

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2013-0414
Appellant/Cross-Appellee, : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
JOSEPH HARRIS, : Court of Appeals
Case No. C110472A
Appellee/Cross-Appellant. :

APPELLEE/CROSS-APPELLANT'S COMBINED MEMORANDUM IN OPPOSITION
TO APPELLANT/CROSS-APPELLEE'S MEMORANDUM IN SUPPORT OF
JURISDICTION AND CROSS-APPELLANT'S MEMORANDUM IN SUPPORT OF
JURISDICTION

Wendy R. Calaway (0069638)
The Law Office of Wendy R. Calaway Co., LPA
810 Sycamore Street, Suite 117
Cincinnati, Ohio 45202
Telephone (513) 351-9400
Facsimile (513) 621-8703

Counsel for Appellee/Cross-Appellant, Joseph Harris

Judith Anton Lapp (008687)
Assistant Prosecutor
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Telephone (513) 946-9400
Facsimile (513) 946-3021

Counsel for Appellant/Cross-Appellee, State of Ohio

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The issue raised by the State in this case has been well settled by Ohio and Federal law. The State used a psychiatrist, who was ordered by the trial court to examine the defendant for competency, as an expert witness in the state's case in chief to call the defendant a liar and to generally opine on his bad character. This was done during the state's case in chief even though the state knew that the defendant did not intend to offer a mental health defense and when in fact the defendant did not do so. This testimony violated defendant's Fifth, Sixth and Fourteenth Amendment rights, is expressly forbidden by United States Supreme Court precedent, Ohio Supreme Court precedent, Ohio rules and Ohio statutes. This particular case presents one of the most egregious violations of United States Supreme Court and Ohio Supreme Court precedent in this area. There is no confusion on this issue. The state has cited no case which allows it to call an expert witness during the state's case in chief to impeach the character of a defendant, offer opinions about his credibility, nor to opine regarding the defendant's mental processes. Indeed the notion that such evidence would be permitted undermines the basic notions of a fair trial and due process of law. The court of appeals correctly decided this issue.

EXPLANATION OF WHY APPELLEE/CROSS-APPELLANT'S LEAVE TO APPEAL SHOULD BE GRANTED

The failure to demonstrate some evidence that a robbery occurred is insufficient as a matter of law to sustain a conviction for aggravated robbery and aggravated murder. In this case, appellee/cross-appellant (hereinafter Defendant) was convicted of aggravated murder premised upon his commission of aggravated robbery in the commission of a murder where no robbery occurred. The evidence at trial demonstrated conclusively that the decedent was not robbed. The allegation was that Defendant went to sell the decedent drugs and during the course of that sale, the decedent was shot. Nothing was stolen from the decedent. He was found in his car with

his wallet, his gun and over \$200.00 in cash. All of the physical evidence supported Defendant's testimony that no robbery occurred. The state introduced evidence of jailhouse informants who testified that Mr. Harris admitted to robbing the decedent. However, an extrajudicial confession is not sufficient as a matter of law to sustain a conviction. In this case, there was not a scintilla of evidence, outside of the testimony of the jailhouse snitches to support the allegation of a robbery. This Court should accept jurisdiction to reaffirm that there must be some minimum threshold of evidence other than an alleged confession, testified to by a jailhouse snitch, in order to sustain a conviction. The *corpus delicti* requirement is the law and the courts are not free to ignore it.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant, Joseph Harris, was charged by way of indictment with one count of aggravated murder in violation of R.C. 2903.01(B), a special felony with specifications, one count of murder in violation of R.C. 2903.02(B), a special felony with specifications, one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, with specifications and one count of having a weapon under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. There were numerous pre-trial motions filed in the case, including a certification of non-disclosure of witness information and a motion to compel discovery which had been withheld by the State. That motion was referred to the presiding judge of the common pleas division and an ex parte hearing was held on the issue of whether certain witness identities and statements should be revealed. The court ruled that the State was permitted to withhold that information. There was also a suggestion of incompetency filed by the defense and a pleas of not guilty by reason of insanity. The court ultimately ruled that Mr. Harris was competent to stand trial. Counsel for Mr. Harris also filed a notice of alibi.

