

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2013-0414
Plaintiff-Appellant, : On Appeal from the Hamilton County
Court of Appeals, First Appellate District
vs. :
JOSEPH HARRIS : Court of Appeals Case Number
C-110472
Defendant-Appellee, :

MERIT BRIEF OF APPELLEE

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
Joseph Harris

Judith Lapp (008687)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000

Counsel for Appellant
State of Ohio

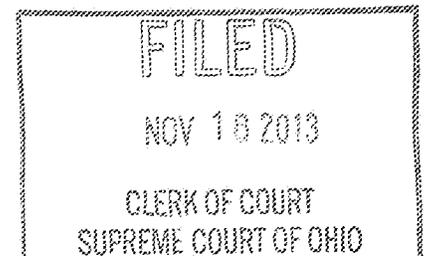
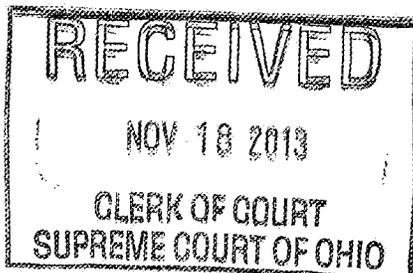


TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW 4

PROPOSITION OF LAW NO. 1: the Introduction of Opinion Testimony from an Expert Psychologist, Who Performed a Court Ordered Psychiatric Evaluation, Pursuant to R.C. 2945.371 for Purposes of a Determination Regarding a Criminal Defendant’s Competency to Stand, Trial Is Inadmissible During the State’s Case in Chief 4

 A. Ohio Revised Code §2945.371 Limits the State’s Use of Information Obtained During a Court Ordered Psychiatric Evaluation to Refuting a Mental Incapacity Defense. 4

 B. The State’s Introduction of the Expert Psychologist’s Testimony in its Case in Chief Violated Mr. Harris’ Fifth and Fourteenth Amendment Rights to be Free from Self Incrimination. 9

 C. The State’s Introduction of the Court-Appointed Expert Psychologist’s Testimony in its Case in Chief Violated Mr. Harris’ Sixth and Fourteenth Amendments Right to Counsel 15

 D. The State’s Introduction of the Court-Appointed Expert Psychologist’s Testimony in its Case in Chief Violated Mr. Harris’ Fourteenth Amendment Rights to Due Process of Law, to a Fair Trial and Equal Protection of the Law 18

 E. Mr. Harris Was Prejudiced By the State’s Use of the Court-Appointed Psychologist 21

CONCLUSION 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

CASES:

Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431 (1971) 18

Buchanan v. Kentucky, 483 U.S. 402, 107 S. Ct. 2906 (1987) 10-11, 15-17

Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981) 6, 9-13, 15-16

McMann v. Richardson, 397 U.S. 749, 771, 90 S. Ct. 1441 (1970) 15

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 1624 (1966) 9

Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55 (1932) 15

Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146 (1989) 11

State v. Brown, 65 Ohio St.3d 483, 485, 605 N.E.2d 46 (1992) 21

State v. Cooley, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989) 3-5, 7, 17, 19, 22

State v. DeMarco, 31 Ohio St.3d 191, 509 N.E.2d 1256 20

State v. Eaton, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969) 9

State v. Goff, 128 Ohio St.3d 169, 181-182, 942 N.E.2d 1075 (2010) 4, 11

State v. Harris, 1st Dist., Case No. C110472, 2013 WL 454904 (Feb. 6, 2013) 1, 3, 13

State v. Mathes, 9th Dist., Case No. CA20225, 2001 WL 651527 (June 13, 2007) 7

State v. Steffen, 31 Ohio St.3d 111, 121-122, 509 N.E.2d 383 (1987) 13

State v. Woodward, 68 Ohio St.3d 70, 623 N.W.2d 75 (1993) 19

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052(1984) 15

United States v. Wade, 388 U.S. 218, 226-227, 87 S.Ct. 1926 (1967) 15

STATUTES:

R.C. 2903.01(B) 1
R.C. 2911.01(A)(1) 1
R.C. 2923.13(A)(3) 1
R.C. 2945.371 5-6, 8, 12-14, 16, 17-18, 23

RULES:

Evid. R. 404 1, 19

STATEMENT OF THE CASE

PROCEDURAL POSTURE

Appellee, 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. (T.d. 1) The state alleged that Mr. Harris purposely caused the death of the decedent while in the commission of a robbery. (*Id.*) The state also charged Mr. Harris with one count of murder 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 R.C. 2923.13(A)(3), a felony of the third degree. (*Id.*) Counsel for Mr. Harris filed a suggestion of incompetency and a plea of not guilty by reason of insanity (NGRI). (T.d. 20-21.) The court ordered a psychiatric evaluation to be performed by the court clinic. (T.d. 22.) The court clinic psychologist found Mr. Harris competent to stand trial and opined that he did not fit the criteria for a plea of not guilty by reason of insanity. (T.d. 24.)

