE

On August 5, 2015, a fourteen-year-old girl, C.H., was staying at the home of her adult sister. That night, C.H. ran to the home of her nearby brother-in-law "crying" and screaming "he raped me." She was referring to thirty-year-old Petitioner Demetrius Jackson who was at the sister's home and arrested at the scene. A Cleveland Police detective visited Jackson in jail, advised him of his *Miranda* rights, and Jackson declined to make a statement.

Holly Mack is a child advocate and social worker with the Cuyahoga County Division of Children and Family Services ("CCDCFS"). Her primary duty is to interview "alleged perpetrators who [CCDCFS] receive[s] referrals for abuse and neglect." On August 11, 2015, Mack visited Jackson in the jail. She identified herself, informed Jackson of what he was accused of doing, and let him know that anything he said "can be subpoenaed by the Courts." Jackson then stated that he and C.H. engaged in consensual "oral sex" after which she demanded money. He also admitted to having a sexually transmitted disease from a prior sexual encounter.

At trial, C.H. testified that Petitioner ripped her underwear off, choked her, and put "his penis inside" her vagina. The State also presented testimony from a nurse who examined C.H. Seminal fluid was found in the vaginal swabs taken during the examination, but a male DNA profile could not be identified. Jackson's DNA was identified in the swab of C.H.'s left ear and the odds of selecting an unrelated African-American male were one in six billion. Mack testified that

Jackson told her he engaged in "oral sex" with C.H. Jackson testified on his own behalf and claimed that C.H. and he engaged in consensual sex.

The trial court found Petitioner guilty of two counts of rape, one count of gross sexual imposition and one count of kidnapping. It stated that it "didn't find anything about Mr. Jackson's story to be credible" and did "not find this a peculiarly close case." At sentencing, C.H.'s father informed the trial court that C.H. contracted a sexually transmitted disease from the rape. Jackson was sentenced to eleven years in prison.

In a divided decision, the state intermediate appellate court reversed Jackson's convictions on the grounds that Mack was an agent of law enforcement and her interview of Jackson violated his Fifth and Sixth Amendment rights. *See* Pet. App. B. The majority relied heavily upon Mack's statutory duty to share information with law enforcement.

The Supreme Court of Ohio reversed that decision, holding that there is no evidence "that law enforcement influenced Mack's interview of Jackson in anyway." *See* Pet. App. A. The Court also held that a statutory duty to cooperate with law enforcement did not transform a social worker into an agent of law enforcement without evidence "that the social worker acted at the direction or under the control of law enforcement." Pet. App. 16a.

The case was remanded to address Jackson's remaining assignments of error. The state intermediate appellate court then rejected Jackson's

challenge to the admission of evidence on the grounds of hearsay as well as his challenge that his convictions are against the manifest weight of the evidence. *See* Pet. App. C. Jackson appealed, and the Supreme Court of Ohio declined to exercise jurisdiction. *See* Pet. App. D.

SUMMARY OF THE ARGUMENT

This Court has held that the "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). It defined "custodial interrogation" as "questioning initiated by *law enforcement officers* after a person has been taken into custody". *Id.* (emphasis added). Petitioner argued in the lower courts that social workers who have a mandatory duty to share information with law enforcement are required to issue a *Miranda* warning prior to interviewing someone alleged to have committed child abuse or neglect.

In this case, Petitioner was arrested for the rape of a girl. He was awaiting trial in jail when he was interviewed by the social worker. Though she was required by Ohio Rev. Code § 2151.421 to submit any information she obtained to law enforcement, she had no direct communication with police. Information she obtained was inputted in a computer system and transmitted to police by another party. Police were not present during the interview and did not provide questions for the social worker to ask. She was not carrying a gun or a badge and lacked the power to

arrest Petitioner or detain him against his wishes. The interview that took place was not a custodial interrogation requiring a *Miranda* warning.

REASONS FOR DENYING THE PETITION

I. The state and circuit court conflict predates *Ohio v. Clark*.

The Supreme Court of Ohio held that a social worker is not an agent of law enforcement for purposes of the Fifth and Sixth Amendments merely because she has a duty to share information with police. Petitioner cites to prior decisions of other state courts of last resort or circuit courts of appeals which have held that such a duty is sufficient to render her an agent of law enforcement. *See Buster v. Commonwealth*, 364 S.W.3d 157, 164-65 (Ky. 2012) (analyzing the Fifth Amendment); *State v. Oliveira*, 961 A.2d 299, 310-11 (R.I. 2008) (analyzing the Sixth Amendment); *Commonwealth v. Howard*, 845 N.E.2d 368, 372-73 (Mass. 2006) (analyzing the Sixth Amendment).

