ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

LARUE MONFORD

Defendant-Appellant.

Case No. 2010-1949

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 09AP-274

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE FACTS 3

I. DEFENDANT PLEADS NGRI AND IS EVALUATED FOR PURPOSES OF THE NGRI PLEA 3

II. AFTER THE DEFENSE MOVES TO SUPPRESS IDENTIFICATION, A SECOND ATTORNEY IS APPOINTED AS CO-COUNSEL AND EVENTUALLY TAKES OVER THE DEFENSE 3

III. AT TRIAL, THE DEFENSE PURSUES A MISIDENTIFICATION DEFENSE AND PRESENTS NO EVIDENCE OF NGRI—THE JURY FINDS DEFENDANT GUILTY ON ALL COUNTS 4

IV. DEFENDANT APPEALS, AND THE TENTH DISTRICT AFFIRMS. 5

ARGUMENT 7

Response to First Proposition of Law: When the defense presents no evidence of NGRI and never requests an NGRI instruction, it is not structural error for the trial court not to instruct the jury on NGRI 7

I. DEFENDANT FAILS TO SHOW ANY LEGAL ERROR 7

A. When a Defendant Pleads NGRI, No Legal Rule Requires the Defense to Pursue an NGRI Defense or to Formally Withdraw the NGRI Plea 7

B. When the Defense Presents No Evidence of NGRI, Nothing Requires the Trial Court to Instruct the Jury on NGRI 9

C. *Cihonski* and the Other Cases Cited By Defendant Are Inapposite 11

II. EVEN IF THERE WERE ERROR, IT WAS NOT STRUCTURAL, AND THE DEFENSE FAILED TO PRESERVE THE JURY-INSTRUCTION ISSUE 14

A. Structural Errors Are Constitutional Defects that Defy Harmless-Error Analysis 14

B. It is Not Structural Error When a Defendant Pleads NGRI and the Defense Neither Pursues an NGRI Defense Nor Formally Withdraws the NGRI Plea 15

C. It Is Not Structural Error When the Trial Court Fails to Instruct the Jury on an Affirmative Defense 16

D. *Cihonski*'s Structural-Error Analysis Is Deeply Flawed 17

E. By Not Preserving the Jury-Instruction Issue, Defendant Forfeited All but Plain-Error Review. 19

Response to Second Proposition of Law: Once a defendant pleads NGRI, trial counsel is not ineffective in choosing not to actively pursue the NGRI defense at trial, and nothing requires a defendant who abandons an NGRI defense to formally withdraw the NGRI plea. 21

I. DEFENDANT FAILS TO SHOW DEFICIENT PERFORMANCE. 21

II. DEFENDANT FAILS TO SHOW PREJUDICE 24

III. *CIHONSKI* AND THE OTHER CASES CITED BY DEFENDANT ARE INAPPOSITE 24

CONCLUSION 27

CERTIFICATE OF SERVICE ..... unnumbered

APPENDIX Appx. Page

R.C. 2901.01 ..... A-1

R.C. 2901.05 ..... A-5

R.C. 2943.03 ..... A-7

R.C. 2945.37 ..... A-8

R.C. 2945.40 ..... A-10

Crim.R. 11 ..... A-12

Crim.R. 30 ..... A-14

Crim.R. 32 ..... A-15

Crim.R. 52 ..... A-17

Fed.R.Crim.P. 12.2 ..... A-18

Prof. Cond. Rule 1.2 ..... A-26

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante (1991), 499 U.S. 279 ..... 14, 15

Chapman v. California (1967), 386 U.S. 18 17

Commonwealth v. Gass (1987), 514 Pa. 287 26

Evans v. State (1930), 123 Ohio St. 132 ..... 11, 12

Johnson v. United States (1997), 520 U.S. 461 ..... 15, 19, 20

Massaro v. United States (2003), 538 U.S. 500 21

Michel v. Louisiana (1955), 350 U.S. 91 22

Miller Chevrolet v. Willoughby Hills (1974), 38 Ohio St.2d 298 27

Neder v. United States (1999), 527 U.S. 1 ..... 15, 16, 17, 18

People v. Boyd (1971), 16 Cal. App.3d 901 14

People v. Leon (1958), 163 Cal. App.2d 791 13

People v. Morrison (1984), 162 Cal. App.3d 995 13

Rose v. Clark (1986), 478 U.S. 570 ..... 14, 15

State v. 1981 Dodge Ram Van (1988), 36 Ohio St.3d 168 27

State v. Barnes (2002), 94 Ohio St.3d 21 20

State v. Bradford, 12th Dist. No. CA2010-04-032, 2010-Ohio-6429 10

State v. Burton (1982), 12th Dist. No. CA81-05-0037 13

State v. Cihonski, 178 Ohio App.3d 713, 2008-Ohio-5191 ..... passim

State v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624 ..... 18, 19, 20

State v. Colon, 119 Ohio St.3d 204, 2008-Ohio-3749 ..... 18, 19

State v. Comen (1990), 50 Ohio St.3d 206 10

State v. Decker (1986), 28 Ohio St.3d 137 23

State v. Dunn (1996), 3rd Dist. No. 1-95-74 10

State v. Esparza (1986), 74 Ohio St.3d 660 16

State v. Fisher, 99 Ohio St.3d 127, 2003-Ohio-2761 ..... 7, 14, 15, 16

State v. Fore (1969), 18 Ohio App.2d 264 9

State v. Grant (1993), 67 Ohio St.3d 465 ..... 10, 11

State v. Hand, 107 Ohio St.3d 378, 2006-Ohio-18 22

State v. Handcock, 2nd Dist. No. 2008 CA 85, 2009-Ohio-4327 ..... 16, 24

State v. Hatt (2000), 140 Ohio App.3d 694 ..... 25, 26

State v. Hill (2001), 92 Ohio St.3d 191 ..... 15, 19, 20

State v. Horner, 126 Ohio St.3d 466, 2010-Ohio-3830 ..... 18, 20

State v. Kulp (1996), 110 Ohio App.3d 144 ..... 12, 26

State v. Langenkamp, 3rd Dist. No. 17-08-09, 2008-Ohio-1136 9

State v. Lavelle, 5th Dist. No. 07 CA 130, 2008-Ohio-3119 22

State v. McQueeney, 148 Ohio App.3d 606, 2002-Ohio-3731 ..... 9, 13

State v. Melchior (1978), 56 Ohio St.2d 15 9

State v. Monford, 10th Dist. No. 09AP-274, 2010-Ohio-5624 6

State v. Monford, 190 Ohio App.3d 35, 2010-Ohio-4732 ..... passim

State v. Perry, 101 Ohio St.3d 118, 2004-Ohio-297 ..... passim

State v. Seiber (1990), 56 Ohio St.3d 4 22

State v. Smith (1981), 3 Ohio App.3d 115 23

State v. Taylor, 98 Ohio St.3d 27, 2002-Ohio-7017 9

State v. Tenace (1997), 121 Ohio App.3d 702 ..... 23, 25

State v. Thomas (1982), 70 Ohio St.2d 79 12

State v. Tibbets (2001), 92 Ohio St.3d 146 22

State v. Tuomala, 104 Ohio St.3d 93, 2004-Ohio-6329 13

Strickland v. Washington (1984), 466 U.S. 668 ..... 21, 22, 24, 27

Sullivan v. Louisiana (1993), 508 U.S. 275 17

United States v. Olano (1993), 507 U.S. 725 7

Statutes

R.C. 2901.01(A)(14) 5, 9, 10

R.C. 2901.05(A) 9

R.C. 2943.03(E) 1

R.C. 2945.37(A) 12

R.C. 2945.40(F) 8

Rules

Crim.R. 11(A) 1

Crim.R. 11(H) 1, 23

Crim.R. 30(A) 19

Crim.R. 30(B) 10

Crim.R. 32(C) 13

Crim.R. 52(B) 19, 20

Fed.R.Crim.P. 12.2(a) 1

Prof. Cond. Rule 1.2(a) 25

Constitutional Provisions

Section 10, Article I, Ohio Constitution 11

Other Authorities

02/02/2011 Case Announcements, 2011-Ohio-376 6

5 Lafave, Criminal Procedure (3rd Ed. 2007) 1, 8

INTRODUCTION

"The federal system and almost all of the states have provisions requiring the defendant to give advance notice if he intends to rely upon the defense of insanity." 5 Lafave, Criminal Procedure (3rd Ed. 2007), 479, Section 20.5(c); see, also, Fed.R.Crim.P. 12.2(a) (requiring a defendant who intends to assert an insanity defense to "so notify an attorney for the government in writing"). In Ohio, this notice comes in the form of a plea of not guilty by reason of insanity (NGRI), which shall be made in writing by either the defendant or trial counsel, and may be joined with a general plea of not guilty. Crim.R. 11(A); R.C. 2943.03(E). A defendant pleading NGRI must do so at arraignment, except that for good cause the trial court may allow an NGRI plea at any time before trial. Crim.R. 11(H); R.C. 2943.03(E).

Defendant Larue Monford was indicted for murder and other offenses and, after pleading not guilty, entered an additional plea of NGRI. But the defense later shifted gears and focused its efforts on a misidentification defense—a strategy that defendant himself seemed to approve. For example, first trial counsel filed a motion to suppress identification testimony. When that motion was overruled, second trial counsel (who had been appointed as co-counsel and later took over the defense due to first trial counsel's death) successfully obtained funds from the trial court to hire an expert on eyewitness identification.

At trial, the defense presented no evidence of NGRI but pursued the misidentification defense instead. Naturally, given the absence of any evidence on NGRI, the defense did not request an NGRI instruction, and the trial court did not give one. The defense never formally withdrew the NGRI plea, and the plea was not mentioned at any point during the trial.

Defendant claims that the non-mention of the NGRI plea at trial amounts to "structural error" requiring automatic reversal. He also claims that second trial counsel was ineffective by not either pursuing an NGRI defense or formally withdrawing the NGRI plea.

Defendant's arguments are without merit. *First*, regarding defendant's structural-error argument, defendant fails to establish the threshold requirement of showing any legal error. No legal rule required the defense to pursue an NGRI defense or formally withdraw the NGRI plea. Indeed, complaints about second trial counsel's decisions regarding which defense to pursue are best addressed as ineffective-assistance claims rather than claims of legal error. As for the trial court not instructing the jury on NGRI, no such instruction was required because the defense presented no evidence of NGRI.

Second, even if there were error, automatic reversal would be inappropriate. Structural errors are constitutional defects that defy harmless-error analysis because they affect the basic framework of the trial. But when a defendant pleads NGRI, and the defense neither pursues an NGRI defense nor formally withdraws the NGRI plea, nothing inhibits a reviewing court from concluding that these decisions are harmless—especially when, as here, there is nothing in the record showing that there was any evidence that would have supported an NGRI defense. A reviewing court can also conclude that the absence of an NGRI instruction is harmless—especially when, as here, the defense presents no evidence of NGRI. And defendant's jury-instruction claim is subject to plain-error review because the defense did not preserve the issue.

Third, defendant fails to show any ineffective assistance. Defendant assumes that second trial counsel either was unaware of the NGRI plea or forgot about it. But second trial counsel is entitled to a strong presumption of competence, and nothing in the record overcomes this presumption. Plus, the record shows no reasonable probability that the trial would have ended differently had the defense pursued an NGRI defense or formally withdrawn the NGRI plea.

Importantly, this case is not about the trial court prohibiting the defense from pursuing an NGRI defense. Nor is this case about the trial court failing to address defendant's competency to

stand trial, an issue often associated with an NGRI plea (defendant's competency was never challenged). Rather, the issue in this case is whether reversal is automatic when (1) a defendant pleads NGRI but the defense neither pursues an NGRI defense nor formally withdraws the NGRI plea, and (2) the defense having presented no evidence on NGRI, the trial court does not instruct the jury on NGRI. Because the answer is "no," the Tenth District's judgment should be affirmed.

STATEMENT OF THE FACTS

I. DEFENDANT PLEADS NGRI AND IS EVALUATED FOR PURPOSES OF THE NGRI PLEA.

On the afternoon of February 7, 2008, while at the Happy Family bar in Columbus, defendant shot and killed Eugene Brown, and then shot and injured Alicia Brown (no apparent relation to Eugene). Defendant was indicted for murder, attempted murder, felonious assault, and carrying a concealed weapon (CCW), with all but the CCW charge carrying a three-year firearm specification. (Trial Doc. 2)

Represented by attorney Myron Shwartz, defendant pleaded not guilty at arraignment. (Trial Doc. 7-8) In April 2008, the trial court allowed defendant to plead NGRI in addition to the general not-guilty plea. (Trial Doc. 59-60) That same day, the trial court appointed Dr. Kristen Haskins to interview and evaluate defendant for purposes of the NGRI plea (the entry mentions nothing about evaluating defendant's competency to stand trial). (Trial Doc. 58) Although Haskins' report is not in the record, Haskins' invoice indicates that she prepared her report in mid-June 2008. (Trial Doc. 244-45)

II. AFTER THE DEFENSE MOVES TO SUPPRESS IDENTIFICATION, A SECOND ATTORNEY IS APPOINTED AS CO-COUNSEL AND EVENTUALLY TAKES OVER THE DEFENSE.

In July 2008, defendant wrote a letter to the trial court repeatedly professing his innocence. (Trial Doc. 94) Shwartz thereafter moved to suppress identification testimony.