The case ultimately proceeded to a trial by jury, whereupon Mr. Harris was found guilty as charged. The case was continued for sentencing. After hearing from both sides at the sentencing hearing the court imposed a sentence of life without the possibility of parole on count one, plus three years on the firearm specification, eight years on count three, plus three years on the firearm specification and five years on count four. Count two was merged into count one and the firearm specifications merged for sentencing purposes. The total aggregate sentence was life without parole, plus 16 years in the Ohio Department of Corrections.

In the early morning hours of September 26, 2010, Shane Gulleman, a resident of Indiana, went to the area of Winton Terrace in Hamilton County, Ohio for the purpose of purchasing drugs. The State alleged that he was there to meet with Joseph Harris and that Mr. Harris went to meeting Gulleman with co-defendant Ryan Bennie. Mr. Harris entered Gulleman's vehicle to negotiate the drug sale when Mr. Harris saw Gulleman reach for a gun. Mr. Harris responded by shooting Gulleman and killing him. Mr. Harris then fled the scene. Gulleman was found in the car with his wallet and \$210.00 in cash.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Where a competency evaluation of a defendant is ordered by the court it is a violation of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution to allow evidence of the psychiatrist's opinions and statements of the defendant derived thereby to be used against the defendant in the state's case in chief.

The Fifth Amendment privilege against self incrimination is "as broad as the mischief against which it seeks to guard." *Estelle v. Smith* (1981), 451 U.S. 454, 467, 101 S.Ct. 1866. The Fifth Amendment privilege serves persons in all settings in which their freedom of action is curtailed in against significant way from being compelled to incriminate themselves. *Miranda v. Arizona* (1966), 384 U.S. 436, 467, 86 S.Ct. 1602, 1624. The prosecution may not use

statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination. *Id.* at 444. A person in custody must receive certain warnings before any official interrogation, including, that he has a right to remain silent and that anything he says can and will be used against him in court. *Id.* The considerations calling for the accused to be warned prior to custodial interrogation apply to a court ordered pre-trial examination. *Estelle*, 451 U.S. at 467; *see also Buchanan v. Kentucky* (1987), 483 U.S. 402, 107 S.Ct. 2906.

In *Estelle* the defendant was in the custody of the county jail awaiting trial on charges of murder. *Estelle*, 451 U.S. at 467. The court *sua sponte* ordered a competency evaluation and a court appointed psychiatrist met with the defendant. *Id.* The state used the findings and conclusions of the psychiatrist during its case in chief in the penalty phase of the trial. The psychiatrist's conclusions relied upon statements made by the defendant. In finding that the evidence violated defendant's Fifth Amendment rights, the Court held that the facts that the defendant's statements were uttered in the context of a psychiatric examination does not remove them from the reach of the Fifth Amendment. Further, the Court found that the trial judge had ordered the evaluation for the "limited, neutral purpose of determining competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to [defendant]." *Id.* at 465 The Court found that under these circumstances, the interview by the psychiatrist could not be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and ensuring he was capable to assist in his own defense. *Id.*

In *Buchanan*, the Supreme Court reaffirmed the holding in *Estelle*. *See Buchanan* 483 U.S. at 421; *see also Powell v. Texas* (1989), 492 U.S. 680, 109 S.Ct. 3146. In *Buchanan*, the

court noted that there may be **limited circumstances for rebuttal purposes** in which the Fifth Amendment would not bar the introduction of evidence regarding a court ordered psychiatric evaluation.

The Ohio Supreme Court has concurred in this analysis, finding that only where the defendant puts the issue of mental status at issue, may the state use psychological analysis of a defendant and then, only in rebuttal. *State v. Goff* (2010), 128 Ohio St.3d 169, 181-182, 942 N.E.2d 1075. In that case, the defendant raised the affirmative defense of battered woman syndrome and the court ordered the defendant to submit to an examination by the state's psychiatrist. *Id.* The Court found that the state's use of that evidence was improper requiring a reversal of the conviction. *Id.* The Court noted that, "[p]sychiatric testimony is one thing - testifying about discrepancies regarding the defendant's recitation of facts and questioning the truth of her representations . . ." went beyond the scope of the purpose of the psychiatric examination and that the expert's role changed and became like that of an agent of the state as in *Estelle. Id.* at 182.