In 2015, this Court held that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015). In that case, a preschool teacher questioned a three-year-old boy regarding physical injuries he sustained, and the boy stated they were caused by the defendant. *Clark*, 135 S. Ct. at 2178. The boy's statement was admitted at trial which the defendant argued violated the Confrontation Clause of the Sixth Amendment. Though it declined to "adopt a

categorical rule" that non-law enforcement agents were excluded from the Sixth Amendment, the Court held that "such statements are much less likely to be testimonial than statements to law enforcement officers." *Clark*, at 2181.

The cases relied upon by Petitioner pre-date this Court's decision in *Clark*. The bright-line rule adopted in many of those cases cannot survive *Clark*. A mandatory reporting obligation alone is insufficient to transform a social worker into an agent of law enforcement.

II. This Court has limited *Miranda* to law enforcement officers or their agents.

The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself". *See* Fifth Amend., U.S. Constitution. This amendment "comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during questioning if the defendant so desires." *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). The effect of *Miranda* is that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. The Court defined "custodial interrogation" as "questioning initiated by *law enforcement officers* after a person has been taken into custody". *Id*. (emphasis added).

Contrary to Petitioner's argument, this Court has not applied *Miranda* to non-law enforcement officers. He primarily cites two cases. First, in *Estelle v. Smith*, 451 U.S. 454, 456, 468 (1981), this Court addressed the constitutionality of admitting a defendant's statements made to his psychiatrist during a "validly ordered competency examination." This Court held that a defendant "may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle*, 451 U.S. at 468. The crux of that decision is not that a *Miranda* warning must be given before a competency evaluation but rather that compelled statements may not be admitted at trial.

This Court has noted that *Estelle* was limited to the "distinct circumstances" presented in the case. *Estelle*, at 466. It has further noted that the Court has "never extended *Estelle's* Fifth Amendment holding beyond its particular facts." *Pentry v. Johnson*, 532 U.S. 782, 795 (2001); *see also Buchanan v. Kentucky*, 483 U.S. 402, 423 (1987). There is no compelled testimony in the underlying case and *Estelle* is simply inapplicable.

Petitioner also relies upon *Mathis v. United States*, 391 U.S. 1 (1968). In that case, the defendant was serving a prison sentence when he was visited by an "Internal Revenue Agent." *Mathis*, at fn. 2. The defendant identified the signature on a tax return as his and was subsequently convicted of filing false claims. *Mathis*, at 2, fn. 2. The Court held that *Miranda* applied because criminal proceedings often do follow routine tax investigations. *Mathis*, at 4. Importantly, *Mathis* did not address whether the

Internal Revenue Agent is a law enforcement agent. This Court has subsequently interpreted *Mathis* narrowly:

> In *Mathis*, an inmate in a state prison was questioned by an Internal Revenue agent . . . . The Court of Appeals held that *Miranda* did not apply to this interview for two reasons: A criminal investigation had not been commenced at the time of the interview, and the prisoner was incarcerated for an 'unconnected offense.' This Court rejected both of those grounds for distinguishing *Miranda*, and thus the holding in *Mathis* is simply that a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda* by either of the two factors on which the Court of Appeals had relied.

Howes v. Fields, 565 U.S. 499, 506-07 (2012) (citations omitted).

In *Miranda*, this Court was concerned with the coercive nature of "an interrogation environment" "created for no purpose other than to subjugate the individual to the will of his examiner". *Miranda*, at 457. The Court noted such police interrogations exist within an atmosphere of "intimidation" and stressed a history of police practices which include physical violence against suspects, "trickery" by having fictitious witnesses identify the suspect in a line up, and "deceptive stratagems" involving false legal advice. *Miranda*, at 445-56. "The sole concern of the Fifth Amendment, on which *Miranda* was based, is

government coercion". *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986).

Interviews by social workers share neither the coercive interrogation atmosphere nor the same history of abuse criticized in *Miranda*. Social workers do not carry a gun or a badge and they have no power to arrest. There is no evidence in the record that the social worker in this case had the power to detain Petitioner or to continue questioning against his wishes.

In this appeal, Petitioner asks the Court to significantly expand the application of *Miranda* beyond existing precedent. The Court should decline that invitation.

III. While the lower courts have not uniformly applied *Miranda* to social worker interviews, most courts have adopted a factor-based test that is inconsistent with Petitioner's bright-line rule.

Petitioner correctly identifies decisions of state courts of last resort and federal circuit courts that conflict regarding the applicability of *Miranda* in social worker interviews of criminal defendants in custody. While most of these courts have held, based on the facts at issue in the respective cases, that a social worker was acting as an agent of law enforcement, they have done so without adopting the bright-line rule that Petitioner requests. The facts typically involve more evidence of coordination between a social worker and law enforcement than the mere statutory duty to share information.