(Trial Doc. 95) After a hearing, the trial court overruled the motion. (Sept. 3, 2008, Tr., 140-42) Appearing for defendant at the hearing were Shwartz and attorney Tracy Younkin, whom the trial court earlier had appointed to serve as co-counsel with Shwartz. (Trial Doc. 115-17)

In October 2008, Younkin moved to have Shwartz replaced as co-counsel, as Shwartz was unable to continue representing defendant for health reasons. (Trial Doc. 155) Younkin also moved for funds to hire an expert on eyewitness identification. (Trial Doc. 156)

Later that month, the trial court held a hearing in response to complaints by defendant regarding his attorneys. (October 21, 2008, Tr., 2) At the hearing, defendant clarified that his complaints "concern with mostly Mr. Shwartz" and stated that he was satisfied with Younkin's representation. (Id., at 3-5) The trial court indicated that it would likely overrule Younkin's motion to replace Shwartz but would likely grant the motion for funds to hire an identification expert. (Id. at 6) The trial court ultimately granted the motion for funds. (Trial Doc. 188)

Shwartz passed away shortly before the trial started in December 2008. (Brief, 1)

III. AT TRIAL, THE DEFENSE PURSUES A MISIDENTIFICATION DEFENSE AND PRESENTS NO EVIDENCE OF NGRI—THE JURY FINDS DEFENDANT GUILTY ON ALL COUNTS.

At trial, the State presented five witnesses who identified defendant as the shooter. (Trial Tr., 111-12, 139-41, 159-62, 274-79, 308-10) A sixth witness saw defendant drive away from the bar immediately after the shooting. (Trial Tr., 205-06) Moreover, the day after the shooting, the police found outside defendant's residence a vehicle matching the description of the shooter's vehicle. (Trial Tr., 237) The vehicle was registered in another name; the police went to the registered owner's residence, where they found defendant and arrested him. (Id.)

For its part, the defense pursued a misidentification defense. To this end, the defense presented an identification expert who testified regarding the various factors that may undermine the reliability of eyewitness identifications. (Tr., 351-92) The defense offered no evidence of

NGRI—that is, the defense presented no evidence that defendant "at the time of the commission of the offense, did not know, as a result of a severe mental disease or defect, the wrongfulness of [his] acts." R.C. 2901.01(A)(14). The defense did not ask for—and the trial court did not give—an NGRI instruction. The NGRI plea was not mentioned at any point during the trial.

The jury found defendant guilty on all counts and specifications (Trial Doc. 211-13, 216-18), and the trial court sentenced defendant to 28 years to life in prison (Trial Doc. 230-34). Defendant continued to maintain his innocence at sentencing. Apparently attempting to bolster his already-failed misidentification defense, defendant told the trial court that deputies in the jail had mistaken him for someone else. (Sent. Tr., 24-26)

IV. DEFENDANT APPEALS, AND THE TENTH DISTRICT AFFIRMS.

On appeal, defendant, relying heavily on the Third District's opinion in *State v. Cihonski*, 178 Ohio App.3d 713, 2008-Ohio-5191, claimed that the lack of any action taken on the NGRI plea was structural error requiring automatic reversal. Defendant also relied on *Cihonski* to further claim that Younkin was ineffective for neglecting the NGRI plea.

In *Cihonski*, the defendant led police on a high-speed chase and was indicted for third-degree felony failure to comply. Id. at ¶ 2. Although the defendant pleaded NGRI prior to trial, the trial court did not instruct the jury on NGRI. Id. at ¶ 8. The Court held that the trial court's failure to instruct the jury on NGRI was structural error, id. at ¶¶ 22-23, and that trial counsel was ineffective for neglecting the NGRI plea, id. at ¶ 30.

The Tenth District affirmed. *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732 (*Monford I*). The Court noted that the Court in *Cihonksi* "seemed to conclude" that the defendant in that case "was advancing a defense of legal insanity, that it was his wish to advance such a defense, and that by failing to comply with the wishes of his client by failing to notify the

jury of the NGRI plea or to request an NGRI instruction, structural error occurred, since the right of the accused to choose the plea to be entered is a substantial right." Id. at ¶ 73. The present case, however, is "dissimilar to *Cihonski*" because "defendant did not present one shred of evidence to demonstrate, or even suggest, that he did not know the wrongfulness of his acts, nor did he ever indicate that he wished to present an NGRI defense." Id. at ¶ 74. Instead, the defense theory "was clearly one of misidentification" and "the record supports the belief that defendant was completely on board with the misidentification defense." Id.

Finding "*Cihonski* to be inapposite to the case at bar," the Court held that "*Cihonski*'s structural error analysis is not applicable here" because "the evidence clearly does not support such an NGRI defense and no such instruction would have been unwarranted." Id. at ¶ 76.

The Tenth District further held that Younkin was not ineffective for not pursuing an NGRI defense. "Because we have already determined that *Cihonski* is distinguishable from the instant case, and because defendant never presented any evidence to even suggest that he was pursuing an NGRI defense, and instead argued throughout the trial that this was simply a case of mistaken identity, we find defendant's counsel was not ineffective in failing to inform the jury of the NGRI plea or in failing to request an NGRI instruction." Id. at ¶ 99. And because there was no evidence of NGRI, "any request for an NGRI instruction would have been denied." Id.

Defendant asked the Tenth District to certify a conflict between its judgment and *Cihonski*. The Tenth District refused, adhering to its view that "the unique facts and circumstances present in *Cihonski* are not present here." *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-5624, ¶ 8 (*Monford II*). Defendant also sought discretionary review in this Court, which agreed to review defendant's first and second propositions of law. *02/02/2011 Case Announcements*, 2011-Ohio-376.

ARGUMENT

Response to First Proposition of Law: When the defense presents no evidence of NGRI and never requests an NGRI instruction, it is not structural error for the trial court not to instruct the jury on NGRI.

Defendant's first proposition of law claims that when a defendant pleads NGRI and neither trial counsel nor the trial court takes any action on the plea during the trial, "the omissions of counsel and the court constitute structural error." (Brief, 5) Specifically, defendant claims that Younkin was required to either pursue an NGRI defense or formally withdraw the NGRI plea, and that the trial court was required to instruct the jury on NGRI.

But defendant's structural-error argument stumbles out of the gate, as he fails to show any legal error at all. Even if there were error, reversal would be inappropriate, because any error was not structural, and because defendant failed to preserve the jury-instruction issue for appeal.

I. DEFENDANT FAILS TO SHOW ANY LEGAL ERROR.

In determining whether to reverse a conviction based on an alleged error, the threshold inquiry is "whether there was an 'error'—i.e. a 'deviation from a legal rule.'" *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶ 7, quoting *United States v. Olano* (1993), 507 U.S. 725, 732-33. Defendant's structural-error argument is a non-starter, because no legal rule required either Younkin or the trial court to take any action on the NGRI plea.

A. When a Defendant Pleads NGRI, No Legal Rule Requires the Defense to Pursue an NGRI Defense or to Formally Withdraw the NGRI Plea.

Although more appropriately addressed in defendant's second proposition of law alleging ineffective assistance of counsel, defendant complains that Younkin neither pursued an NGRI defense nor formally withdrew the NGRI plea. But nothing required the defense to actively pursue an NGRI defense at trial. "Where the defendant enters a notice of insanity or other

mental condition defense, he remains free to change his mind and proceed at trial with another defense." 5 Lafave, Criminal Procedure (3rd Ed. 2007), 481, Section 20.5(c). Several factors may motivate a decision to forego an NGRI defense. The evaluation may reveal that an NGRI defense would lack factual support. Also, a defendant may conclude that pursuing an NGRI defense is an unattractive option, considering that an NGRI verdict may result in hospitalization or institutionalization. R.C. 2945.40(F). Or, the defendant may simply wish to avoid the stigma of an NGRI verdict.

Here, the defense chose to pursue a misidentification defense rather than an NGRI defense. And this was what defendant himself wanted. As the Tenth District observed, nothing in the record indicates that defendant "wished to present [an NGRI] defense," and "the record supports the belief defendant was completely on board with the misidentification defense." *Monford I*, at ¶ 74. For example, after Haskins prepared her report, defendant repeatedly asserted his innocence in his July 2008 letter to the trial court. Younkin filed the motion to suppress identification testimony shortly after this letter. At the October 2008 hearing, defendant stated that he was happy with his representation by Younkin, and the trial court stated that it would likely approve Younkin's request for funds to hire an identification expert. If defendant desired to pursue an NGRI defense as opposed to a misidentification defense, the October 2008 hearing was his opportunity to say so. It is also telling that defendant continued to argue misidentification at the sentencing hearing.

Moreover, nothing required the defense to formally withdraw the NGRI plea. Indeed, even *Cihonski* seemed to acknowledge this point. *Cihonski*, at ¶ 30 ("We also note that, had trial counsel believed the insanity defense was not viable under the facts and wished to pursue a different defense, he was free to withdraw the plea of NGRI, after consulting with Cihonski and

obtaining his compliance"). The defense is free to keep an NGRI plea in place while pursuing other defense theories at trial. Of course, if the defense presents no evidence of NGRI at trial, then it will have failed to meet its burden of proving the NGRI defense. Either way—whether the NGRI plea is formally *withdrawn* or simply *unproven*—the effect is the same: the defendant cannot obtain an NGRI verdict.

In a related context, courts have held that a defendant may plead guilty or no contest even though the defense has not formally withdrawn a previously-entered NGRI plea. *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, ¶¶ 38-40; *State v. Langenkamp*, 3rd Dist. No. 17-08-09, 2008-Ohio-1136, ¶¶ 28-29; *State v. Fore* (1969), 18 Ohio App.2d 264, 269. In *Fore*, the Fourth District held that the defendant had "abandoned" the NGRI plea by not "reassert[ing]" it when he pleaded guilty. *Fore*, 18 Ohio App.2d at 269. A guilty plea "gives rise to an inference that counsel believed defendant to be sane at the time such plea was entered" and is an "implied admission of sanity." Id. If a defendant may plead guilty or no contest without formally withdrawing an NGRI plea, there is no reason why the defense must formally withdraw an NGRI plea before pursuing other theories at trial.

B. When the Defense Presents No Evidence of NGRI, Nothing Requires the Trial Court to Instruct the Jury on NGRI.

Nor did the trial court commit any legal error by not instructing the jury on NGRI. "The defense of not guilty by reason of insanity is an affirmative defense that must be proved by the accused." *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶ 64, citing R.C. 2901.05(A), and R.C. 2901.01(A)(14). As with any other affirmative defense, a trial court must instruct on NGRI only if the defense "has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus.

Thus, that the defense never formally withdrew the NGRI plea was not enough to require the trial court to instruct the jury on NGRI. The defense was required to present *evidence* supporting an NGRI defense—and the defense came nowhere near meeting this burden. The defense presented no evidence that "at the time of the commission of the offense, [defendant] did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." R.C. 2901.01(A)(14). As the Tenth District stated, the defense "did not present one shred of evidence" to support an NGRI defense. *Monford I*, at ¶ 74. Instead, the defense theory throughout the trial was that the State's witnesses had misidentified defendant as the shooter.

In other words, rather than admitting to the shooting and offering evidence that defendant did not know right from wrong due to a severe mental disease or defect, the defense denied that defendant was the shooter at all. The Tenth District therefore correctly held that "the evidence clearly does not support such an NGRI defense and no such instruction would have been warranted." Id. at ¶ 76; see, also, *State v. Bradford*, 12th Dist. No. CA2010-04-032, 2010-Ohio-6429, ¶ 89 (no NGRI instruction required, because defendant did not provide "a scintilla of evidence" supporting NGRI defense); *State v. Dunn* (1996), 3rd Dist. No. 1-95-74 ("[T]he trial court did not err by not including an instruction to the jury on the defense of insanity because the evidence presented did not warrant such an instruction.").

Defendant's argument that the trial court should have informed the jury of the NGRI plea during the preliminary instructions (Brief, 7) fails as well. A trial court may give preliminary instructions to "acquaint the jury generally with the nature of the case," Crim.R. 30(B), but is not required to do so, *State v. Grant* (1993), 67 Ohio St.3d 465, 476, citing *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph one of the syllabus. Rather, trial courts may give preliminary

instructions at their discretion. *Grant*, 67 Ohio St.3d at 476. Defendant cannot show that the trial court abused its discretion.

C. *Cihonski* and the Other Cases Cited By Defendant Are Inapposite.

Defendant's argument that this case "corresponds" to *Cihonski* (Brief, 7) is unavailing. In *Cihonski*, the Court held that the trial court's failure to instruct the jury on NGRI violated the defendant's right to a trial by jury under Section 10, Article I, of the Ohio Constitution. *Cihonksi*, at ¶ 22. But in reaching this conclusion, the Court observed that the defendant "presented evidence that his actions were not voluntary." Id. at ¶ 12. Specifically, the defendant testified that he had a "reflex action" and that he fled the police "as a result of a panic attack." Id. at ¶ 7.

As the Tenth District observed, the Court in *Cihonski* "seemed to conclude" that the defendant in that case "was advancing a defense of legal insanity, that it was his wish to advance such a defense, and that by failing to comply with the wishes of his client by failing to notify the jury of the NGRI plea or to request an NGRI instruction, structural error occurred, since the right of the accused to choose the plea to be entered is a substantial right." *Monford I*, at ¶ 73. The present case, however, is "dissimilar to *Cihonski*" because "defendant did not present one shred of evidence to demonstrate, or even suggest, that he did not know the wrongfulness of his acts, nor did he ever indicate that he wished to present an NGRI defense." Id. at ¶ 74. To the contrary, "the record supports the belief defendant was completely on board with the misidentification defense." Id. Accordingly, the Tenth District correctly found *Cihonski* "to be inapposite to the case at bar." Id. at ¶ 76.