The case proceeded to a trial by jury, whereupon Mr. Harris was found guilty as charged. (T.d. 81-84.) The trial court sentenced Mr. Harris to life in prison without the possibility of parole on count one, plus three years on the firearm specification, eight years in prison on count three, and five years on count four. Count two was merged into count one. (T.d. 95.) The total aggregate sentence was life without parole, plus 16 years.

Mr. Harris appealed the conviction to the First District Court of Appeals, raising numerous assignments of error. (T.d. 96.) The court of appeals reversed the conviction because the state called the court ordered psychologist to testify regarding Mr. Harris' credibility, during its case in chief, in violation of R.C. 2945.371(J) and the due process clause of the Fourteenth Amendment. *State v. Harris*, 1st Dist., Case No. C110472, 2013 WL 454904 (Feb. 6, 2013). The

state filed an appeal of that decision, over which this Court has accepted jurisdiction.

STATEMENT OF FACTS

The facts of the case involve a drug transaction between the decedent and Mr. Harris. (T.p. 1219, lines 15-21.) Mr. Harris met the decedent in the decedent's car in a parking lot. (T.p. 1220, line 25.) There were no eyewitnesses to what transpired between Mr. Harris and the decedent inside the car. Mr. Harris testified that he met the decedent on the night in question to sell him drugs. (T.p. 1219, lines 19-21.) When Mr. Harris entered the vehicle, he saw the decedent reach for a gun. (T.p. 1224, lines 13-20.) Fearing he was in danger, Mr. Harris responded by shooting the decedent. (T.p. 1222, lines 1-9.) He denied taking or attempting to take anything from the decedent. (T.p. 1222, lines 11-17.) Mr. Harris fled the scene and the decedent was found in the car with his wallet, \$210.00 in cash, and his gun. (T.pp. 794-795, 802, lines 1-6.)

The only evidence offered at trial to prove the version of events alleged by the state were jailhouse and confidential informants working with the state. This evidence consisted of alleged statements made by Mr. Harris implicating himself in the offense. There was no physical evidence, nor was there testimony from any eyewitnesses to the event regarding what happened inside the car between the decedent and Mr. Harris.

In an effort to bolster the testimony of their jailhouse informants, the state called an expert witness to offer an opinion on Mr. Harris' credibility. The state called the psychologist from the court ordered competency and NGRI evaluation to offer the expert opinion that Mr. Harris was an untruthful person who was feigning mental illness in an effort to escape prosecution. (T.pp. 877-879.) The state's expert further opined that Mr. Harris suffered from an

antisocial personality disorder which is characterized by, “. . . disregarding the rights of others * * * a history of impulsivity, aggressiveness, irresponsibility, lack of regard for the rights of others, lack of remorse for their behavior and so forth.” (T.p. 921, lines 2-19.) The state then used this information to argue in closing that Mr. Harris was unable to control himself, had no boundaries, does not respect others, “commits crimes” and has no remorse. (T.p. 1361, lines 15-23.)

The court of appeals reversed the conviction finding that the state’s use of an expert psychologist in this manner violated Mr. Harris’ right to due process of law as guaranteed by the Fourteenth Amendment and specifically, violated the provisions of R.C. 2945.371(J). *State v. Harris*, 1st Dist., Case No. C110472, 2013 WL 454904, (Feb. 6, 2013). The court of appeals acknowledged that evidence of a defendant’s consciousness of guilty may be admissible in certain circumstances, however, not when the evidence is obtained pursuant to a court ordered competency or NGRI evaluation, ordered pursuant to R.C. 2945.371. *Id.* at ¶23. The statute specifically provides that “[n]o statement that a defendant makes in an evaluation or hearing under divisions (A) to (H) of this section in relation to the defendant’s competence to stand trial or to the defendant’s mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal proceeding * * *.” *Id.*, citing R.C. 2945.371(J). The court of appeals went on to cite this Court’s prior holding that, “[a] defendant’s statements made in the course of a court-ordered psychological examination may be used to refute his assertion of mental incapacity, but may not be used to show that he committed the acts constituting the offense.” *Id.*, citing *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989), and Evid. R. 404(A)(1).