No court cited by Petitioner has adopted a categorical rule that social workers are exempt from the requirements of *Miranda*. Instead, the lower courts, including the Supreme Court of Ohio below, recognize that the facts of a particular case *may* establish that a social worker is acting as an agent of law enforcement. They have looked to a variety of factors in determining whether the social worker has become such an agent. The Court of Criminal Appeals of Texas referenced an exhaustive list of relevant questions, including the following:

> Did the police arrange the meeting?
> Were the police present during the interview?
> Did they provide the interviewer with the questions to ask?
> What was the interviewer's primary reason for questioning the person?
> At whose request did the interviewer question the arrestee?
> Did the defendant believe he was speaking with a law-enforcement agent, someone cloaked with actual or apparent authority of the police?

Wilkerson v. State, 173 S.W.3d 521, 530-31 (Tex. Crim. App. 2005). The Supreme Court of Louisiana provided additional factors to consider, including "whether the investigator discussed the case with police prior to the interview, whether the interview was conducted at the police's request, and whether the primary purpose of the investigator's visit was to elicit a confession while in cahoots with law enforcement." *State v. Bernard*, 31 So.3d 1025, 1035 (La. 2010).

The Court of Appeals of North Carolina held that a social worker went beyond the statutory duty to report findings of child abuse to law enforcement and "began working with the Wikes County Sheriff's Department on the case *prior to* interviewing the defendant." *State v. Morrell*, 424 S.E.2d 147, 153 (N.C. 1993). In *Blanton v. State*, the Court of Criminal Appeals of Oklahoma held that a social worker's questioning amounted to custodial interrogation because she was "called to assist the police in their investigation" and "became part of the investigative team when she was asked to view the living conditions, the crime scene, and then interview the victim." 172 P.3d 207, 211 (Okla. Crim. App. 2007).

In the underlying case, a social worker fulfilled her statutory duty to inform Petitioner that he was alleged to have committed child abuse or neglect. She told Petitioner whatever he said would be provided to the courts. Police were not present during the interview, did not arrange the interview, and never had any contact with the social worker. Simply put, the social worker was not acting as agent of law enforcement.

Some of the cases relied upon by Petitioner are not on point. In *State v. Harper*, 613 A.2d 945, 949 fn4 (Me. 1992), the "State conceded at oral argument that [the social worker] was a government agent to whom the rules of Miranda apply." Therefore, the central issue in this appeal was not actually at issue in that case. He also cites to *State v. Gouin*, 182 A.3d 28 (R.I. 2018) as a case supporting his position. But the defendant in that case conceded that *Miranda* did not apply because he was not in custody at the time of the

interview. *Gouin*, 182 A.3d at 32-33. The issue raised there was whether the statements were voluntarily made, *Gouin*, at 34, which is not an issue raised in this case.

IV. The Sixth Amendment does not treat mandatory reporters as agents of law enforcement.

Petitioner argues separately that the Sixth Amendment right to counsel prohibits a social worker, with a mandatory duty to share information with law enforcement, from interviewing a defendant in jail after arraignment. Few lower courts have addressed this issue. *See State v. Oliveira*, 961 A.2d 299 (R.I. 2008); *Commonwealth v. Howard*, 845 N.E.2d 368 (Mass. 2006). The decision of the United States Court of Military Appeals is not on point because the defendant was not in custody during the interview. *United States v. Moreno*, 36 M.J. 107, 112 (C.M.A. 1992) ("appellant was plainly not in custody when, unaccompanied, he drove to [the social worker's] office and permitted himself to be interviewed by her.")

Oliveira and *Howard* both rely upon decisions of this Court that are inapplicable. The Court has held that after a criminally charged defendant asserts his right to counsel, law enforcement may not "deliberately elicit[]" information through the use of an undercover informant. *See Massiah v. United States*, 377 U.S. 201, 206 (1964). Law enforcement 'deliberately elicits' information when the defendant is in custody, law enforcement hires an inmate as a paid informant, specifically directs the inmate to engage the defendant in conversation, and the inmate is only paid if "he

produce[s] useful information". *See United States v. Henry*, 447 U.S. 264, 270-71 (1980). A social worker interview is distinguishable from the use of a secret government informant: "An accused speaking to a known Government agent is typically aware that his statements may be used against him". *Henry*, 447 U.S. at 273.

It is also necessary to reiterate that both *Oliveira* and *Howard* were decided before this Court's decision in *Clark*. In that case, the Court held that a teacher's mandatory reporting obligation did not make her an agent of law enforcement for purpose of the Sixth Amendment's Confrontation Clause. The same should follow for the Sixth Amendment's Right to Counsel.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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