The other cases defendant cites bring him no closer to establishing legal error. In *Evans v. State* (1930), 123 Ohio St. 132, this Court held that the trial court erred by not addressing

whether the defendant was "sane" at the time of trial (i.e. whether he was competent). Id. at 135-36. Although this Court did not "deem it necessary" to consider the trial court's refusal to permit testimony regarding whether the defendant was sane at the time of the offense, two justices had "grave doubt" as to the constitutionality of a statute that prohibits a defendant from pursuing an NGRI defense because trial counsel failed to file an NGRI plea. Id. at 138-39. But this dicta has no bearing on the present case. The defense fully preserved its right to pursue an NGRI defense; it simply chose to pursue a misidentification defense instead.

Nor does *State v. Kulp* (1996), 110 Ohio App.3d 144, help defendant. There, the defendant pleaded NGRI, and the trial court ordered that the defendant be evaluated for purposes of competency to stand trial and sanity at the time of the offense. Id. at 145. Other than an entry requiring that the defendant be transported for evaluation, the record contained no further reference to the defendant's competence or his NGRI plea. Id. at 147-48. The Sixth District found that the omission of "highly relevant documents concerning appellant's mental state" and the "trial court's failure to follow the proper procedures" amounted to plain error. Id. at 148.

But the Court's references to "highly relevant documents" and "proper procedures" show that it was concerned more with the trial court's failure to address the defendant's competence than with the NGRI plea. After all, the Court noted that, while the examiner was required to file the competency report, an NGRI report would not necessarily have been filed. Id. at 147. The Court also emphasized that the trial court was required to hold a hearing and make a determination as to the defendant's competence. Id. A trial court, however, generally does not need to hold a hearing or make any findings relating to an NGRI plea. Although a trial court may order an evaluation when a defendant pleads NGRI, R.C. 2945.37(A), "insanity is an issue for the jury to decide." *State v. Thomas* (1982), 70 Ohio St.2d 79, 80.

The Twelfth District's memorandum decision in *State v. Burton* (1982), 12th Dist. No. CA81-05-0037, has no bearing on this case, either. The defendant in *Burton* pleaded guilty without formally withdrawing the NGRI plea. The Court held that, given the "state of the record," it was unclear whether the defendant subjectively understood the charges to which he was pleading guilty. In addition to the NGRI plea, the record included a letter from a psychiatric consultant that "tend[ed] to emphasize the seriousness of the sanity issue."

Thus, at most, *Burton* stands for the proposition that evidence in the record that a defendant is insane (beyond just the NGRI plea) may cast doubt on the voluntariness of a guilty plea. But even if one reads *Burton* to hold that a defendant must always formally withdraw an NGRI plea before pleading guilty, this holding would carry no weight today, given the Twelfth District's more recent holding that a trial court may accept a guilty plea without requiring the defense to withdraw the NGRI plea. *McQueeney*, at ¶¶ 38-40.

Finally, the decades-old California cases cited by defendant are inapposite. In *People v. Leon* (1958), 163 Cal. App.2d 791, the Court held that, although the trial court found the defendant guilty, the judgment was "prematurely entered" because the trial court had not yet ruled on the defendant's NGRI plea. Id. at 795; see, also *People v. Morrison* (1984), 162 Cal. App.3d 995, 998 (under California law, insanity finding follows a determination (by verdict or plea) that the accused committed the criminal act charged). Ohio, however, does not follow this bifurcated procedure—in Ohio, a single guilty verdict simultaneously establishes that the defendant committed the underlying offense and disposes of an NGRI plea. Crim.R. 32(C) (criminal judgment must set forth "the verdict"); c.f., *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6329, ¶ 14 (a finding of "guilt" is "not only inconsistent with the notion that a defendant is not guilty (by reason of insanity), it is antithetical to that notion.").

And in *People v. Boyd* (1971), 16 Cal. App.3d 901, the Court found that the trial court failed to give the defendant an opportunity to show "good cause" to enter an NGRI plea during the trial. Id. at 908. But in the present case, the trial court allowed defendant to enter the NGRI plea; the defense simply chose not to present an NGRI defense.

II. EVEN IF THERE WERE ERROR, IT WAS NOT STRUCTURAL, AND THE DEFENSE FAILED TO PRESERVE THE JURY-INSTRUCTION ISSUE.

The absence of any legal error alone justifies rejecting defendant's first proposition of law. Defendant, however, goes one step further. He argues that there was not only error, but *structural* error requiring automatic reversal. As he did in the Tenth District, defendant relies heavily on *Cihonski*. But even if it was error for the defense to neither pursue an NGRI defense nor formally withdraw the NGRI plea—and it was not—any error in this regard was not structural. Likewise, even if it was error for the trial court not to give an NGRI instruction—and it was not—this error was not structural, either. And because defendant failed to preserve the jury-instruction issue for appeal, that claim is subject to plain-error review.

A. Structural Errors Are Constitutional Defects that Defy Harmless-Error Analysis.

Any defendant attempting to classify an error as structural faces a long and steep climb. Structural errors are "constitutional defects that defy analysis by 'harmless error' standards" because they "affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself." *Fisher*, at ¶ 9, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-10. Such errors permeate "the entire conduct of the trial from beginning to end" such that the trial cannot "'reliably serve its function as a vehicle for determination of guilt or innocence.'" *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 17, quoting *Fulminante*, 499 U.S. at 309-10, quoting *Rose v. Clark* (1986), 478 U.S. 570, 577-78. A "trial error," on the other

hand, "is error which occurs during the presentation of the case to the jury, and which therefore may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fisher*, at ¶ 9, quoting *Fulminante*, 499 U.S. at 307-08.

"[I]f 'the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" *Perry*, at ¶ 17, quoting *State v. Hill* (2001), 92 Ohio St.3d 191, 197, quoting *Rose*, 478 U.S. at 579. Consistent with this presumption, the United States Supreme Court has found an error to be structural "only in a 'very limited class of cases.'" *Perry*, at ¶ 18, quoting *Neder v. United States* (1999), 527 U.S. 1, 8, quoting *Johnson v. United States* (1997), 520 U.S. 461, 468 (listing cases recognizing structural error).

Under these standards, defendant fails to show any structural error.

B. It is Not Structural Error When a Defendant Pleads NGRI and the Defense Neither Pursues an NGRI Defense Nor Formally Withdraws the NGRI Plea.

Again, to the extent defendant seeks reversal based on Younkin's alleged omissions, these arguments are better addressed as ineffective-assistance claims. In any event, when a defendant pleads NGRI, it is not structural error for the defense not to pursue an NGRI defense. Absent proof in the record that the defendant insisted on pursuing an NGRI defense and that evidence was available to the defense that would have supported an NGRI defense, not pursuing an NGRI defense does not "affect[] the framework within which the trial proceeds." *Fisher*, at ¶ 9.

Nor, in such a scenario, is it structural error for the defense not to formally withdraw the NGRI plea. When there is no evidence in the record that an NGRI defense would have been successful, reviewing courts are perfectly capable of concluding that not formally withdrawing

the NGRI plea is unprejudicial. *State v. Handcock*, 2nd Dist. No. 2008 CA 85, 2009-Ohio-4327, ¶¶ 24-29 (not formally withdrawing NGRI plea was harmless when psychiatric report showed that NGRI defense would have lacked factual support). Also, defendant's complaint about the lack of formal withdrawal of the NGRI plea would—at best—be a state-law procedural matter. Because any such error is not constitutionally based, it cannot rise to the level of structural error. *Perry*, at ¶ 24, citing *State v. Esparza* (1986), 74 Ohio St.3d 660, 662 ("the trial-error/structural-error distinction is irrelevant unless it is first established that a *constitutional* error has occurred.") (emphasis sic); see, also, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 55.

C. It Is Not Structural Error When the Trial Court Fails to Instruct the Jury on an Affirmative Defense.

Nor is it structural error when the trial court fails to instruct the jury on NGRI (or any other affirmative defense, for that matter). The failure to give an NGRI instruction does not necessarily rob the trial of its ability to "serve its function as a vehicle for determination of guilt or innocence." *Perry*, at ¶ 17. The absence of an NGRI instruction does not undermine the jury's finding that the State proved the elements of the offense beyond a reasonable doubt. Plus, the less evidence the defense presents of NGRI, the more confident reviewing courts can be that the absence of an NGRI instruction had no effect on the trial's outcome. Put differently, courts can "quantitatively assess[]," *Fisher*, at ¶ 9, the effect of not giving an NGRI instruction.

The United States Supreme Court's decision in *Neder* is instructive. The Court held that the failure to instruct the jury on an element of the offense was not structural error, because the error "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9 (emphasis sic). The omission of an element is unlike a defective reasonable-doubt instruction, which "vitiates *all* the jury's findings" and produces "consequences that are necessarily unquantifiable and indeterminate." Id. at 11,

quoting *Sullivan v. Louisiana* (1993), 508 U.S. 275, 281-82 (emphasis sic). The Court then applied harmless-error review and found that, given that "the omitted element was uncontested and supported by overwhelming evidence," the failure to instruct the jury on the element "did not contribute to the verdict obtained." *Neder*, 527 U.S. at 17, citing *Chapman v. California* (1967), 386 U.S. 18, 24.

Likewise, the failure to instruct the jury on NGRI does not necessarily render the trial unfair. Just as a reviewing court can quantify the failure to instruct the jury on an element of the offense by "asking whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," *Neder*, 527 U.S. at 19, so can a reviewing court quantify the failure to instruct on NGRI by asking whether the evidence could rationally lead to an NGRI acquittal. In other words, if *overwhelming* evidence can make the failure to instruct on an element harmless, then the *absence* of evidence can make the failure to instruct on NGRI harmless.

Indeed, the present case provides the perfect example of how a court can apply harmless-error analysis to the failure to instruct the jury on NGRI. The defense "did not present one shred of evidence" supporting an NGRI defense, *Monford I*, at ¶ 74, so not instructing the jury on NGRI made no difference at all in the trial's outcome. In other words, there was no probability whatsoever that instructing the jury on NGRI would have resulted in an NGRI acquittal. Harmless-error analysis does not get any easier than this.

D. *Cihonski*'s Structural-Error Analysis Is Deeply Flawed.

In *Cihonski*, the Court found that the trial court's failure to instruct the jury on NGRI amounted to structural error because "the complete lack of mention of Cihonski's NGRI plea permeated the entire trial." *Cihonski*, at ¶ 23. The Court pointed out that, in addition to the

absence of an NGRI instruction, neither the State nor the defense mentioned the NGRI plea during the trial. Id. According to the Court, "no evidence exists in the record that the jury even considered Cihonski's defense," so "the trial was unable to reliably serve its function." Id. Due to the "unique facts and circumstances" of that case, the Court found that "the trial court's failure to notify the jury that Cihonski entered a plea of NGRI or to instruct the jury on that plea constituted structural error and warrants reversal." Id.

But *Cihonski*'s structural-error analysis is flawed and should not be adopted by this Court. To start, the Court's analysis closely resembles *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*). In *Colon I*, this Court held that, even when there is no objection, structural error occurs when a defect in an indictment leads "to significant errors throughout the defendant's trial." Id. at ¶ 23. But *Cihonski* failed to acknowledge that this Court had confined the structural-error analysis in *Colon I* to the unique facts of that case. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶ 8 (*Colon II*).

In any event, this Court recently overruled *Colon I* altogether. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, paragraphs one and three of the syllabus. Overruling *Colon I* is consistent with the United States Supreme Court's structural-error precedent. By asking whether a defective indictment leads to other errors at trial, *Colon I* "import[ed] into the initial structural-error determination (*i.e.*, whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (*i.e.*, whether an error is harmless)." *Neder*, 527 U.S. at 14. In short, "a constitutional error is either structural or it is not." Id. Any approach that requires a reviewing court to look to the specific circumstances of the case to determine whether an error is structural is "inconsistent with our traditional categorical approach to structural errors." Id.

Even if *Colon I* is still viable today, the *Cihonski* Court got its structural-error analysis exactly backwards. Again, the "error" identified in *Cihonski* was the trial court's failure to instruct the jury on NGRI. But this error came at the *end* of the trial and thus could not have caused the non-mention of the NGRI plea *during* the trial. By contrast, in *Colon I*, the defect in the indictment "led to" and "resulted in" the other errors throughout the trial. *Colon I*, at ¶¶ 23, 29; see, also, *Colon II*, at ¶ 8 (describing *Colon I*—"multiple errors at the trial *follow* the defective indictment") (emphasis added).

Here, the absence of any NGRI instruction did not lead to or result in the non-mention of the NGRI plea during the trial. Just the opposite, the non-mention of the NGRI plea during the trial is precisely why the trial court committed no error at all in not instructing the jury on NGRI.

E. By Not Preserving the Jury-Instruction Issue, Defendant Forfeited All but Plain-Error Review.

There is yet another reason the absence of an NGRI instruction does not justify automatic reversal: the defense raised no objection in the trial court, thereby forfeiting all but plain-review. Crim.R. 52(B); see, also, Crim.R. 30(A).

Even structural errors must be preserved for appeal. "[B]oth this court and the United States Supreme Court have cautioned against applying a structural-error analysis where [] the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court." *Perry*, at ¶ 23, citing *Hill*, 92 Ohio St.3d at 199, and *Johnson*, 520 U.S. at 466. Expanding Crim.R. 52(B) to allow automatic reversal for unpreserved structural errors "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *Hill*, 92 Ohio St.3d at 199, quoting *Johnson*, 520 U.S. at 466. Courts

have no authority to create a "structural error exception" to Crim.R. 52(B). *Hill*, 92 Ohio St.3d at 199, quoting *Johnson*, 520 U.S. at 466.