In the case at bar, defense counsel alerted the court that there may be an issue with regard to Mr. Harris' competency to stand trial. The court then ordered that Mr. Harris be evaluated for his competency to stand trial. The court ordered psychologist conducted one interview with Mr. Harris. There is no evidence that Mr. Harris was advised of his *Miranda* rights. After obtaining a report from the court appointed psychologist, the court found Mr. Harris competent to stand trial. During the State's case in chief, the prosecutor called the court appointed psychologist, Carla Dreyer as a witness. During the State's case in chief, the prosecutor elicited testimony from Dr. Dreyer regarding statements that Mr. Harris made during the examination. Based upon statements that Mr. Harris made to Dr. Dreyer, Dr. Dreyer formed the opinion that Mr. Harris was

a liar. Further, the State elicited testimony from Dr. Dryer that based upon her conversations with Mr. Harris that he had antisocial personality disorder, that is characterized by disregarding the rights of others, that he had a history of impulsivity, aggressiveness, irresponsibility, lack of regard for the rights of others and lack of remorse.

This testimony mirrors closely the testimony offered by the psychiatrist in *Estelle*. In that case, the doctor testified before the jury in the state's case in chief, that the defendant was a severe sociopath, will continue his previous behavior, that his sociopathic condition will only get worse and that he had no regard for another human being's property or life. The Court in *Estelle* rejected the state's argument that the conversation between the psychiatrist and the defendant were non-testimonial in nature, finding that the State's use of the information for a much broader purpose than that for which it was intended, i.e. competency evaluation, was plainly adverse to the defendant and implicated the Fifth Amendment.

B. Introduction of evidence of the psychiatrist's competency evaluation violated Defendant's Sixth Amendment right to counsel.

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. The need for a lawyer's advice and aid during the pre-trial phase has been long recognized by the Court. *See e.g. Powell v. Alabama* (1932), 287 U.S. 45, 57, 53 S.Ct. 55. It is central to the Sixth Amendment principle that the accused need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. *United States v. Wade* (1967), 388 U.S. 218, 226-227, 87 S.Ct. 1926. The right to counsel encompasses the right to the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 749, 771; *see also Strickland v. Washington* (1984) 466 U.S. 668. An

attorney's ability to effectively advise a client with regard to a competency evaluation, an insanity defense or the assertion of a Fifth Amendment privilege, depends upon counsel's awareness of the possible uses to which the client's statements can be put. *Buchanan*, 483 U.S. at 425; citing *Estelle*, 451 U.S. at 471. Where defense counsel is not notified in advance that a competency evaluation will encompass issues regarding a client's general character and that it will be available to the state for use in its case in chief, he cannot effectively advise his client with regard such an examination. *Estelle*, 451 U.S. at 471. In *Estelle*, the Court found that defense counsel was not notified in advance of the scope of the competency evaluation and that therefore, defendant was denied his Sixth Amendment right to the effective assistance of counsel in making the "significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* The *Buchanan* Court held that counsel's effectiveness depends on the awareness of possible uses of defendant's statements. *Buchanan*, 483 U.S. at 425.

In the case at bar, counsel filed a suggestion of incompetency and the court ordered a competency evaluation. Unlike the defendant in *Buchanan*, in this case, the State introduced the evidence in its case in chief; Mr. Harris did not present a mental status defense, nor did he present any psychological evidence. Competency evaluations are governed by statute and there is no reason to believe that the Court, the court appointed psychologist and the parties would not follow the statute regarding the nature, scope and purpose of the competency evaluation. *See* R.C. 2925.37, *et seq.* Indeed, the statute even prohibits the use of competency evaluations in the manner used by the State in this case. *See* R.C. 2945.371(J). Furthermore, the Ohio Supreme Court has determined that a defendant's statements made in the course of a court-ordered psychological examination may only be used in rebuttal to refute his assertion of mental

incapacity. *State v. Hancock* (2006), 108 Ohio St.3d 57, 65, 840 N.E.2d 1032; *State v. Cooney* (1989), 46 Ohio St. 3d 20, 32, 544 N.E.2d 895, 911 (*overruled on other grounds by State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668). Defense counsel in this case was not notified in advance of the nature and scope of the competency evaluation and as such Mr. Harris was deprived of his right to counsel.