ARGUMENT

I. PROPOSITION OF LAW NO. 1: THE INTRODUCTION OF OPINION TESTIMONY FROM AN EXPERT PSYCHOLOGIST, WHO PERFORMED A COURT ORDERED PSYCHIATRIC EVALUATION, PURSUANT TO R.C. 2945.371 FOR PURPOSES OF A DETERMINATION REGARDING A CRIMINAL DEFENDANT'S COMPETENCY TO STAND, TRIAL IS INADMISSIBLE DURING THE STATE'S CASE IN CHIEF.

A. Ohio Revised Code §2945.371 Limits the State's Use of Information Obtained During a Court Ordered Psychiatric Evaluation to Refuting a Mental Incapacity Defense.

Ohio Revised Code §2945.371 provides a unique and extremely narrow exception to the general proposition that the defendant in a criminal case has the right to remain silent, described in the Fifth Amendment. This statute allows access to the defendant by a neutral, court-appointed psychological examiner in two circumstances: 1) when the issue of a defendant's competence is raised (whether by the defendant, the court or another party), or 2) where the defendant enters a plea of not guilty by reason of insanity. *See* R.C. §2945.371(A). Under these two circumstances, submission to an evaluation by a court-ordered examiner is mandatory. *Id.* The reason the defendant is required to submit to this evaluation has been explained by this Court. The only reason R.C. 2945.371 requires the defendant to submit to a court-ordered examination is to "alleviate the unfairness that would result if the defendant could plead not guilty by reason of insanity, use his own psychologist's testimony to prove his plea, and block any possibility of rebuttal by refusing to submit to any other mental examination." *Cooley*, 46 Ohio St.3d at 32; *see also State v. Goff*, 128 Ohio St.3d 169, 182, 943 N.E.2d 1075.

Recognizing that forcing a defendant to subject himself to examination by a court-ordered examiner can tread on constitutional protects afforded a criminal defendant, the statute limits the

uses that can be made of the information obtained during these examinations. The statute provides that, “[n]o statement that a defendant makes in an evaluation or hearing under divisions (A) to (H) of this section relating to the defendant’s competence to stand trial or to the defendant’s mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal action or proceeding . . .” R.C. 2945.371(J).

This Court has recognized this limitation and noted that it parallels the limits placed upon the use of such information by the federal rules. *See Cooney*, 46 Ohio St.2d at 32; *citing* Fed.R.Crim.P. 12.2(c). Thus, R.C. 2945.371 prohibits the use of information obtained by an examiner during a court-ordered evaluation of a defendant during the state’s case in chief.

In the case at bar, the state took the information it obtained from the court-ordered examination and used it to procure an expert witness, the court-appointed psychologist, to offer an expert opinion on the credibility of Mr. Harris. The court-appointed psychologist offered her expert opinion that Mr. Harris was malingering, faking mental illness. She also offered the opinion that he had a propensity to engage in criminal activity, antisocial personality disorder, characterized by disregarding the rights of others, had a history of impulsivity, aggressiveness, irresponsibility, lack of regard for the rights of others and a lack of remorse. (T.p. 914, lines 24-25, 921, lines 2-19.) The state’s expert also opined, that not only Mr. Harris, but that lots of criminals have antisocial personality disorder. (T.p. 918, lines 5-12.) The state introduced all of this evidence in its case in chief, making certain that the jury knew that the state was of the opinion that Mr. Harris was a liar, a criminal and a bad person before he even had a chance to present his case. The prosecutor reiterated all of this in closing arguments, essentially arguing that Mr. Harris had the kind of character of a person who would commit the offenses and that he

acted accordingly. (T.p. 1361, lines 18-24.)

i. The State Used Statements of a Defendant Against the Defendant on the Issue of Guilt.

The state attempts to justify its actions in this case by arguing that the court-appointed expert's testimony was admissible because she did not repeat verbatim any statements made by Mr. Harris and did not testify regarding facts of the case. This position is unsupported by statute or case law. Further, the argument ignores the plain language of R.C. 2945.371 which states that "[n]o statement that a defendant makes [in an evaluation or hearing under R.C. 2945.371] shall be **used** against the defendant on the issue of guilt. . . ." R.C. 2945.371(J) (emphasis added), *see also Estelle v. Smith*, 451 U.S. 454, 460, 101 S.Ct. 1866, 1872 (1981) (finding that the court ordered psychiatrist's opinions and conclusions derived from conversations from the defendant pursuant to a court-ordered mental status examination were statements of the defendant.) The statute does not place any limitations on the kinds of statements a defendant might make. It simply says, no statement. The only things that the court-appointed expert had to base her opinion on were statements of the defendant. She testified that she obtained the information upon which she based her opinion from conversations with the defendant. (See T.p. 897, lines 10-13.) When asked for specifics about her conversations with Mr. Harris she pointed to a conversation she had with him wherein he did not understand basic court terms even though his IQ score would suggest higher intellectual functioning. (T.p. 905, lines 1-10.) No medical procedure was used to look inside Mr. Harris' brain to make the determination that he was lying. The psychologist never suggested that she was able to form her opinion just by looking at him. The basis of her opinion were statements made by Mr. Harris. The statute prohibits the state

from using these statements against Mr. Harris to prove guilt.