Indeed, a contrary rule would "encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed." *Perry*, at ¶ 23. Courts should "foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court—where, in many cases, such errors can be easily corrected." Id.

To be sure, this Court retreated from this view in *Colon I*, finding that a defective indictment can amount to structural error requiring automatic reversal, even when the defendant does not object to the indictment. *Colon I*, at ¶ 23. But in *Horner*, this Court overruled *Colon I* and held that "[b]y failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal." *Horner*, 126 Ohio St.3d 466, paragraph three of the syllabus. *Horner* shows this Court's commitment to Crim.R. 52(B).

Because the defense did not request an NGRI instruction, defendant's argument that the trial court should have instructed the jury on NGRI is subject to plain-error review under Crim.R. 52(B). Even if the trial court was required to give an NGRI instruction, defendant cannot show plain error. Given the absence of any evidence on NGRI, the jury would have been required to reject the NGRI defense, so not instructing the jury on NGRI did not affect defendant's substantial rights. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

In the end, defendant fails to show any legal error, let alone structural error requiring automatic reversal. Younkin was not required to pursue an NGRI defense or formally withdraw the NGRI plea. And the trial court committed no error in not giving an NGRI instruction for

which the defense offered no evidence in support and for which the defense did not even request. Defendant's first proposition of law should be rejected.

> **Response to Second Proposition of Law:** Once a defendant pleads NGRI, trial counsel is not ineffective in choosing not to actively pursue the NGRI defense at trial, and nothing requires a defendant who abandons an NGRI defense to formally withdraw the NGRI plea.

Defendant's second proposition of law claims that trial counsel provides ineffective assistance when a defendant pleads NGRI and the defense neither pursues an NGRI defense nor formally withdraws the NGRI plea. To prevail on an ineffective-assistance claim, a defendant must show (1) that his trial counsel's performance fell below an objective level of reasonable representation, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Ineffective-assistance claims are generally unreviewable on direct appeal due to inadequacies of the appellate record. *Massaro v. United States* (2003), 538 U.S. 500, 504-05.

On the existing record, defendant fails to establish either prong under *Strickland.* Younkin's decision not to pursue an NGRI defense or formally withdraw the NGRI plea was not deficient performance. And even if Younkin had pursued an NGRI defense or withdrawn the NGRI plea, there is no reasonable probability of a different outcome.

I. DEFENDANT FAILS TO SHOW DEFICIENT PERFORMANCE.

One of the recurring themes throughout defendant's brief is his speculation that Younkin was either unaware of the NGRI plea or forgot about it. But this speculation fails to credit Younkin with the necessary presumption of competence. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances,

the challenged action 'might be considered sound trial strategy.'" Id., quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

In fact, the record suggests that Younkin's decision not to pursue an NGRI defense was a strategic one. Dr. Haskins' invoice states that she prepared her report in mid-June 2008. Shwartz filed the motion to suppress identification testimony about a month later, and Younkin was appointed as co-counsel before the suppression hearing. Although Haskins' report itself is not in the record, the timing of these events suggests that the report motivated Shwartz's decision to pursue a misidentification defense, and that Younkin adhered to this strategy when he took over the case. Shwartz's and Younkin's decision in this regard is exactly the type of tactical decision that a court should refrain from second-guessing. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 231, citing *Strickland*, 466 U.S. at 689. They are strongly presumed to have had a good reason not to pursue the NGRI defense after Haskins made her report. And, of course, given that the defense presented no evidence of NGRI, Younkin was not ineffective for not asking the trial court to instruct the jury on NGRI.

Nor was Younkin ineffective in not formally withdrawing the NGRI plea. This Court has held that trial counsel need not enter an NGRI plea when such a plea has no reasonable chance of success. *State v. Tibbets* (2001), 92 Ohio St.3d 146, 165, citing *State v. Seiber* (1990), 56 Ohio St.3d 4, 12. Plus, it is not ineffective assistance for trial counsel to formally withdraw an NGRI plea when an NGRI defense would be futile. *State v. Lavelle*, 5th Dist. No. 07 CA 130, 2008-Ohio-3119, ¶¶ 43-45. It naturally follows, then, that when evidence of an NGRI defense is lacking, trial counsel is not ineffective in choosing to forego the NGRI defense while nonetheless keeping a previously-entered NGRI plea in place.

After all, as explained above, no legal rule requires the defense to formally withdraw an unpursued NGRI plea. The purpose of an NGRI plea is to give the trial court and the State notice that the defense may be presenting evidence of insanity. It is not meant to be a binding commitment to pursue an NGRI defense that the defense can escape only by formally withdrawing the NGRI plea.

Indeed, there were legitimate strategic reasons not to formally withdraw the NGRI plea. If new evidence had surfaced that supported an NGRI defense, Crim.R. 11(H) would have required the defense to show good cause to re-enter the NGRI plea. By leaving the NGRI plea in place, trial counsel kept the NGRI option in play. *State v. Decker* (1986), 28 Ohio St.3d 137, 138 (defendant's contention that NGRI should have been raised at trial was "at odds" with defendant's earlier withdrawal of NGRI plea).

Moreover, as explained above, nothing in the record indicates that defendant "wished to present [an NGRI] defense," and "the record supports the belief defendant was completely on board with the misidentification defense." *Monford I*, at ¶ 74; compare, *State v. Tenace* (1997), 121 Ohio App.3d 702 (defendant received ineffective assistance of counsel when trial counsel withdrew NGRI plea against defendant's wishes). That defendant himself appeared perfectly content with pursuing a misidentification defense rather than an NGRI defense further supports the reasonableness of Younkin's decision not to pursue an NGRI defense. C.f., *State v. Smith* (1981), 3 Ohio App.3d 115, 120 (trial court need not personally address defendant when trial counsel withdraws NGRI plea, "at least when the record shows no dissension from that decision by the defendant.").

The bottom line is that Younkin's decision not to pursue an NGRI defense or to formally withdraw the NGRI plea was not deficient performance. Rather than accepting defendant's

speculation that Younkin was either unaware of the NGRI plea or forgot about it, this Court should adhere to *Strickland* and presume that Younkin's decisions in this regard were sound strategy. And nothing in this record rebuts the strong presumption that Younkin acted competently.

II. DEFENDANT FAILS TO SHOW PREJUDICE.

Defendant also fails to establish *Strickland*'s prejudice prong. To start, there is no evidence in the record that pursuing an NGRI defense would have created a reasonable probability of a different outcome. The record shows no indication that there was any viable evidence available to the defense that would have supported an NGRI defense. Dr. Haskins' report is not in the record, and there is no other evidence that suggests that defendant suffered from any severe mental disease or defect—let alone that any such defect affected his ability to know right from wrong. Thus, it is purely speculative that pursuing an NGRI defense would have had any effect on the outcome of the trial. Nor was defendant prejudiced by Younkin not asking the trial court for an NGRI instruction, as the trial court would have been required to overrule any such request. In short, a "possibility" of a "substantial basis" (Brief, 15) for arguing NGRI is not enough to establish prejudice.

Moreover, because the record contains no evidence that NGRI was a viable defense, Younkin's decision not to formally withdraw the NGRI plea did not prejudice defendant. *Handcock*, at ¶ 26. There is no reasonable probability that formally withdrawing the NGRI plea would have made any difference in the trial.

III. *CIHONSKI* AND THE OTHER CASES CITED BY DEFENDANT ARE INAPPOSITE.

Defendant's reliance on *Cihonski* is again misplaced. The Third District in *Cihonski*—after improperly assuming that trial counsel "forgot or ignored the plea of NGRI"—held that the

defendant's trial counsel was ineffective for not notifying the jury of the NGRI plea during the trial. *Cihonski*, at ¶¶ 29-30. The Court, however, relied on the following passage from the Sixth District's opinion in *Tenace*: "the right of a defendant who is competent to stand trial, but who insists that he was insane at the time of the crime, to choose what plea to enter is a substantial right." Id. at ¶ 28, quoting *Tenace*, 121 Ohio App.3d at 715; see, also, Prof. Cond. Rule 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered.").

The Court in *Cihonski* therefore apparently concluded that the defendant in that case—like the defendant in *Tenace*—insisted that he was insane. The Court in *Cihonski* went on to observe that "had trial counsel believed the insanity defense was not viable under the facts and wished to pursue a different defense, he was free to withdraw the plea of NGRI, after consulting with Cihonski and obtaining his compliance." *Cihonski*, at ¶ 30. This passage indicates that the Court believed that trial counsel had abandoned the NGRI defense without consulting with the defendant and against the defendant's wishes.

In the present case, however, defendant never "indicate[d] that he wished to present an NGRI defense" and was "completely on board with the misidentification defense." *Monford I*, at ¶ 74. *Cihonski*'s ineffective-assistance analysis is therefore inapposite.

Defendant's reliance on the Twelfth District's opinion in *State v. Hatt* (2000), 140 Ohio App.3d 694, is also unpersuasive. The defendant in that case was convicted after a bench trial of driving under the influence of alcohol. Id. at 695. Prior to the trial, the defendant pleaded NGRI and a competency evaluation was scheduled but never held. Id. The Twelfth District held that trial counsel failed to admit a favorable blood analysis report into evidence. Id. at 697. The Court also found that trial counsel failed to require the trial court to "rule on the NGRI issues or to make a record showing some resolution of those issues." Id. Noting that the record showed

that prior to trial the defendant was in a psychiatric ward and was "unable to assist in his defense," id., n. 1, the Court stated that it was "unable to even consider whether the trial court may have impliedly ruled against appellant on his NGRI plea by permitting the case to proceed to trial because the record does not show any hearing upon which the court could have evaluated evidence on the issue," id. at 697.

But, as was the case in *Kulp*, the Court in *Hatt* was concerned more with the failure to address the defendant's competence than with the NGRI plea. The Court's comment that the defendant was "unable to assist in his defense" was a clear reference to competency. Also, whether the trial court "permit[ted] the case to proceed to trial" is also a question related to competency, not NGRI. While the Court held that trial counsel was ineffective in not requiring the trial court to rule on the NGRI issue during the bench trial, this holding was based on the evidence in the record showing that an NGRI defense had at least a reasonable probability of success. No such evidence exists in the present case.

Finally, *Commonwealth v. Gass* (1987), 514 Pa. 287, lends no support to defendant's argument. There, the Pennsylvania Supreme Court held that trial counsel was ineffective in not requesting an NGRI instruction. Id. at 291. But the defense in *Gass* actually presented evidence of NGRI. "Insanity was clearly at issue in Appellant's trial." Id. "Appellant's defense rested solely upon a claim of insanity" and the "only witness presented by the defense was a psychiatrist." Id. In the present case, however, NGRI was not at issue in defendant's trial, and the defense presented no evidence of NGRI. Even if Pennsylvania's rules for obtaining an instruction on an affirmative defense are similar to Ohio's, *Gass* does not help defendant.

Defendant points out that "[s]omething said to or observed by [Shwartz] led him to enter the insanity plea and to have funds allocated for an evaluation." (Brief, 15) Assuming this is

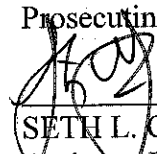
true, one must also assume that something led Shwartz and Younkin to pursue a misidentification defense rather than NGRI. Under *Strickland*, the decision not to pursue an NGRI defense and to pursue a misidentification defense instead is presumed to be sound strategy—and the record contains no evidence to overcome this presumption or that a different decision would have created a reasonable probability of a different outcome. Defendant's second proposition of law should be rejected.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reject defendant's two propositions of law and affirm the Tenth District's judgment.[1]

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

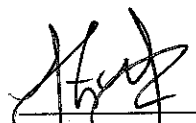


SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee

[1] If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered, this day, June 13, 2011, to ALLEN V. ADAIR, 373 South High Street, 12th Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellant.



SETH L. GILBERT 0072929
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APPENDIX

R.C. 2901.01 ..... A-1

R.C. 2901.05 ..... A-5

R.C. 2943.03 ..... A-7

R.C. 2945.37 ..... A-8

R.C. 2945.40 ..... A-10

Crim.R. 11 ..... A-12

Crim.R. 30 ..... A-14

Crim.R. 32 ..... A-15

Crim.R. 52 ..... A-17

Fed.R.Crim.P. 12.2 ..... A-18

Prof. Cond. Rule 1.2 ..... A-26

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

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ORC Ann. 2901.01 (2011)

§ 2901.01. Definitions

(A) As used in the Revised Code:

(1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

(6) "Serious physical harm to property" means any physical harm to property that does either of the following:

(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;

(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211 [2903.21.1], 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161 [2923.16.1], of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of *section 2919.22 of the Revised Code* or felonious sexual penetration in violation of former *section 2907.12 of the Revised Code*;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10) (a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, other telecommunications service, telecommunications devices, information service, computers, data, computer software, financial instruments associated with computers, other documents associated with computers, or copies of the documents, whether in machine or human readable form, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in division (A)(10) of this section, "trade secret" has the same meaning as in *section 1333.61 of the Revised Code*, and "telecommunications service" and "information service" have the same meanings as in *section 2913.01 of the Revised Code*.

(c) As used in divisions (A)(10) and (13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," "data," and "telecommunications device" have the same meanings as in *section 2913.01 of the Revised Code*.