C. Introduction of evidence of the competency evaluation was improper character evidence introduced in violation Evid. R. 404 and violated Defendant's Fourteenth Amendment right to a fair trial and due process of law.

Evidence of other crimes, wrongs or bad acts independent of, and unrelated to, the offenses for which a defendant is on trial is inadmissible to show criminal propensity. *State v. Woodward* (1993), 68 Ohio St.3d 70, 623 N.E.2d 75. The basic thrust of Evidence Rule 404 concerns the propensity rule, which is a basic principle for the purpose of proving that he acted in conformity with his character on a particular occasion. *State v. Taylor* (March 26, 2004), Ohio App. 1st Dist., Case No. C020475, *7 It prohibits the use of propensity to demonstrate actions conforming to the propensity. *Id.* It creates a forbidden inferential pattern, in which character or a trait of it is used to show propensity and to demonstrate therefrom conforming conduct. *Id.* The policy of the rule is not based on relevance, but upon the danger of prejudice. *Id.* Evidence Rule 404(B) is to be strictly construed against admissibility. *Id.*; citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256.

In this case, the State used the court ordered psychologist, whose role was to determine if Mr. Harris was competent to stand trial, to tell the jury that, in her opinion, Mr. Harris was liar. This was not in rebuttal, but before he even had the opportunity to address the jury. After eliciting that information, the State went even further on re-direct, to provide the jury with the psychologist's opinion that Mr. Harris had antisocial personality disorder, is characterized by

disregarding the rights of others, that he had a history of impulsivity, aggressiveness, irresponsibility, lack of regard for the rights of others and lack of remorse. The state introduced all of this evidence in its case in chief, making sure that the jury knew that the state thought that Mr. Harris was a “bad person” before he even had a chance to present his case. The prosecutor reiterated all of this evidence in his closing arguments, essentially arguing that Mr. Harris had the character of a kind of a person who would commit this offense and that he acted accordingly.

This type of character evidence, presented in the state’s case in chief against the defendant undermines the very notions of fairness and due process that the Constitution protects. This is especially true in light of the Fifth and Sixth Amendment violations that led to the acquisition of the information. It is simply not fair for a man to be on trial for his life and not be afforded the opportunity to investigate a competency defense without fear that the psychologist will be used against him in this fashion. This evidence undermines, not only, the reliability of the verdict, but any confidence in the fairness of the process.

Proposition of Law No. 2: Where the state fails to introduce any evidence that a robbery occurred, extrajudicial statements of the defendant alone are insufficient to sustain a conviction for aggravated robbery and aggravated murder under the Fourteenth Amendment to the United States Constitution.

While the State may rely upon circumstantial evidence in the presentation of its case, a conviction based upon speculation and conjecture is a violation of due process. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which other reasonable factual inferences may be drawn. When making determinations about evidence, one inference may not be drawn from another inference. *Hurt v. Rogers Transportation Co.* (1955), 164 Ohio St. 329, 130 N.E.2d 820. In order for a conviction to be based on circumstantial evidence, the conclusion drawn from the evidence must be the more probable inference. *State v. Dunganitz*

(1994) 76 Ohio App.3d. 363, 367, 601 N.E.2d 642. The State must prove all the elements alleged beyond a reasonable doubt. R.C. 2901.05. Reasonable doubt is created by a contemplation of competing constructions of the evidence. *Id.*

A. There is no evidence that a robbery or an attempted robbery occurred.

The State charged Mr. Harris with aggravated murder for purposely causing the death of the decedent while purposely committing or attempting to commit a theft offense. The evidence adduced at trial was that Mr. Harris was went to meet the decedent to sell him drugs and when the decedent reached for a weapon, Mr. Harris shot him. Nothing was stolen from decedent. He was found in his car with his wallet, his gun and over \$200.00 in cash. The only evidence that exists to suggest that Mr. Harris was there that night to commit a robbery was the testimony of jail house informants, who offered testimony of what Mr. Harris allegedly told them. This testimony was not admissible because the State failed to prove the *corpus delicti* of the crime of aggravated murder.