Furthermore, these statements of the defendant, relied upon by the expert and used against him in the state's case in chief, were used to attempt to demonstrate Mr. Harris' guilt. They were not used to refute a mental capacity defense set forth by the defendant, because he did not present a mental capacity defense. The statements were used in a systematic way throughout the state's case and in closing to try to show that Mr. Harris was a liar with a propensity for criminal activity who disregards the rights of others, was aggressive and lacked remorse. The purpose using the opinions of the expert, was to try to show that he was guilty. By introducing the expert psychologist's opinion, which was formed from statements of the defendant, in their case in chief, the state violated the statute.

The state also incorrectly argues that the statute makes a distinction between "inadmissible statements of factual guilt" and "admissible evidence of a defendant's psychological state."¹ (See Merit Brief of Appellant, p. 5.) The distinction that the statute makes is between factual guilt and mental capacity. See *Cooley*, 45 Ohio St.3d at 32. This distinction is based upon the reasons behind the enactment of the statute, that being an effort to level the playing field, in the event that the defendant pursues a mental capacity defense. This "attempt to level the playing field" is the only reason the state was privy to the statements of the defendant. Therefore, the only permissible use of the statements was to refute a mental capacity defense. The statute, does not, and cannot, consistent with the Ohio and United States Constitutions and

¹ To support this assertion, the state cites an unreported case from the Ninth District of Ohio. *State v. Mathes*, 9th Dist., Case No. CA 20225, 2001 WL 651527 (June 13, 2001). The state's reliance on this case is misplaced. The *Mathes* court incorrectly quotes this Court's holding in *Cooley* and completely ignores this Court's determination regarding the scope and purpose of information obtained from a court-ordered examination.

the Ohio Rules of Evidence, allow the state to make use of this information simply to comment generally on the defendant's psychological state. It is a well settled principle of law that the state cannot call witnesses (whether expert or lay witnesses) to testify regarding a defendant's "psychological state" absent the defendant asserting a mental capacity defense. *See* Ohio Evid. Rule 404(A), U.S. Constitution XIV Amend.. What the state advocates for in this case would be no different than calling an acquaintance of the defendant to testify that in his opinion, the defendant was a liar and a violent person who was prone to doing bad things. It does not improve the state's position that this case involves an expert witness who only had access to the defendant because the statute mandates that in order to explore a mental capacity defense, the defendant must make himself available to a court appointed examiner.

ii. The Issue of Malingering Was Not Admissible in the State's Case in Chief as Consciousness of Guilt.

Even if R.C. 2945.371 did not prohibit the introduction of testimony of the court-appointed examiner, which it does by its plain language, evidence of the defendant's alleged malingering was not admissible in the state's case in chief because it violates the prohibitions contained in Evidence Rule 404(A). Simply because the state is in possession of evidence that might be helpful to their case, does not make that evidence admissible at trial. The state attempts to liken the opinion testimony of the court-appointed expert psychologist in this case to evidence of flight, arguing that it can use "... any evidence that sheds (light) on the defendant's consciousness. . . ." (*See* Merit Brief of Appellant, p. 7.)

The state's position that it is entitled to use "any evidence that sheds light on the defendant's consciousness" is not supported by the Ohio Revised Code, the Ohio Rules of

Evidence, the Ohio Rules of Criminal Procedure, the Ohio Constitution, nor the United States Constitution. These rules provide limitations on a vast array of evidence that might otherwise be “helpful” to the states’ cases. Certainly conduct of a defendant can be used by the state in certain circumstances to demonstrate consciousness of guilt. This Court has held that “. . . flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related **conduct** are admissible as evidence of consciousness of guilt, and thus, guilt itself.” *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969) (emphasis added), *vacated on other grounds*, 408 U.S. 935, 92 S.Ct. 2857 (1972), quoting 2 Wigmore, *Evidence* 111, Section 276 (3 Ed.). The problem with the state’s position is that the use of the information obtained pursuant to the R.C. 2945.371, court-ordered examination is specifically limited by the statute that allowed them to obtain the information. Contrary to the state’s expressed position, it cannot use “any evidence” that sheds light on the defendant’s consciousness. Furthermore, even if that were not the case, the issue involved in the case at bar is not evidence of the defendant’s conduct, but opinion testimony regarding the defendant’s general character for truthfulness and propensity for criminal activity.