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under division (D) of *section 3735.31 of the Revised Code*, or state highway patrol trooper;

(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;

(c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

(d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;

(e) A person lawfully called pursuant to *section 311.07 of the Revised Code* to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;

(f) A person appointed by a mayor pursuant to *section 737.01 of the Revised Code* as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;

(g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;

(i) A veterans' home police officer appointed under *section 5907.02 of the Revised Code*;

(j) A member of a police force employed by a regional transit authority under division (Y) of *section 306.35 of the Revised Code*;

(k) A special police officer employed by a port authority under *section 4582.04* or *4582.28 of the Revised Code*;

(l) The house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to division (E)(1) of *section 101.311 [101.31.1] of the Revised Code* and an assistant house of representatives sergeant at arms;

(m) A special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in *section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3*, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended.

(12) "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

(13) "Contraband" means any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. "Contraband" includes, but is not limited to, all of the following:

(a) Any controlled substance, as defined in *section 3719.01 of the Revised Code*, or any device or paraphernalia;

(b) Any unlawful gambling device or paraphernalia;

(c) Any dangerous ordnance or obscene material.

(14) A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in *section 2901.05 of the Revised Code*, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

(B) (1) (a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX [29] of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

(i) An individual, corporation, business trust, estate, trust, partnership, and association;

(ii) An unborn human who is viable.

(b) As used in any section contained in Title XXIX [29] of the Revised Code that does not set forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

(c) As used in division (B)(1)(a) of this section:

(i) "Unborn human" means an individual organism of the species Homo sapiens from fertilization until live birth.

(ii) "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term "person" that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX [29] of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that

violates the conditions described in the immediately preceding sentence may be punished as a violation of *section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21*, or *2903.22 of the Revised Code*, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of *section 2919.13*, or *section 2919.151 [2919.15.1], 2919.17*, or *2919.18 of the Revised Code*, may be punished as a violation of section 2919.12, division (B) of *section 2919.13*, or *section 2919.151 [2919.15.1], 2919.17*, or *2919.18 of the Revised Code*, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with *section 2919.12 of the Revised Code*.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

(C) As used in Title XXIX [29] of the Revised Code:

(1) "School safety zone" consists of a school, school building, school premises, school activity, and school bus.

(2) "School," "school building," and "school premises" have the same meanings as in *section 2925.01 of the Revised Code*.

(3) "School activity" means any activity held under the auspices of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district; a governing authority of a community school established under Chapter 3314. of the Revised Code; a governing board of an educational service center; or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under *section 3301.07 of the Revised Code*.

(4) "School bus" has the same meaning as in *section 4511.01 of the Revised Code*.

HISTORY:

142 v H 708 (Eff 4-19-88); 143 v S 24 (Eff 7-24-90); 144 v H 77 (Eff 9-17-91); 144 v S 144 (Eff 8-8-91); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 239 (Eff 9-6-96); 146 v S 277 (Eff 3-31-97); 147 v H 565 (Eff 3-30-99); 148 v S 1 (Eff 8-6-99); 148 v H 162 (Eff 8-25-99); 148 v S 107 (Eff 3-23-2000); 148 v S 137 (Eff 5-17-2000); 148 v H 351 (Eff 8-18-2000); 148 v S 317 (Eff 3-22-2001); 149 v S 184 (Eff 5-15-2002); 149 v H 675 (Eff 3-14-2003); 149 v H 545 (Eff 3-19-2003); 149 v H 364. Eff 4-8-2003; 151 v H 241, § 1, eff. 7-1-07; 153 v S 235, § 1, eff. 3-24-11.

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2901.05 (2011)

§ 2901.05. Burden and degree of proof; presumption concerning self-defense or defense of another; jury instructions concerning reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) (1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2) (a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(D) As used in this section:

(1) An "affirmative defense" is either of the following:

(a) A defense expressly designated as affirmative;

(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is

temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4) "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

(E) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

HISTORY:

134 v H 511 (Eff 1-1-74); 137 v H 1168. Eff 11-1-78; 152 v S 184, § 1, eff. 9-9-08.

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2943. ARRAIGNMENT; PLEAS

Go to the Ohio Code Archive Directory

ORC Ann. 2943.03 (2011)

§ 2943.03. Pleas to indictment

Pleas to an indictment or information are:

(A) Guilty;

(B) Not guilty;

(C) A former judgment of conviction or acquittal of the offense;

(D) Once in jeopardy;

(E) Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged. The court may, for good cause shown, allow a change of plea at any time before the commencement of the trial.

HISTORY:

GC § 13440-2; 113 v 123(175), ch 19, § 2; Bureau of Code Revision. Eff 10-1-53.

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
COMPETENCY TO STAND TRIAL

Go to the Ohio Code Archive Directory

ORC Ann. 2945.37 (2011)

§ 2945.37. Definitions; hearing on competence to stand trial

(A) As used in *sections 2945.37* to *2945.402 [2945.40.2] of the Revised Code*:

(1) "Prosecutor" means a prosecuting attorney or a city director of law, village solicitor, or similar chief legal officer of a municipal corporation who has authority to prosecute a criminal case that is before the court or the criminal case in which a defendant in a criminal case has been found incompetent to stand trial or not guilty by reason of insanity.

(2) "Examiner" means either of the following:

(a) A psychiatrist or a licensed clinical psychologist who satisfies the criteria of division (I)(1) of *section 5122.01 of the Revised Code* or is employed by a certified forensic center designated by the department of mental health to conduct examinations or evaluations.

(b) For purposes of a separate mental retardation evaluation that is ordered by a court pursuant to division (H) of *section 2945.371 [2945.37.1] of the Revised Code*, a psychologist designated by the director of developmental disabilities pursuant to that section to conduct that separate mental retardation evaluation.

(3) "Nonsecured status" means any unsupervised, off-grounds movement or trial visit from a hospital or institution, or any conditional release, that is granted to a person who is found incompetent to stand trial and is committed pursuant to *section 2945.39 of the Revised Code* or to a person who is found not guilty by reason of insanity and is committed pursuant to *section 2945.40 of the Revised Code*.

(4) "Unsupervised, off-grounds movement" includes only off-grounds privileges that are unsupervised and that have an expectation of return to the hospital or institution on a daily basis.

(5) "Trial visit" means a patient privilege of a longer stated duration of unsupervised community contact with an expectation of return to the hospital or institution at designated times.

(6) "Conditional release" means a commitment status under which the trial court at any time may revoke a person's conditional release and order the rehospitalization or reinstitutionalization of the person as described in division (A) of *section 2945.402 [2945.40.2] of the Revised Code* and pursuant to which a person who is found incompetent to stand trial or a person who is found not guilty by reason of insanity lives and receives treatment in the community for a period of time that does not exceed the maximum prison term or term of imprisonment that the person could have received for the offense in question had the person been convicted of the offense instead of being found incompetent to stand trial on the charge of the offense or being found not guilty by reason of insanity relative to the offense.

(7) "Licensed clinical psychologist," "mentally ill person subject to hospitalization by court order," and "psychiatrist" have the same meanings as in *section 5122.01 of the Revised Code.*

(8) "Mentally retarded person subject to institutionalization by court order" has the same meaning as in *section 5123.01 of the Revised Code.*

(B) In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion.

(C) The court shall conduct the hearing required or authorized under division (B) of this section within thirty days after the issue is raised, unless the defendant has been referred for evaluation in which case the court shall conduct the hearing within ten days after the filing of the report of the evaluation or, in the case of a defendant who is ordered by the court pursuant to division (H) of *section 2945.371 [2945.37.1] of the Revised Code* to undergo a separate mental retardation evaluation conducted by a psychologist designated by the director of developmental disabilities, within ten days after the filing of the report of the separate mental retardation evaluation under that division. A hearing may be continued for good cause.

(D) The defendant shall be represented by counsel at the hearing conducted under division (C) of this section. If the defendant is unable to obtain counsel, the court shall appoint counsel under Chapter 120. of the Revised Code or under the authority recognized in division (C) of section 120.06, division (E) of section 120.16, division (E) of *section 120.26,* or *section 2941.51 of the Revised Code* before proceeding with the hearing.

(E) The prosecutor and defense counsel may submit evidence on the issue of the defendant's competence to stand trial. A written report of the evaluation of the defendant may be admitted into evidence at the hearing by stipulation, but, if either the prosecution or defense objects to its admission, the report may be admitted under *sections 2317.36* to *2317.38 of the Revised Code* or any other applicable statute or rule.

(F) The court shall not find a defendant incompetent to stand trial solely because the defendant is receiving or has received treatment as a voluntary or involuntary mentally ill patient under Chapter 5122. or a voluntary or involuntary mentally retarded resident under Chapter 5123. of the Revised Code or because the defendant is receiving or has received psychotropic drugs or other medication, even if the defendant might become incompetent to stand trial without the drugs or medication.

(G) A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by *section 2945.38 of the Revised Code.*

(H) Municipal courts shall follow the procedures set forth in *sections 2945.37* to *2945.402 [2945.40.2] of the Revised Code.* Except as provided in *section 2945.371 [2945.37.1] of the Revised Code,* a municipal court shall not order an evaluation of the defendant's competence to stand trial or the defendant's mental condition at the time of the commission of the offense to be conducted at any hospital operated by the department of mental health. Those evaluations shall be performed through community resources including, but not limited to, certified forensic centers, court probation departments, and community mental health agencies. All expenses of the evaluations shall be borne by the legislative authority of the municipal court, as defined in *section 1901.03 of the Revised Code,* and shall be taxed as costs in the case. If a defendant is found incompetent to stand trial or not guilty by reason of insanity, a municipal court may commit the defendant as provided in *sections 2945.38* to *2945.402 [2945.40.2] of the Revised Code.*

HISTORY:

137 v H 565 (Eff 11-1-78); 138 v S 297 (Eff 4-30-80); 139 v H 694 (Eff 11-15-81); 142 v S 156 (Eff 7-1-89); 146 v S 285. Eff 7-1-97; 153 v S 79, § 1, eff. 10-6-09.

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
COMPETENCY TO STAND TRIAL

Go to the Ohio Code Archive Directory

ORC Ann. 2945.40 (2011)

§ 2945.40. Procedure upon acquittal by reason of insanity

(A) If a person is found not guilty by reason of insanity, the verdict shall state that finding, and the trial court shall conduct a full hearing to determine whether the person is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order. Prior to the hearing, if the trial judge believes that there is probable cause that the person found not guilty by reason of insanity is a mentally ill person subject to hospitalization by court order or mentally retarded person subject to institutionalization by court order, the trial judge may issue a temporary order of detention for that person to remain in effect for ten court days or until the hearing, whichever occurs first.

Any person detained pursuant to a temporary order of detention issued under this division shall be held in a suitable facility, taking into consideration the place and type of confinement prior to and during trial.

(B) The court shall hold the hearing under division (A) of this section to determine whether the person found not guilty by reason of insanity is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order within ten court days after the finding of not guilty by reason of insanity. Failure to conduct the hearing within the ten-day period shall cause the immediate discharge of the respondent, unless the judge grants a continuance for not longer than ten court days for good cause shown or for any period of time upon motion of the respondent.

(C) If a person is found not guilty by reason of insanity, the person has the right to attend all hearings conducted pursuant to *sections 2945.37* to *2945.402 [2945.40.2] of the Revised Code*. At any hearing conducted pursuant to one of those sections, the court shall inform the person that the person has all of the following rights:

(1) The right to be represented by counsel and to have that counsel provided at public expense if the person is indigent, with the counsel to be appointed by the court under Chapter 120. of the Revised Code or under the authority recognized in division (C) of section 120.06, division (E) of section 120.16, division (E) of *section 120.26*, or *section 2941.51 of the Revised Code*;

(2) The right to have independent expert evaluation and to have that independent expert evaluation provided at public expense if the person is indigent;

(3) The right to subpoena witnesses and documents, to present evidence on the person's behalf, and to cross-examine witnesses against the person;

(4) The right to testify in the person's own behalf and to not be compelled to testify;

(5) The right to have copies of any relevant medical or mental health document in the custody of the state or of any place of commitment other than a document for which the court finds that the release to the person of information contained in the document would create a substantial risk of harm to any person.

(D) The hearing under division (A) of this section shall be open to the public, and the court shall conduct the hearing in accordance with the Rules of Civil Procedure. The court shall make and maintain a full transcript and record of the hearing proceedings. The court may consider all relevant evidence, including, but not limited to, any relevant psychiatric, psychological, or medical testimony or reports, the acts constituting the offense in relation to which the person was found not guilty by reason of insanity, and any history of the person that is relevant to the person's ability to conform to the law.

(E) Upon completion of the hearing under division (A) of this section, if the court finds there is not clear and convincing evidence that the person is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order, the court shall discharge the person, unless a detainer has been placed upon the person by the department of rehabilitation and correction, in which case the person shall be returned to that department.

(F) If, at the hearing under division (A) of this section, the court finds by clear and convincing evidence that the person is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order, it shall commit the person to a hospital operated by the department of mental health, a facility operated by the department of developmental disabilities, or another medical or psychiatric facility, as appropriate, and further proceedings shall be in accordance with *sections 2945.401 [2945.40.1]* and *2945.402 [2945.40.2] of the Revised Code*. In determining the place and nature of the commitment, the court shall order the least restrictive commitment alternative available that is consistent with public safety and the welfare of the person. In weighing these factors, the court shall give preference to protecting public safety.