A plea of not guilty requires the state to prove all material facts relating to the crime charged, including those facts relating to the *corpus delicti*. *State v. Mango* (1974), 38 Ohio St.2d 223. The *corpus delicti* means the body or substance of the crime. *Id.* An extrajudicial confession is not sufficient in and of itself to sustain a conviction of a crime. *State v. Maranda* (1916), 94 Ohio St. 364. Some corroborating circumstances tending to prove criminal agency should be offered by the state before such extrajudicial confession is competent. *Id.* In this case, the State may have adduced enough evidence to prove the *corpus delicti* of murder, there was no evidence of the *corpus delicti* of aggravated murder or aggravated robbery. As a matter of law, the evidence submitted on these two counts of the indictment was insufficient and the trial court should have granted the defendant's motion for acquittal. This is not a mere technicality or an

issue that can be dismissed with harmless error analysis. Mr. Harris has been sentenced to life without the possibility of parole. The State has the burden of proving each element of the offense charged beyond a reasonable doubt. The Supreme Court has held that a part of that burden is to prove the *corpus delicti* and the State is not permitted to rely on statements of the defendant to prove *corpus delicti*. The evidence submitted on counts one and three of the indictment was legally insufficient and the convictions should be reversed.

Proposition of Law No. 3: Where the prosecutor engages in repeated acts of misconduct which affect the fairness of the trial, the conviction must be set aside and a new trial ordered.

The prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious, but to see that justice shall be done. "A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but not striking foul ones." *Berger v. United States* (1935), 295 U.S. 78, 88. The prosecutor representing the State of Ohio must be held to a higher standard of professionalism. Where the prosecutor's conduct deprives the defendant of a fair trial, the conviction must be reversed. *State v. Fears* (1999), 86 Ohio St.3d 329, 715 N.E.2d 136. The prejudicial effect of the alleged misconduct must be considered in the context of the entire trial, and not simply the immediate context in which the misconduct occurred. *Id.* The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. It is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks; instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty. The prosecutor's misconduct in this case was conspicuous, repeated, pervasive and prejudicial.

Proposition of Law No.4: Where a defendant does not have the benefit of the effective assistance of counsel, the trial must be overturned and a new trial ordered.

It is axiomatic that in order for a defendant to have a fair trial and avail himself of the rights guaranteed in the Constitution, a defendant is entitled to the assistance of counsel. *See Gideon v. Wainwright* (1963) 372 U.S. 335; U.S. Constitution, XI Amendment. The Sixth Amendment right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 749, 771; *see also Strickland v. Washington* (1984) 466 U.S. 668.

Where trial counsel makes errors to the effect that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment and where this deficient performance prejudices the defense, a reversal of defendant’s conviction is required. *Strickland* 466 U.S. at 687.

To demonstrate prejudice, Mr. Harris must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Huff* (2001), 145 Ohio App. 3d 555, 560, 763 N.E.2d 695, 698-99 (2001).

Counsel in this case was ineffective in eliciting damaging testimony from the court ordered psychologist. Counsel asked questions of the psychologist regarding Mr. Harris “psychosis,” to which the psychologist responded that Mr. Harris has an antisocial personality disorder, with a propensity to engage in criminal activity and which is further marked by violating the rights of others, having little regard for the rights of others, having no remorse a history of impulsiveness and aggressiveness and that he was a substance abuser. Mr. Harris was on trial for aggravated murder, facing a sentence of life without parole, which he ultimately received. Counsel’s elicitation of this evidence was inappropriate and fell below an objective standard of reasonableness. Counsel’s ineffectiveness was prejudicial to Mr. Harris. Not only did it cast him in a very negative light before the jury, but it provided ammunition for the

prosecutor to use against him on re-direct examination and in closing argument. Counsel further failed to object when this testimony was offered by the State.

Counsel was further ineffective in failing to object to a number of instances of prosecutorial misconduct as outlined in the previous assignment of error. As previously argued, the cumulative effective of the prosecutor's misconduct was prejudicial to Mr. Harris and counsel should have objected in order to provide effective representation.