B. The State’s Introduction of the Expert Psychologist’s Testimony in its Case in Chief Violated Mr. Harris’ Fifth and Fourteenth Amendment Rights to be Free from Self Incrimination.

The Fifth Amendment privilege against self incrimination is “as broad as the mischief against which it seeks to guard.” *Estelle v. Smith*, 451 U.S. 454, 467, 101 S.Ct. 1866 (1981). The Fifth Amendment privilege serves persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. *Miranda v. Arizona*, 384 U.S. 436, 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*, 483 U.S. 402, 107 S.Ct. 2906.

In *Estelle* the defendant was in 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. *Id.* 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. *Id.* 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 (emphasis added). 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 the defendant 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*, 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. *Id.* In that case, the defendant's entire defense strategy was to establish the mental status defense of extreme emotional disturbance, as such, counsel for the defendant requested a psychiatric evaluation. The evidence put forward by the defense at trial was solely on that issue. Under these circumstances, the Court found that it was not a Fifth Amendment violation for the state to use evidence of the competency evaluation for the limited purpose of rebutting the defense evidence of a mental status defense.

This Court has concurred in this analysis, finding that only where the defendant puts the issue of his mental status at issue may the state use psychological analysis of a defendant, and only then in rebuttal. *See State v. Goff*, 128 Ohio St.3d 169, 181-182, 942 N.E.2d 1075 (2010). 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.* This Court acknowledged the caution that must be take in infringing on a defendant's Fifth Amendment rights. *Id.* This Court found that the state's use of the psychiatric testimony obtained from the court-ordered evaluation was improper and reversed the conviction. *Id.* "Psychiatric 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 and contemporaneously filed a plea of not guilty by reason of insanity. (T.d. 20-21.) Pursuant to R.C. 2945.371, in the State of Ohio in order for a defendant to explore a mental capacity, he must submit to a court-ordered examination on certain limited issues enunciated in the statute. (The statute does not ask for an evaluation on whether the defendant is malingering or whether he has a propensity for criminal conduct.) Accordingly, the trial court in this case ordered that Mr. Harris be evaluated for his competency to stand trial. (T.d. 24.) The court ordered psychologist conducted one interview with Mr. Harris. (T.p. 898, lines 24-25, p. 899, line 1.) 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. (T.d. 24.) During the state's case in chief, the state called the psychologist to offer her opinion that Mr. Harris was untruthful, that he had a propensity to engage in criminal activity, that he had antisocial personality disorder, that he disregards the rights of others, that he has a history of impulsivity, aggressiveness, irresponsibility, lack of regard for the rights of others and lacks remorse. (T.pp. 904-905, 914, lines 23-25, 921, lines 2-19.)

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. *Estelle*, 451 U.S. at 459. 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. *Id.* at 464-465. Of relevance to the Court's decision were factors that are similar to Mr. Harris' case. The defendant was in the custody of the county jail, as was Mr. Harris. *Id.* at 467. The psychiatrist was ordered by the court to interview the defendant, as the court did in this case. *Id.* The defendant presented no psychiatric evidence, neither did Mr. Harris in this case. *Id.* at 466. In striking similarity to the case at bar, the *Estelle* Court noted that:

[w]hen the [psychiatrist] went beyond simply reporting to the court on the issue of competency and testified for the prosecution . . . his role changed and became essentially like that of an agent of the state recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation [defendant] assuredly was 'faced with a phase of the adversary system' and was 'not in the presence of [a] perso[n] acting solely in his interest.'

Id. at 467, quoting *Miranda*, 384 U.S. at 469.

The prosecution may not use the statements of a defendant against him unless he is first advised that he has the right to remain silent and that anything he says can be used against him. *Miranda*, 384 U.S. at 436. This rule applies to pre-trial psychiatric evaluations. *Estelle*, 451 U.S. 467. The safeguards required by *Miranda* and *Estelle* were not afforded Mr. Harris in this case. The First District Court of Appeals rejected this argument on the basis that the counsel for Mr. Harris filed the suggestion of incompetence and a written NGRI plea, and therefore, Mr. Harris "cannot complain about the use of the results obtained from it." *State v. Harris*, 1st Dist. Case No. C110472, ¶21, 2013 WL 454904 (Feb. 6, 2013.), citing *State v. Steffen*, 31 Ohio St.3d 111, 121-122, 509 N.E.2d 383 (1987). This conclusion is incorrect for three reasons. First, the statute under which the psychological examination was ordered specifically limits the way that the information that can be obtained and the way it can be used. R.C. 2945.371. When the state

is permitted to put the information to a use not permitted by the statute, Mr. Harris has a right to object.