(G) If a court makes a commitment of a person under division (F) of this section, the prosecutor shall send to the place of commitment all reports of the person's current mental condition, and, except as otherwise provided in this division, any other relevant information, including, but not limited to, a transcript of the hearing held pursuant to division (A) of this section, copies of relevant police reports, and copies of any prior arrest and conviction records that pertain to the person and that the prosecutor possesses. The prosecutor shall send the reports of the person's current mental condition in every case of commitment, and, unless the prosecutor determines that the release of any of the other relevant information to unauthorized persons would interfere with the effective prosecution of any person or would create a substantial risk of harm to any person, the prosecutor also shall send the other relevant information. Upon admission of a person committed under division (F) of this section, the place of commitment shall send to the board of alcohol, drug addiction, and mental health services or the community mental health board serving the county in which the charges against the person were filed a copy of all reports of the person's current mental condition and a copy of the other relevant information provided by the prosecutor under this division, including, if provided, a transcript of the hearing held pursuant to division (A) of this section, the relevant police reports, and the prior arrest and conviction records that pertain to the person and that the prosecutor possesses.

(H) A person who is committed pursuant to this section shall not voluntarily admit the person or be voluntarily admitted to a hospital or institution pursuant to *section 5122.02, 5122.15, 5123.69*, or *5123.76 of the Revised Code*.

HISTORY:

137 v H 565 (Eff 11-1-78); 138 v S 297 (Eff 4-30-80); 138 v H 965 (Eff 4-9-81); 139 v H 1 (Eff 8-5-81); 142 v S 156 (Eff 7-1-89); 143 v S 24 (Eff 7-24-90); 145 v H 571 (Eff 10-6-94); 146 v H 567 (Eff 10-29-96); 146 v S 285. Eff 7-1-97; 153 v S 79, § 1, eff. 10-6-09.

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*** RULES CURRENT THROUGH APRIL 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2011)

Review Court Orders which may amend this Rule.

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of *Crim. R. 44(B)* and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

HISTORY: Amended, eff 7-1-76; 7-1-80; 7-1-98.

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*** RULES CURRENT THROUGH APRIL 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 30 (2011)

Review Court Orders which may amend this Rule.

Rule 30. Instructions

(A) Instructions; error; record.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(B) Cautionary instructions.

At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.

HISTORY: Amended, eff 7-1-75; 7-1-82; 7-1-92; 7-1-05.

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*** RULES CURRENT THROUGH APRIL 1, 2011 ***
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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32 (2011)

Review Court Orders which may amend this Rule.

Rule 32. Sentence

(A) Imposition of sentence.

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

HISTORY: Amended, eff 7-1-92; 7-1-98; 7-1-04; 7-1-09.

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*** RULES CURRENT THROUGH APRIL 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2011)

Review Court Orders which may amend this Rule.

Rule 52. Harmless Error and Plain Error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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*** CURRENT THROUGH CHANGES RECEIVED MAY 2, 2011 ***

FEDERAL RULES OF CRIMINAL PROCEDURE
TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Go to the United States Code Service Archive Directory

USCS Fed Rules Crim Proc R 12.2

Review Court Orders which may amend this Rule.
Review expert commentary from The National Institute for Trial Advocacy

Rule 12.2. Notice of an Insanity Defense; Mental Examination

(a) Notice of an Insanity Defense. A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.
(1) *Authority to Order an Examination; Procedures.*
(A) The court may order the defendant to submit to a competency examination under *18 U.S.C. § 4241*.
(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under *18 U.S.C. § 4242*. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.
(2) *Disclosing Results and Reports of Capital Sentencing Examination.* The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.
(3) *Disclosing Results and Reports of the Defendant's Expert Examination.* After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.
(4) *Inadmissibility of a Defendant's Statements.* No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:
(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or
(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply.

(1) *Failure to Give Notice or to Submit to Examination.* The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) *Failure to Disclose.* The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

HISTORY:

(Added April 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, P.L. 94-64, §§ 2, 3(14), 89 Stat. 370, 373; Aug. 1, 1983; Oct. 12, 1984, P.L. 98-473, Title II, Ch IV, § 404, 98 Stat. 2067; Oct. 30, 1984, P.L. 98-596, § 11(a), (b), 98 Stat. 3138; Aug. 1, 1985; Nov. 10, 1986, P.L. 99-646, § 24, 100 Stat. 3597; Aug. 1, 1987.)

(As amended Dec. 1, 2002; Dec. 1, 2005.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975. Act July 31, 1975, § 3(4) (effective 12/1/75, as provided by § 2 of such Act, which appears as a note to Rule 4), substituted subsec. (c) for one which read: "(c) Psychiatric examination. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court.".

1984. Act Oct. 12, 1984 purported to amend subsec. (b) of this rule by substituting "any other mental condition bearing upon the issue of guilt" for "other condition bearing upon the issue of whether he had the mental state required for the offense charged", but such amendment was not executed because it was repealed by Act Oct. 30, 1984.

Such Act further, in subsec. (c), purported to substitute "to an examination pursuant to *18 U.S.C. 4242*" for "to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court", but the amendment could not be executed because such language did not appear in the text.

Such Act further, in subsec. (d), purported to substitute "guilt" for "mental state", but the amendment was not executed because it was repealed by Act Oct. 30, 1984.

Act Oct. 30, 1984, in subsec. (c) substituted "to an examination pursuant to *18 U.S.C. 4242*" for "to a mental examination by a psychiatrist or other expert designated for this purpose in the order of the court"; and, in subsec. (d), substituted "guilt" for "mental condition".

1986. Act Nov. 10, 1986, in subsec. (c), inserted "4241 or".

Other provisions:

Notes of Advisory Committee. Rule 12.2 is designed to require a defendant to give notice prior to trial of his intention (1) to rely upon the defense of insanity or (2) to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged. This rule does not deal with the issue of mental competency to stand trial.

The objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony. Failure to give advance notice commonly results in the necessity for a continuance in the middle of a trial, thus unnecessarily delaying the administration of justice.

A requirement that the defendant give notice of his intention to rely upon the defense of insanity was proposed by the Advisory Committee in the Second Preliminary Draft of Proposed Amendments (March 1964), rule 12.1, p. 7. The objective of the 1964 proposal was explained in a brief Advisory Committee Note:

Under existing procedure although insanity is a defense, once it is raised the burden to prove sanity beyond a reasonable doubt rests with the government. *Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895).* This rule requires pretrial notice to the government of an insanity defense, thus permitting it to prepare to meet the issue. Furthermore, in *Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962),* the Supreme Court held that, at least in the face of a mandatory commitment statute, the defendant had a right to determine whether or not to raise the issue of insanity. The rule gives the defendant a method of raising the issue and precludes any problem of deciding whether or not the defendant relied on insanity.

The Standing Committee on Rules of Practice and Procedure decided not to recommend the proposed Notice of Insanity rule to the Supreme Court. Reasons were not given.

Requiring advance notice of the defense of insanity is commonly recommended as a desirable procedure. The Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, p. 254 (1970), state in part:

It is recommended that procedural reform provide for advance notice that evidence of mental disease or defect will be relied upon in defense. . . .

Requiring advance notice is proposed also by the American Law Institute's Model Penal Code, § 4.03 (P.O.D. 1962). The commentary in Tentative Draft No. 4 at 193-194 (1955) indicates that, as of that time, six states required pretrial notice and an additional eight states required that the defense of insanity be specially pleaded.

For recent state statutes see N.Y. CPL § 250.10 (McKinney's Consol. Laws, c. 11-A, 1971) enacted in 1970 which provides that no evidence by a defendant of a mental disease negativing criminal responsibility shall be allowed unless defendant has served notice on the prosecutor of his intention to rely upon such defense. See also New Jersey Penal Code (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) § 2c: 4-3; New Jersey Court Rule 3:12; *State v. Whitlow, 45 N.J. 3, 22 n. 3,* 210 T.2d 763 (1965), holding the requirement of notice to be both appropriate and not in violation of the privilege against self-incrimination.

Subdivision (a) deals with notice of the "defense of insanity." In this context the term insanity has a well-understood meaning. See, e.g., Tydings, A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure, *27 Md.L.Rev. 131 (1967).* Precisely how the defense of insanity is phrased does, however, differ somewhat from circuit to circuit. See Study Draft of a New Federal Criminal Code, § 503 Comment at 37 (USGPO 1970). For a more extensive discussion of present law, see Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, pp. 229-247 (USGPO 1970). The National Commission recommends the adoption of a single test patterned after the proposal of the American Law Institute's Model Penal Code. The proposed definition provides in part:

In any prosecution for an offense lack of criminal responsibility by reason of mental disease or defect is a defense. [Study Draft of a New Federal Criminal Code § 503 at 36-37.]

Should the proposal of the National Commission be adopted by the Congress, the language of subdivision (a) probably ought to be changed to read "defense of lack of criminal responsibility by reason of mental disease or defect" rather than "defense of insanity."

Subdivision (b) is intended to deal with the issue of expert testimony bearing upon the issue of whether the defendant had the "mental state required for the offense charged."

There is some disagreement as to whether it is proper to introduce evidence of mental disease or defect bearing not upon the defense of insanity, but rather upon the existence of the mental state required by the offense charged. The American Law Institute's Model Penal Code takes the position that such evidence is admissible [§ 4.02(1) (P.O.D. 1962)]. See also *People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492 (1959).*

The federal cases reach conflicting conclusions. See *Rhodes v. United States, 282 F.2d 59, 62 (4th Cir. 1960):*

The proper way would have been to ask the witness to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity knowingly to make the false statement charged, or knowingly to forge the signatures . . ..

Compare *Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382 (1946).*

Subdivision (b) does not attempt to decide when expert testimony is admissible on the issue of the requisite mental state. It provides only that the defendant must give pretrial notice when he intends to introduce such evidence. The pur-

pose is to prevent the need for a continuance when such evidence is offered without prior notice. The problem of unnecessary delay has arisen in jurisdictions which do not require prior notice of an intention to use expert testimony on the issue of mental state. Referring to this, the California Special Commission on Insanity and Criminal Offenders, First Report 30 (1962) said:

The abuses of the present system are great. Under a plea of "not guilty" without any notice to the people that the defense of insanity will be relied upon, defendant has been able to raise the defense upon the trial of the issue as to whether he committed the offense charged.

As an example of the delay occasioned by the failure to heretofore require a pretrial notice by the defendant, see *United States v. Albright, 388 F.2d 719 (4th Cir. 1968),* where a jury trial was recessed for 23 days to permit a psychiatric examination by the prosecution when the defendant injected a surprise defense of lack of mental competency.

Subdivision (c) gives the court the authority to order the defendant to submit to a psychiatric examination by a psychiatrist designated by the court. A similar provision is found in ALI, Model Penal Code § 4.05(1) (P.O.D. 1962). This is a common provision of state law, the constitutionality of which has been sustained. Authorities are collected in ALI, Model Penal Code, pp. 195-196 Tent. Draft No. 4, (1955). For a recent proposal, see the New Jersey Penal Code § 2c: 4-5 (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) authorizing appointment of "at least one qualified psychiatrist to examine and report upon the mental condition of the defendant." Any issue of self-incrimination which might arise can be dealt with by the court as, for example, by a bifurcated trial which deals separately with the issues of guilt and of mental responsibility. For statutory authority to appoint a psychiatrist with respect to competency to stand trial, see *18 U.S.C. § 4244.*

Subdivision (d) confers authority on the court to exclude expert testimony in behalf of a defendant who has failed to give notice under subdivision (b) or who refuses to be examined by a court-appointed psychiatrist under subdivision (c). See *State v. Whitlow, 45 N.J. 3, 23, 210 A.2d 763 (1965),* which indicates that it is proper to limit or exclude testimony by a defense psychiatrist whenever defendant refuses to be examined.

Notes of Committee on the Judiciary on 1975 amendments (House Report No. 94-247). A. Amendments Proposed by the Supreme Court. Rule 12.2 is a new rule that deals with defense based upon mental condition. It provides that: (1) The defendant must notify the prosecution in writing of his intention to rely upon the defense of insanity. If the defendant fails to comply, "insanity may not be raised as a defense." (2) If the defendant intends to introduce expert testimony relating to mental disease or defect on the issue whether he had the requisite mental state, he must notify the prosecution in writing. (3) The court, on motion of the prosecution, may order the defendant to submit to a psychiatric examination by a court-appointed psychiatrist. (4) If the defendant fails to undergo the court-ordered psychiatric examination, the court may exclude any expert witness the defendant offers on the issue of his mental state.

B. Committee Action. The Committee agrees with the proposed rule but has added language concerning the use of statements made to a psychiatrist during the course of a psychiatric examination provided for by Rule 12.2. The language provides:

No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused before the judge who or jury which determines the guilt of the accused, prior to the determination of guilt.

The purpose of this rule is to secure the defendant's fifth amendment right against self-incrimination. See *State v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318 (1967).* The provision is flexible and does not totally preclude the use of such statements. For example, the defendant's statement can be used at a separate determination of the issue of sanity or for sentencing purposes once guilt has been determined. A limiting instruction to the jury in a single trial to consider statements made to the psychiatrist only on the issue of sanity would not satisfy the requirements of the rule as amended. The prejudicial effect on the determination of guilt would be inescapable.

The Committee notes that the rule does not attempt to resolve the issue whether the court can constitutionally compel a defendant to undergo a psychiatric examination when the defendant is unwilling to undergo one. The provisions of subdivision (c) are qualified by the phrase, "In an appropriate case." If the court cannot constitutionally compel an unwilling defendant to undergo a psychiatric examination, then the provisions of subdivision (c) are inapplicable in every instance where the defendant is unwilling to undergo a court-ordered psychiatric examination. The Committee, by its approval of subdivision (c), intends to take no stand whatever on the constitutional question.