Proposition of Law No.5: Where the trial court fails to follow the procedure proscribed in Criminal Rule 16, allows the State to withhold discoverable information from the defendant, and allows the State to obtain and use undiscoverable evidence defendant's right to a fair trial as guaranteed by the Fourteenth Amendment to the U.S. Constitution is violated.

In 2010, the Ohio rule of discovery in criminal cases was completely overhauled. The purpose of the changes to the discovery procedure is announced in the first paragraph of the newly enacted rule. This purpose is expounded upon in the Staff Notes:

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

The rules now require the State to disclose the names and addresses of the witnesses they intend to call at trial, police reports, statements of witnesses and many other items. The rule also provides a provision for non-disclosure of certain information in limited circumstances. As it applies to this case, the, the prosecuting attorney must have a reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion. Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or

prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information. The rule further provides that upon motion of the defendant, that the trial court shall review the prosecutor's certification of non-disclosure, *in camera*, with counsel participating.

In this case, the prosecutor filed a certification of non-disclosure withholding the names of and other identification information for its witnesses. The certification fails to give any reasonable articulable facts regarding the case at bar. In fact, the motion filed by the prosecutor in this case is a form motion that the prosecutors routinely use, citing the same reasons to withhold discovery in almost every homicide case. This prosecutor's motion makes the outrageously bold statement that "[e]xperience has shown that intimidation is present in virtually all major criminal cases. It is impossible to predict how or when it will occur, and the only solution is preventive action." This language and most of the other language in the motion is lifted verbatim from the motions filed in all homicide cases by the prosecutor. This certification not only violates the spirit of the new Criminal Rule 16, but the letter of the rule requiring articulable grounds about the specific case at issue.

This case involved no special circumstances and did not fall under the "minority of cases" that the non-disclosure provision was intended to apply. It is simply not fair and violates the very notions of due process to expect a criminal defendant, especially one who is incarcerated pre-trial on a bond he cannot make, to be able to investigate and prepare for trial without knowing who the witnesses against him are. Furthermore, the trial court erred in failing to review this issue and make a determination. Instead, the trial court referred the case to the "presiding judge" without explanation and without authority under the Rule. The Rule provides that: "Upon motion of the defendant, the trial court shall review the prosecuting attorney's

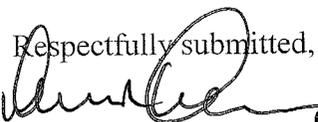
decision of non-disclosure or designation of “counsel only” material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, **with counsel participating.”**

Upon receipt of the case by the presiding judge, the judge allowed only the prosecutor and the police officers to participate in the *in camera* hearing regarding the State’s certification. Defense counsel was excluded from the hearing, in direct contravention of the explicit language of the rule.

There is no provision in the statute to refer the case to another judge for decision, no reason is articulated in the record and it was inappropriate for the trial court to do so. The discovery rule was enacted and amended to increase the access to information and thus the fairness of criminal trials. The trial court is the gatekeeper and enforcer of these rules. The trial court violated the plain dictates of the Rule with regard to the procedure for conducting hearings on these issues and abdicated its role to review the State’s certification simply rubber stamping the State’s assertions. The result was that Mr. Harris was forced to go to trial without the ability to investigate the prejudices, biases and motivations of a number of the State’s witnesses, many of whom were jailhouse informants. The Rule was enacted to make access to information more available, not less. Instead, the State is using the Rule to restrict defendant’s access to information, undermining the fairness of the process.

CONCLUSION

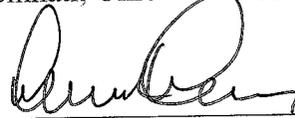
For the foregoing reasons, the State’s motion for leave to appeal should be denied and Defendant’s motion should be granted.

Respectfully submitted,


Wendy R. Calaway (0069638)
810 Sycamore Street, Suite 117
Cincinnati, Ohio 45202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to State's Memorandum in Support of Jurisdiction and Appellee/Cross-Appellant's Memorandum in Support of Jurisdiction has been served upon Judith Anton Lapp, Assistant Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 12th day of April, 2013 via regular U.S. Mail.



Wendy R. Calaway