Second, in order to investigate a mental capacity defense, Mr. Harris was **required** by the statute to submit to a court-ordered examination. He had no choice. The court of appeals reliance on *Steffen* is incorrect because *Steffen* did not involve a court ordered mental evaluation pursuant to R.C. 2945.371. In *Steffen* the defendant requested a pre-sentence investigation for use in mitigation of sentence. 31 Ohio St.3d at 121. *Steffen* was not a case where the defendant was required by law to submit to an examination. The statute at issue in the case at bar compels a defendant to submit to a court-ordered examination if competency or an NGRI defense is to be investigated. To ignore this distinction would force defense counsel to face the Hobson's Choice of properly investigating competency issues and a mental status defense and giving up all Fifth Amendment privileges to an examiner who could become a state's witness at any time or foregoing a competency challenge or capacity defense altogether to avoid the defendant's statements being used against him. Because the statute requires defendants to submit to an examination it cannot be said that such submission is voluntary in the way that a pre-sentence investigation is voluntary. Third, the Fifth Amendment is implicated whenever a court-ordered psychiatric evaluation is ordered and that examination goes beyond the scope of what was ordered or anticipated. Ohio Revised Code 2945.371 plainly lists the issues into which a court-ordered examiner may inquire and section (J) specifically limits the use of information obtained from such an examination. Because neither defense counsel, nor Mr. Harris could have anticipated that information obtained during the examination would be used against him in the state's case in chief, especially in the manner done in this case, the holding and reasoning of

Estelle does apply in this case and Mr. Harris' Fifth Amendment rights were violated.

C. The State's Introduction of the Court-Appointed Expert Psychologist's Testimony in its Case in Chief Violated Mr. Harris' Sixth and Fourteenth Amendments 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. U.S. Const. VI Amendment. The need for a lawyer's advise and aid during the pre-trial phase has long been recognized by the Supreme Court. *See e.g. Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55 (1932). 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*, 388 U.S. 218, 226-227, 87 S.Ct. 1926 (1967). The right to counsel encompasses the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 749, 771; *see also Strickland v. Washington*, 466 U.S. 668 (1984).

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 v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906 (1987). 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 to such an examination. *Estelle v. Smith*, 451 U.S. 454, 467, 101

S.Ct. 1866. In *Estelle* the Court found that defense counsel was not notified in advance of the scope of the competency evaluation and that therefore, the 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.* Similarly, the *Buchanan* Court held that counsel’s effectiveness depends upon the awareness of the possible uses of a defendant’s statements.” *Buchanan*, 483 U.S. at 425.

The court-ordered evaluation in this case was initiated by the defense counsel’s filing a suggestion of incompetency. The trial court then ordered an evaluation pursuant to R.C. 2945.371. The provisions of R.C. 2945.371 mandate a defendant’s participation in a court-ordered evaluation whenever the issue of competency is raised, by anyone in a criminal proceeding. Where an issue regarding the defendant’s competency has been raised, the statute instructs the court-ordered examiner to evaluate the defendant and issue an opinion on five very specific and narrow issues:

- 1) whether the defendant is capable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant’s defense;
- 2) if the examiner finds that the defendant is incapable of understanding the nature and objective of the proceedings whether the defendant is mentally ill or mentally retarded and whether he is subject to institutionalization;
- 3) the likelihood of the defendant becoming capable of understanding the nature and objective of the proceedings within one year if the defendant is provided treatment;
- 4) the examiner’s opinion as to the least restrictive placement consistent with the defendant’s treatment needs; and
- 5) if the defendant is charged with a misdemeanor and is incapable of understanding the nature and objective of the proceedings, the examiner’s recommendation as to whether the defendant is amenable to mental health treatment.

R.C. 29945.371(G). If the examiner is asked to evaluate the defendant with regard to a plea of not guilty by reason of insanity, the examiner must issue findings regarding whether the defendant, at the time of the alleged offense, did not know, as a result of severe mental disease, the wrongfulness of his action. R.C. 2945.371(G)(4). The statute does not instruct the examiner to issue an opinion on the issue of whether the defendant is malingering, nor to offer generalized opinions regarding the defendant's character. The statute also specifically provides that "... no statement that a defendant makes in an evaluation or hearing under [this statute] relating to the defendant's competence to stand trial or to the defendant's mental condition . . . shall be used against the defendant on the issue of guilt in any criminal action" R.C. 2945.371(J). This Court has interpreted these provisions, holding that "... a defendant's statements made in the course of a court-ordered psychological examination may be used to refute his assertion of mental incapacity, but may not be used to show that he committed the acts constituting the offense." *Cooley*, 45 Ohio St.3d at 32.