Notes of Conference Committee on 1975 amendments (House Report No. 94-414). Rule 12.2(c) deals with court-ordered psychiatric examinations. The House version provides that no statement made by a defendant during a court-ordered psychiatric examination could be admitted in evidence against the defendant before the trier of fact that determines the issue of guilt prior to the determination of guilt. The Senate version deletes this provision.

The Conference adopts a modified House provision and restores to the bill the language of H.R. 6799 as it was originally introduced. The Conference adopted language provides that no statement made by the defendant during a psychiatric examination provided for by the rule shall be admitted against him on the issue of guilt in any criminal proceeding.

The Conference believes that the provision in H.R. 6799 as originally introduced in the House adequately protects the defendant's fifth amendment right against self-incrimination. The rule does not preclude use of statements made by a defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissable on that issue. However, a limiting instruction would not satisfy the rule if a statement is so prejudicial that a limiting instruction would be ineffective. Cf. practice under *18 U.S.C. 4244.*

Approval of amendments by Act July 31, 1975; effective date. Act July 31, 1975, P.L. 94-64, § 2, 89 Stat. 370, which appears as a note to Rule 4, approved U. S. Supreme Court Order of April 22, 1974, which added this Rule, and rendered it effective on Dec. 1, 1975.

Notes of Advisory Committee on 1983 amendments. *Note to Subdivision (b).* Courts have recently experienced difficulty with the question of what kind of expert testimony offered for what purpose falls within the notice requirement of rule 12.2(b). See, e.g., *United States v. Hill, 655 F.2d 512 (3d Cir. 1980)* (rule not applicable to tendered testimony of psychologist concerning defendant's susceptibility of inducement, offered to reinforce defendant's entrapment defense); *United States v Webb, 625 F.2d 709 (5th Cir. 1980)* (rule not applicable to expert testimony tendered to show that defendant lacked the "propensity to commit a violent act," as this testimony was offered "to prove that Webb did not commit the offense charged," shooting at a helicopter, "not that certain conduct was unaccompanied by criminal intent"); *United States v. Perl, 584 F.2d 1316 (4th Cir. 1978)* (because entrapment defense properly withheld from jury, it was unnecessary to decide if the district court erred in holding rule applicable to tendered testimony of the doctor that defendant had increased susceptibility to suggestion as a result of medication he was taking); *United States v. Olson, 576 F.2d 1267 (8th Cir. 1978)* (rule applicable to tendered testimony of an alcoholism and drug therapist that defendant was not responsible for his actions because of a problem with alcohol); *United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977)* (rule applicable to tendered testimony of psychologist that defendant, charged with assaulting federal officer, was more likely to hurt himself than to direct his aggressions toward others, as this testimony bears upon whether defendant intended to put victim in apprehension when he picked up the gun).

What these cases illustrate is that expert testimony about defendant's mental condition may be tendered in a wide variety of circumstances well beyond the situation clearly within rule 12.2(b), i.e., where a psychiatrist testifies for the defendant regarding his diminished capacity. In all of these situations and others like them, there is good reason to make applicable the notice provisions of rule 12.2(b). This is because in all circumstances in which the defendant plans to offer expert testimony concerning his mental condition at the time of the crime charged, advance disclosure to the government will serve "to permit adequate pretrial preparation, to prevent surprise at trial, and to avoid the necessity of delays during trial." 2 A.B.A. Standards for Criminal Justice 11-55 (2d 1980). Thus, while the district court in *United States v. Hill, 481 F.Supp. 558 (E.D.Pa. 1979),* incorrectly concluded that present rule 12.2(b) covers testimony by a psychologist bearing on the defense of entrapment, the court quite properly concluded that the government would be seriously disadvantaged by lack of notice. This would have meant that the government would not have been equipped to cross-examine the expert, that any expert called by the government would not have had an opportunity to hear the defense expert testify, and that the government would not have had an opportunity to conduct the kind of investigation needed to acquire rebuttal testimony on defendant's claim that he was especially susceptible to inducement. Consequently, rule 12.2(b) has been expanded to cover all of the aforementioned situations.

Note to Subdivision (c). The amendment of the first sentence of subdivision (c), recognizing that the government may seek to have defendant subjected to a mental examination by an expert other than a psychiatrist, is prompted by the same considerations discussed above. Because it is possible that the defendant will submit to examination by an expert of his own other than a psychiatrist, it is necessary to recognize that it will sometimes be appropriate for defendant to be examined by a government expert other than a psychiatrist. The last sentence of subdivision (c) has been amended to more accurately reflect the Fifth Amendment considerations at play in this context. See *Estelle v. Smith, 451 U.S. 454 (1981),* holding that self-incrimination protections are not inevitably limited to the guilt phase of a trial and that the privilege, when applicable, protects against use of defendant's statement and also the fruits thereof, including expert testimony based upon defendant's statements to the expert. Estelle also intimates that "a defendant can be required to submit to a sanity examination," and presumably some other form of mental examination, when "his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."

Note to Subdivision (d). The broader term "mental condition" is appropriate here in light of the above changes to subdivisions (b) and (c).

Note to Subdivision (e). New subdivision (e), generally consistent with the protection afforded in rule 12.1(f) with respect to notice of alibi, ensures that the notice required under subdivision (b) will not deprive the defendant of an op-

portunity later to elect not to utilize any expert testimony. This provision is consistent with *Williams v. Florida, 399 U.S. 78 (1970),* holding the privilege against self-incrimination is not violated by requiring the defendant to give notice of a defense where the defendant retains the "unfettered choice" of abandoning the defense.

Dissenting statement of Justice O'Connor to 1983 Amendment. With one minor reservation, I join the Court in its adoption of the proposed amendments. They represent the product of considerable effort by the Advisory Committee, and they will institute desirable reforms. My sole disagreement with the Court's action today lies in its failure to recommend correction of an apparent error in the drafting of Proposed Rule 12.2(e).

As proposed, Rule 12.2(e) reads:

"Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention."

Identical language formerly appeared in *Fed. Rules Crim. Proc. 11(e)(6)* and *Fed. Rules Evid. 410,* each of which stated that

"[Certain material] is not admissible in any civil or criminal proceeding against the defendant."

Those rules were amended, *Supreme Court Order April 30, 1979, 441 U.S. 970, 987, 1007,* Pub. Law 96-42, approved July 31, 1979, 93 Stat. 326. After the amendments, the relevant language read,

"[Certain material] is not, in any civil or criminal proceeding, admissible against the defendant."

As the Advisory Committee explained, this minor change was necessary to eliminate an ambiguity. Before the amendment, the word "against" could be read as referring either to the kind of proceeding in which the evidence was offered or to the purpose for which it was offered. Thus, for instance, if a person was a witness in a suit but not a party, it was unclear whether the evidence could be used to impeach him. In such a case, the *use* would be against the person, but the *proceeding* would not be against him. Similarly, if the person wished to introduce the evidence in a proceeding in which he was the defendant, the use, but not the proceeding, would be against him. To eliminate the ambiguity, the Advisory Committee proposed the amendment clarifying that the evidence was inadmissible against the person, regardless of whether the particular proceeding was against the person. See Adv. Comm. Note to *Fed. Rules Crim. Proc. 11(e)(6)*; Adv. Comm. Note to *Fed. Rules Evid. 410.*

The same ambiguity inheres in the proposed version of Rule 12.2(e). We should recommend that it be eliminated now. To that extent, I respectfully dissent.

Repeal of 1984 amendments of subsecs. (b) and (d). Act Oct. 30, 1984, P.L. 98-596, § 11(b), 98 Stat. 3138, applicable on and after enactment of Act Oct. 12, 1984, P.L. 98-473, 98 Stat. 1837, on Oct. 12, 1984, as provided by § 11(c) of Act Oct. 30, 1984, repealed the amendments made to subsecs. (b) and (d) of this section by Act Oct. 12, 1984, P.L. 98-473, § 404(b) and (d); see the 1984 Amendment notes to this section.

Application of Oct. 30, 1984 amendments. Act Oct. 30, 1984, P.L. 98-596, § 11(c), 98 Stat. 3128, provides: "The amendments and repeals made by subsections (a) and (b) of this section [amending this rule and repealing amendments made by Act Oct. 12, 1984, Title II, Ch IV, § 404(b), (d), 98 Stat. 2067; see 1984 Amendment notes] shall apply on and after the enactment of the joint resolution entitled 'Joint resolution making continuing appropriations for the fiscal year 1985, and for other purposes', H.J. Res. 648, Ninety-eighth Congress [Act Oct. 12, 1984, P.L. 98-473, 98 Stat. 1837; enacted on Oct. 12, 1984].".

Notes of Advisory Committee on 1985 amendments. *Note to Subdivision (e).* This clarifying amendment is intended to serve the same purpose as a comparable change made in 1979 to similar language in Rule 11(e)(6). The change makes it clear that evidence of a withdrawn intent is thereafter inadmissible against the person who gave the notice in any civil or criminal proceeding, without regard to whether the proceeding is against that person.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 2002 amendments. The language of Rule 12.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The substantive changes to Rule 12.2 are designed to address five issues. First, the amendment clarifies that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt. Second, the defendant is required to give notice of an intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding. Third, the amendment addresses the ability of the trial court to order a mental examination for a defendant who has given notice of an intent to present evidence of mental condition during capital sentencing proceedings and when the results of that examination may be disclosed. Fourth, the amendment addresses the timing of disclosure of the results and reports of the defendant's expert examination. Finally, the amendment extends the sanctions for failure to comply with the rule's requirements to the punishment phase of a capital case.

Under current Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As several courts have recognized, the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings. See, e.g., *United States v. Beckford, 962 F. Supp. 748, 754-64 (E.D. Va. 1997); United States v. Haworth, 942 F. Supp. 1406, 1409 (D.N.M. 1996).* The amendment adopts that view.

Revised Rule 12.2(c)(1) addresses and clarifies the authority of the court to order mental examinations for a defendant -- to determine competency of a defendant to stand trial under *18 U.S.C. § 4241*; to determine the defendant's sanity at the time of the alleged offense under *18 U.S.C. § 4242*; or in those cases where the defendant intends to present expert testimony on his or her mental condition. Rule 12.2(c)(1)(A) reflects the traditional authority of the court to order competency examinations. With regard to examinations to determine insanity at the time of the offense, current Rule 12.2(c) implies that the trial court may grant a government motion for a mental examination of a defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, *18 U.S.C. § 4242*, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination. Revised Rule 12.2(c)(1)(B) now conforms the rule to § 4242. Any examination conducted on the issue of the insanity defense would thus be conducted in accordance with the procedures set out in that statutory provision.

Revised Rule 12.2(c)(1)(B) also addresses those cases where the defendant is not relying on an insanity defense, but intends to offer expert testimony on the issue of mental condition. While the authority of a trial court to order a mental examination of a defendant who has registered an intent to raise the insanity defense seems clear, the authority under the rule to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. See, e.g., *United States v. Stackpole, 811 F.2d 689, 697 (1st Cir. 1987); United States v. Buchbinder, 796 F.2d 910, 915 (1st Cir. 1986);* and *United States v. Halbert, 712 F.2d 388* (9th Cir. 1983). In *United States v. Davis, 93 F.3d 1286 (6th Cir. 1996),* however, the court in a detailed analysis of the issue concluded that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. The court noted first that the defendant could not be ordered to undergo commitment and examination under *18 U.S.C. § 4242*, because that provision relates to situations when the defendant intends to rely on the defense of insanity. The court also rejected the argument that the examination could be ordered under Rule 12.2(c) because this was, in the words of the rule, an "appropriate case." The court concluded, however, that the trial court had the inherent authority to order such an examination.

The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c)(1)(B) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. See, e.g., *United States v. Hall, 152 F.3d 381 (5th Cir. 1998),* cert. denied, *119 S. Ct. 1767 (1999).*

The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.

The amendment leaves to the court the determination of what procedures should be used for a court-ordered examination on the defendant's mental condition (apart from insanity). As currently provided in the rule, if the examination is being ordered in connection with the defendant's stated intent to present an insanity defense, the procedures are dictated by *18 U.S.C. § 4242*. On the other hand, if the examination is being ordered in conjunction with a stated intent to present expert testimony on the defendant's mental condition (not amounting to a defense of insanity) either at the guilt or sentencing phases, no specific statutory counterpart is available. Accordingly, the court is given the discretion to specify the procedures to be used. In so doing, the court may certainly be informed by other provisions, which address hearings on a defendant's mental condition. See, e.g., *18 U.S.C. § 4241*, et seq.

Additional changes address the question when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. See *Estelle v. Smith, 451 U.S. 454 [68 L. Ed. 2d 359]* (1981) (defendant's privilege against self-incrimination violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements during capital sentencing hearing). But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. See, e.g., *Powell v. Texas, 492 U.S. 680, 683-84 [106 L. Ed. 2d 551, 555]* (1989); *Buchanan v. Kentucky, 483 U.S. 402, 421-24 [97 L. Ed. 2d 336, 354]* (1987); *Presnell v. Zant, 959 F.2d 1524, 1533* (11th Cir. 1992); *Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir. 1987); United States v. Madrid, 673 F.2d 1114, 1119-21*

(10th Cir. 1982). That view is reflected in Rule 12.2(c), which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. What the current rule does not address is if, and to what extent, the prosecution may see the results of the examination, which may include the defendant's statements, when evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding.