This is the information and status of the statute that was available to defense counsel at the time counsel raised the issue of competency and filed the NGRI and that the court ordered the evaluation of Mr. Harris. Unlike the defendant in *Buchanan*, Mr. Harris did not present a mental status defense, nor did he present any psychological evidence. Competency evaluations in the state of Ohio are governed by statute and there is no way counsel could have known that the trial court, the court-ordered psychologist and the state would not follow the statute regarding the nature, scope and purpose of the competency/NGRI evaluation. *See* R.C. 2945.371, *et seq.* Because counsel was not notified in advance regarding the use to which the information obtained in the court-ordered examination would be put, Mr. Harris was deprived of his right to effective

assistance of counsel as guaranteed in the Sixth Amendment.

D. The State's Introduction of the Court-Appointed Expert Psychologist's Testimony in its Case in Chief Violated Mr. Harris' Fourteenth Amendment Rights to Due Process of Law, to a Fair Trial and Equal Protection of the Law.

To the extent that the Court finds that R.C. 2945.371 authorizes the state to use information obtained from a defendant in its case in chief in the manner outlined in this case, the statute is unconstitutional on its face and/or unconstitutional as applied. As previously argued, such interpretation of the statute violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The Fourteenth Amendment provides a guarantee of equal protection under the law. In *Britt v. North Carolina* the Supreme Court held that the State must as a matter of equal protection, must provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to others. (1971) 404 U.S. 226, 227. Where a defendant wishes to pursue a mental capacity defense, he is only able to obtain an expert witness to assist him through the mechanism of R.C. 2945.371. Neither the state, nor defendant's with resources to retain their own experts are bound by this statute. This statute forces indigent defendants to be interviewed by state actors at their own peril. The harm that can be wrought from a defendant's decision to investigate the issue of competency or an NGRI defense is immeasurable if R.C. 2945.371 is read to allow the state to put the information it obtains thereby to whatever use it wants. Certainly any criminal defendant with the financial resources to hire their own expert would not be required to share this information with the state until the defendant and counsel had an opportunity to review the information and ensure that the defendant was not being used as tool in his own prosecution. Putting indigent defendants in this situation, to be a

the mercy of the state, is a violation of the equal protection clause of the Fourteenth Amendment.

The Fourteenth Amendment also protects a defendant's right to due process of law and to a fair trial. Those rights are infringed when a defendant is compelled by statute to submit to a psychiatric examination and the results of that examination are permitted to be used against him in the state's case in chief. Indeed, this Court has previously concurred in this analysis when examining an argument that the statute, on its face, was an unconstitutional violation of the Fifth Amendment. This Court held:

We conclude that the statute distinguishes not between the issues of guilt and penalty, but between the issues of guilt - i.e. factual guilt - and insanity. * * * Thus, a defendant's statements made in the court of a court-ordered psychological examination may be used to refute his assertion of mental incapacity, but may not be used to show that he committed the acts constituting the offense. **So construed**, the statute is constitutional.

Cooley, 46 Ohio St.3d at 32 (emphasis added).

Evidence of a person's character or a trait of character is not admissible for the purpose of providing action in conformity therewith on a particular occasion. Evid. R. 404(A). 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. Evid. R. 404(B), *State v. Woodward*, 68 Ohio St.3d 70, 623 N.W.2d 75 (1993). The thrust of Evid. R. 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. 1 Weissenberger, *Ohio Evidence* (1993), Sections 404.4 and 404.23. The rule 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 demonstrate therefrom, conforming conduct. *Id.* The policy of the

rule is not based on relevance, but upon danger of prejudice. *Id.* Evidence Rule 404 is to be strictly construed against admissibility. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256.

In the case at bar, the state called the court-appointed psychologist, qualified the witness as an expert (T.p. 885. 893.) and elicited the following evidence and opinions regarding Mr. Harris:

1. Mr. Harris had previous arrests and criminal contacts. (T.pp. 897, 899.)
2. Mr. Harris was malignering, feigning, making up, exaggerating and faking. (T.pp. 896, 905.)
3. Many criminals engage in this type of behavior. (T.p. 920.)
4. The criminal justice center has a large number of people with antisocial personality disorder because their behavior is criminal in nature. (T.p. 918.)
5. Mr. Harris had antisocial personality disorder. (T.p. 921.)
6. Mr. Harris' antisocial personality disorder is characterized by a history of impulsivity, aggressiveness, irresponsibility, lack of regard for the rights of others, and lack of remorse. (T.p. 921.)
7. Mr. Harris has a propensity to engage in criminal activity, to violate the rights of others, has little regard to the rights of others and is a drug user. (T.pp. 914-15.)²

In closing argument, the prosecutor used this information to argue to the jury that Mr. Harris was guilty. (T.p. 1361.)

The court-appointed psychologist, whose role was to determine whether Mr. Harris was

² Although this information was testified to on cross is was volunteered by the state's expert witness as a non-responsive answer to a question.

competent to stand trial and whether he qualified for the NGRI defense, essentially testified for the state that Mr. Harris was a liar, a dangerous person of poor character. This was not in rebuttal, but before Mr. Harris even had a chance to address the jury.

This type of character evidence 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 and statutory 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 to be afforded the opportunity to investigate a competency defense without fear that the psychologist will be used against him in this fashion.

E. Mr. Harris Was Prejudiced By the State's Use of the Court-Appointed Psychologist

Before constitutional error can be considered harmless, the Court must be able to “declare a belief that it was harmless beyond a reasonable doubt.” *State v. Brown*, 65 Ohio St.3d 483, 485, 605 N.E.2d 46 (1992). It is only where there is no reasonable possibility that unlawful testimony contributed to a conviction that the error can be considered harmless. *Id.*

In this case, Mr. Harris was convicted of aggravated murder, the aggravating offense being that he committed the robbery in the course of killing another. As a result of this conviction he was sentenced to life without the possibility of parole. If the state is unable to prove the robbery in this case, Mr. Harris cannot be sentenced to life without parole. There was no physical evidence to support the robbery allegations in this case. No eyewitnesses offered any evidence on the issue of a robbery. More importantly, the decedent was found with his wallet, his gun and over \$200.00 in cash. No evidence was offered that anything was taken from the decedent. The only evidence the state had on the robbery issue was that of jailhouse informants -

witnesses testifying from the justice center or recently released, all with their own pending or recently plea bargained criminal cases. Mr. Harris testified in his own defense that he did not rob or attempt to rob the decedent. Upon meeting with the decedent the decedent reached for a gun, Mr. Harris became frightened and fired at the decedent. The jailhouse informants testified that Mr. Harris admitted committing or attempting to commit a robbery of the decedent - despite the fact that this was contrary to the physical evidence.

Therefore, the evidence presented for the juries consideration was a collection of criminal defendants testifying in hopes of helping their own criminal situations versus that of Mr. Harris testifying on his own behalf. To tip the scales, the state had the expert testimony of the court-appointed psychologist to testify about the credibility of Mr. Harris. She offered her expert opinion that Mr. Harris exaggerates, is a faker (i.e. liar), has a propensity for criminal conduct, disregards the rights of others is aggressive, impulsive and lacks remorse. As the First District pointed out, this expert testimony with regard to Mr. Harris' character called into question his credibility.

The state argues that this evidence is harmless because the jailhouse informants testified about Mr. Harris' plan to use a mental capacity defense and to convince the psychologist that he was NGRI. (Merit Brief of Appellant, p. 12.) The state cites to this Court's decision in *Cooley*. *Cooley's* harmless error analysis is inapposite because the psychologist in *Cooley* testified regarding statements made by the defendant implicating himself - the very same statements he made to others. 45 Ohio St.3d at 35. The testimony of the psychologist was merely a recitation of the testimony offered by others. However, the case at bar goes well beyond offering the same testimony. The court-appointed expert in this case testified to her opinions and conclusions

regarding Mr. Harris' credibility and character. The psychologist did more than just repeat statements. She offered expert opinions - opinions that went directly to Mr. Harris credibility. There is a wide gulf between the testimony of jailhouse informants regarding alleged admissions made by the defendant and that of an expert psychologist, with a bachelors degree, a masters degree and a doctorate degree from Xavier University, who has been appointed, sanctioned and recognized as an expert witness in the field of forensic psychology offering an opinion on credibility and character. (T.pp. 885, 893.) It cannot be maintained that, beyond a reasonable doubt, this had no effect on the jury.

CONCLUSION

The decision of the First District Court of Appeals should be upheld. Ohio Revised Code 2945.371 limits the way in which information obtained pursuant to a court-ordered psychiatric evaluation can be used in a criminal trial. The state's use of the court-ordered examiner as an expert witness violated the express provisions as well as the intent of the statute. The testimony of the court-appointed expert violated R.C. 2945.371, the Fifth, Sixth and Fourteenth Amendments to the Constitution. Mr. Harris is entitled to a new trial, free from such statutory and constitutional violations - a trial that upholds the integrity in the justice system.

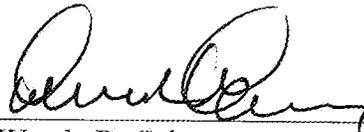
Respectfully submitted,



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
Attorney for Appellee Joseph Harris

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee has been served upon the office of Judith Lapp, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 18th day of November, 2013, via regular U.S. Mail.



Wendy R. Calaway