The proposed change in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of an intent to introduce expert mental-condition evidence in the sentencing phase. See, e.g., *United States v. Beckford, 962 F. Supp. 748 (E.D. Va. 1997).* Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. See, e.g., *United States v. Hall, supra, 152 F.3d at 398* (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Except as provided in Rule 12.2(c)(3), the rule does not address the time for disclosing results and reports of any expert examination conducted by the defendant. New Rule 12.2(c)(3) provides that upon disclosure under subdivision (c)(2) of the results and reports of the government's examination, disclosure of the results and reports of the defendant's expert examination is mandatory, if the defendant intends to introduce expert evidence relating to the examination.

Rule 12.2(c), as previously written, restricted admissibility of the defendant's statements during the course of an examination conducted under the rule to an issue respecting mental condition on which the defendant "has introduced testimony" -- expert or otherwise. As amended, Rule 12.2(c)(4) provides that the admissibility of such evidence in a capi l sentencing proceeding is triggered only by the defendant's introduction of expert evidence. The Committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.2(d) has been amended to extend sanctions for failure to comply with the rule to the penalty phase of a capital case. The selection of an appropriate remedy for the failure of a defendant to provide notice or submit to an examination under subdivisions (b) and (c) is entrusted to the discretion of the court. While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." *Taylor v. Illinois, 484 U.S. 400, 414 n.19 [98 L. Ed. 2d 798, 814]* (1988) (citing *Fendler v. Goldsmith, 728 F.2d 1181* (9th Cir. 1983)).

Notes of Advisory Committee on 2005 amendments. The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to relate only to the evidence related to the matters addressed in the report, which the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)--which can substantially affect the entire hearing--the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed, as required in Rule 12.2(c)(3).

The rule assumes that the sanction of exclusion will result only where there has been a complete failure to disclose the report. If the report is disclosed, albeit in an untimely fashion, other relief may be appropriate, for example, granting a continuance to the government to review the report.

OHIO RULES OF COURT SERVICE
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*** RULES CURRENT THROUGH APRIL 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules of Professional Conduct
I. CLIENT-LAWYER RELATIONSHIP

Ohio Prof. Cond. Rule 1.2 (2011)

Review Court Orders which may amend this Rule.

Rule 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

(b) [RESERVED]

(c) A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

NOTES:

Comment

Allocation of Authority between Client and Lawyer

[1] Division (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in division (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, law-

yers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is guided by reference to Rule 1.14.

[4A] Division (a) makes it clear that regardless of the nature of the representation the lawyer does not breach a duty owed to the client by maintaining a professional and civil attitude toward all persons involved in the legal process. Specifically, punctuality, the avoidance of offensive tactics, and the treating of all persons with courtesy are viewed as essential components of professionalism and civility, and their breach may not be required by the client as part of the representation.

Independence from Client's Views or Activities

[5] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] [RESERVED]

[7] Although division (c) affords the lawyer and client substantial latitude in defining the scope of the representation, any limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

[7A] Written confirmation of a limitation of a new or existing representation is preferred and may be any writing that is presented to the client that reflects the limitation, such as a letter or electronic transmission addressed to the client or a court order. A lawyer may create a form or checklist that specifies the scope of the client-lawyer relationship and the fees to be charged. An order of a court appointing a lawyer to represent a client is sufficient to confirm the scope of that representation.

[8] All agreements concerning a lawyer's representation of a client must accord with the Ohio Rules of Professional Conduct and other law. See, *e.g.*, Rules 1.1, 1.8 and 5.6.

Illegal, Fraudulent and Prohibited Transactions

[9] Division (d) prohibits a lawyer from knowingly counseling or assisting a client to commit an illegal act or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between pre-

senting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

[10[When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. See Rules 3.3(b) and 4.1(b).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12[Division (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate illegal or fraudulent avoidance of tax liability. Division (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of division (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13[If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Comparison to former Ohio Code of Professional Responsibility

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules.

Model Rule 1.2(b) has been moved to Comment [5] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language "criminal" was changed to "illegal" in Rule 1.2(d), and Model Rule 1.2(d) was split into two sentences in Rule 1.2(d).

Rule 1.2(e) does not exist in the Model Rules.

Decisions Under Former Law

Access to legal representation Breach of courtroom decorum Contract of employment Denial of continuance Discharge for consulting attorney Disqualification of attorney Duty of attorney Duty to counsel client Illegal drugs as payment for services Misrepresenting defendant's record

Access to legal representation

When an employee, upon being told that her annual bonus income would be reduced by 50 percent, said she would consult an attorney and was discharged a week later for threatening another employee, it was error to grant summary judgment to her employer on a claim of wrongful discharge in violation of public policy on the theory that her threat to consult an attorney was distinct from an actual consultation and was not a protected activity giving rise to a claim of termination in violation of public policy because this was a distinction without a difference, and provisions in Ohio Const. art. I, § 16 and Ohio Code Prof. Resp. EC 1-1 and 2-1, encouraging employees to consult an attorney regarding possible claims that would affect an employer's business interests showed that the employer's claim that the termination was valid was a factual issue which had to be submitted to the trier of fact. *Newcomb v. Hostetler Catering, Inc., -- Ohio App. 3d --, 2007 Ohio 361, -- N.E. 2d --, 2007 Ohio App. LEXIS 309* (Jan. 29, 2007).

When considering sources of public policy that encouraged employees to consult an attorney about possible claims that would affect an employer's business interests, the Ohio Constitution gave the Ohio Supreme Court the authority to adopt the Code of Professional Responsibility (CPR), and the CPR contained two provisions which helped to show that encouraging individuals to consult an attorney was a clear public policy in Ohio. Ohio Code Prof. Resp. EC 1-1 stated that every person in society should have ready access to the independent professional services of a lawyer of integrity and competence, and Ohio Code Prof. Resp. EC 2-1 stated that the need of members of the public for legal services was met only if they recognized their legal problems, appreciated the importance of seeking legal assistance, and were able to obtain the services of acceptable legal counsel. Important functions of the legal profession were to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available, and it would be inappropriate to engraft upon the CPR the caveat "however, if a claim is against the potential client's employer, the attorney must advise the client that she might lose her livelihood simply for consulting the attorney." *Newcomb v. Hostetler Catering, Inc., -- Ohio App. 3d --, 2007 Ohio 361, -- N.E. 2d --, 2007 Ohio App. LEXIS 309* (Jan. 29, 2007).

Breach of courtroom decorum

Respondent's zealous representation of his client pursuant to Canon 7 was no excuse for his disrespectful, discourteous behavior which resulted in a serious breach of courtroom decorum: *Bar Asso. of Greater Cleveland v. Milano, 9 Ohio St. 3d 86, 459 N.E.2d 496, 1984 Ohio LEXIS 1011 (1984).*

Contract of employment

Attorney was suspended for one year with that suspension stayed based upon the attorney's admission and several mitigators, including his severe depression, and willingness to get treatment, after the attorney filed a personal injury action for a client then dismissed it without the client's consent and did not refile within the statute of limitations period; the attorney violated Ohio Code Prof. Resp. DR 1-102(A)(5), 6-101(A)(3), 7-101(A)(2), 7-101(A)(3) and Ohio Sup. Ct. R. Gov't Bar V(4)(G). *Akron Bar Ass'n v. Goodlet, 99 Ohio St. 3d 355, 2003 Ohio 3935, 792 N.E. 2d 1072, 2003 Ohio LEXIS 2104* (Aug. 6, 2003).

Attorney's license to practice law was suspended for one year, stayed for six months on conditions of his repaying his client, based on findings of misconduct, including the neglect of a client's case and failure to account for unearned fees. The attorney violated former Ohio Code Prof. Resp. 6-101(A)(3), 7- 101(A)(2), and 9-102(B)(4) by abandoning his client and ignoring requests for her file and an accounting. *Cuyahoga County Bar Ass'n v. Peto, -- Ohio St. 3d --, 2007 Ohio 5250, -- N.E. 2d --, 2007 Ohio LEXIS 2520* (Oct. 10, 2007).

Denial of continuance

Where a trial court denies a continuance in a criminal trial and, as a consequence, defense counsel refuses to participate in the trial for fear that the defendant would receive ineffective assistance of counsel and that counsel would be in violation of DR 6-101(A)(2) and 7-101(A)(3), the court may commit error under the circumstances of the particular case in finding defense counsel in contempt and in imposing a fine: *In re Sherlock, 37 Ohio App. 3d 204, 525 N.E.2d 512, 1987 Ohio App. LEXIS 10607 (1987).*

Discharge for consulting attorney

When considering sources of public policy that encouraged employees to consult an attorney about possible claims that would affect an employer's business interests, the Ohio Constitution gave the Ohio Supreme Court the authority to adopt the Code of Professional Responsibility (CPR), and the CPR contained two provisions which helped to show that

encouraging individuals to consult an attorney was a clear public policy in Ohio. Ohio Code Prof. Resp. EC 1-1 stated that every person in society should have ready access to the independent professional services of a lawyer of integrity and competence, and Ohio Code Prof. Resp. EC 2-1 stated that the need of members of the public for legal services was met only if they recognized their legal problems, appreciated the importance of seeking legal assistance, and were able to obtain the services of acceptable legal counsel. Important functions of the legal profession were to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available, and it would be inappropriate to engraft upon the CPR the caveat "however, if a claim is against the potential client's employer, the attorney must advise the client that she might lose her livelihood simply for consulting the attorney." *Newcomb v. Hostetler Catering, Inc., -- Ohio App. 3d --, 2007 Ohio 361, -- N.E. 2d --, 2007 Ohio App. LEXIS 309* (Jan. 29, 2007).

Disqualification of attorney

Trial court erred when it disqualified the attorneys. There was no evidence to aid the trial court in determining whether their testimony would have been admissible or whether their testimony would have prejudiced their client such that the presumption of continued representation in Ohio Code Prof. Resp. DR 1-502(B) should not have applied. *Hall v. Tucker, 169 Ohio App. 3d 520, 2006 Ohio 5895, 863 N.E.2d 1064, 2006 Ohio App. LEXIS 5833 (2006).*

Duty of attorney

Attorney did not violate his professional duty as stated in Ohio Code Prof. Resp. EC 7-8 when he pursued suit against the buyers of certain property belonging to the client in the face of the client's alleged protestations to the contrary. Specific documentary evidence showed that the client assigned his interests in the property to the attorney, and this assignment provided evidence of the client's ratification of the attorney's course of conduct. *Augusta v. Lemieux, -- Ohio App. 3d --, 2006 Ohio 6696, -- N.E. 2d --, 2006 Ohio App. LEXIS 6594* (Dec. 15, 2006).

Multiple attorneys who represented a minor passenger, a minor driver, and their respective parents in actions against each other, alleging claims of negligence and loss of consortium arising from a vehicle accident that each party blamed on the other, had ethical obligations to represent the clients' interest, as expressed by the client, pursuant to Ohio Code Prof. Resp. EC 7-7 and 7-8. There was no ethical violation found by the attorneys' conduct, as they each were acting in independent roles, and the client did not have the burden of electing which course of action to take, where such choice would have entitled abandoning either his defense or his pursuit of a claim. *Jacobs v. McAllister, -- Ohio App. 3d --, 2006 Ohio 123, -- N.E. 2d --, 2006 Ohio App. LEXIS 94* (Jan. 13, 2006).

Where an attorney apparently converted a client's funds and failed to respond to a disciplinary investigation, the attorney violated Ohio Code Prof. Resp. DR 1-102(A)(4), 1-102(A)(6), 6-101(A)(3), 7-101(A)(2), 9-102(B)(3), and Ohio Sup. Ct. R. Gov't Bar V(4)(G); as a result, the attorney was suspended indefinitely from the practice of law. *Office of Disciplinary Counsel v. Smith, 101 Ohio St. 3d 27, 2003 Ohio 6623, 800 N.E. 2d 1129, 2003 Ohio LEXIS 3437* (Dec. 31, 2003).

Duty to counsel client

Where an attorney violated Ohio Code Prof. Resp. DR 6-101(A)(3), 7-101(A)(2), 1-102(A)(4) and 9-102(B)(4) by seriously neglecting clients' cases, deceiving the clients, and failing to return client funds, and thereafter ignored investigative inquiries and disciplinary proceedings in violation of Ohio Sup. Ct. R. Gov't Bar V(4)(G), and failed to present any mitigating evidence pursuant to Ohio Sup. Ct. R. Gov't Bar V(10)(B)(2), the attorney was disbarred. *Toledo Bar Ass'n v. Pommeranz, 102 Ohio St. 3d 26, 2004 Ohio 1586, 806 N.E. 2d 509, 2004 Ohio LEXIS 703* (Apr. 14, 2004).

Under EC 7-8, an attorney has a duty to counsel a client as to appropriate courses of action, not merely to serve as a "hired gun" executing the client's wishes: *Disciplinary Council v. Hardesty, 80 Ohio St. 3d 444, 1997 Ohio 329, 687 N.E.2d 417, 1997 Ohio LEXIS 3137 (1997).*

Illegal drugs as payment for services

Accepting illegal drugs as payment for legal services violates both DR 2-106(A) and 7-102(A)(7): *Columbus Bar Asso. v. Cockrum, 21 Ohio St. 3d 51, 487 N.E.2d 314, 1986 Ohio LEXIS 523 (1986).*

Misrepresenting defendant's record

Under DR 7-102, a criminal defense lawyer is prohibited from misrepresenting a client's prior record: *Cincinnati Bar Ass'n v. Nienaber, 80 Ohio St. 3d 534, 1997 Ohio 314, 687 N.E.2d 678, 1997 Ohio LEXIS 3159 (1997).*