

NO. 14-1091

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. TIMOTHY J. MCGINTY,
Prosecutor of Cuyahoga County

Relator

-vs-

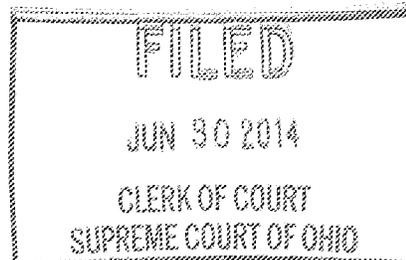
THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT
Cuyahoga County Court House, 1 Lakeside Ave. #202, Cleveland, OH 44113

Respondent

MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF PROHIBITION

Counsel for Relator

TIMOTHY J. MCGINTY (0024626)
CUYAHOGA COUNTY PROSECUTOR
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800



MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF PROHIBITION

i. Introduction/Summary of Argument

The Eighth District Court of Appeals (Respondent) is currently exercising jurisdiction over a trial court ruling that is not a final, appealable order. A Writ of Prohibition must be granted to stop this unconstitutional act and allow this case to proceed to trial.

Defendant Michael Madison is capitally charged for the alleged murders of three women in Cuyahoga County, Ohio. Madison retained private psychiatric experts in order to prepare for trial. Madison's psychiatric experts prepared reports after having had the opportunity to meet with and interview Madison. In anticipation of Madison's claims, Relator began to prepare to rebut Madison's experts. Relator filed a motion that was opposed by Madison, in which he asked that Madison submit to a psychiatric evaluation by Relator's expert. Because Madison admitted that he intended to present psychiatric testimony during the penalty phase of his capital trial, the trial court granted the motion but prohibited Relator's expert from inquiring into the facts of the charged offenses. The trial court's decision was clearly supported by the recent United States Supreme Court decision in *Kansas v. Cheever*, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013); see also *Santistevan v. Smith*, D. Idaho No. 1:11-cv-00319-REB, 2014 WL 104985, at *14 (Jan. 9, 2014) ("[i]ndeed, *Cheever* has now made clear that when a defendant seeks to introduce evidence of his mental state, a court may order the defendant to undergo a psychiatric evaluation by a state expert so that the state may rebut defendant's psychiatric evidence.")

Unhappy with this proper application of controlling precedent, Madison filed an interlocutory appeal in the Eighth District and requested a stay of the trial court's order. Relator opposed the appeal and argued that the Eighth District lacked jurisdiction. The Eighth District denied Relator's motion to dismiss, granted the stay, and denied reconsideration. In doing so, the Eighth District held that "there appears to be a final appealable order in this case pursuant to R.C. 2505.02(B)(4)." (Exhibit 11.) The Eighth District also declined to hear the matter on an accelerated docket despite the upcoming trial date. The matter is now currently pending; causing unnecessary delay to the scheduled trial.

There is neither an apparent or real final, appealable order in this case. In *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, this Court held that a ruling under Civ. R. 35(a) ordering the defendant to submit to a physical examination was not a final appealable order. The Eighth District distinguished *Myers* on the basis that it was a civil case. However, multiple cases-including one from the Eighth District-have discussed Civ. R. 35(a) in criminal appeals. See *State v. Ervin*, 8th Dist. Cuyahoga No. 80473, 2002-Ohio-4093 (defendant requested independent medical examination of victim, no good cause shown pursuant to Civ. R. 35(A)). This is because Crim. R. 57(B) states that if no procedure is specifically prescribed by the criminal rules, the court shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

Madison's appeal serves no purpose other than to delay a lawful examination and a trial. In claiming jurisdiction over this issue, the Eighth District has essentially determined that a defendant can take an interlocutory appeal over any trial court order

that has a Fifth Amendment implication. This is inconsistent with decades of precedent. See *State v. Wetzel*, 118 Ohio App. 368, 194 N.E.2d 911 (1963) (the denial of motion to suppress is not a final, appealable order); *Arizona v. Fulminante*, 499 U.S. 279, 308-312, 111 S.Ct. 1246, 113 L.Ed.2d 302 (harmless error rule applied to admission of involuntary confessions.)

The trial court's order does not impact Madison's liberty, it does not invoke structural error, and it does not preclude Madison from meaningful review on appeal. A Writ of Prohibition is necessary, appropriate, and consistent with this Court's precedent. Therefore, Relator respectfully requests this Court end this unauthorized exercise of judicial authority.

ii. Statement of the Case and Facts

On October 28, 2013, Michael Madison was indicted in Cuyahoga County Court of Common Pleas case number CR-13-579539-A on three counts of aggravated murder in violation of R.C. 2903.01(A) (Counts 1, 4, and 7), three counts of aggravated murder in violation of R.C. 2903.01(B) (Counts 2, 5, and 8), three counts of kidnapping in violation of R.C. 2905.01(A)(3) (Counts 3, 6, and 9), one count of rape in violation of R.C. 2907.02(A)(2) (Count 10), one count of having a weapon while under a disability in violation of R.C. 2923.13(A)(2) (Count 11), and three counts of gross abuse of a corpse in violation of R.C. 2927.01(B) (Counts 12, 13, and 14) with one or more firearm specifications under R.C. 2941.141(A), repeat violent offender specifications under R.C. 2941.149(A), sexually violent predator specifications under R.C. 2941.148(A), course of conduct specifications under R.C. 2929.04(A)(5), felony murder specifications under R.C. 2929.04(A)(7), sexual motivation specifications under R.C. 2941.147(A), forfeiture

of a weapon while under a disability under R.C. 2941.1417(A), and notice of prior convictions under R.C. 2929.13(F)(6) attached to one or more of the above counts.

On May 22, 2014, Relator filed a motion to have Mr. Madison submit to a psychological evaluation in anticipation that the defense would introduce testimony from experts in either or both phases of trial concerning Mr. Madison's psychological state before, during, and after the offenses he is alleged to have committed. On June 2, 2014, the trial court conducted a hearing on Relator's motion. During that hearing, counsel for Madison stated that they did not intend to use the psychiatric reports of their expert during the guilt phase of the trial but admitted that they did intend to use it during the mitigation phase of the trial. (Exhibit 3, Tr. 22). Because it was clear that Madison intended to present psychological testimony during the trial, the trial court ordered that Madison participate in a psychiatric evaluation by the Relator's expert but limited the State's inquiry to preclude the State's expert from asking about the facts and circumstances of the case.

On June 3, 2014, Madison filed a notice of appeal and an emergency motion to stay the trial court's order with the Eighth District Court of Appeals (Respondent) in Case No. 101478. On June 3, 2014, Relator filed a brief in opposition to Madison's motion for emergency stay and motion to dismiss appeal. The morning of June 4, 2014, the Eighth District had not yet ruled on Madison's motions and the Relator's expert initiated his examination.

Later that day, the Eighth District found that there "appeared to be a final appealable order" and granted Madison's motion to stay the proceedings. Undersigned counsel was notified by the Clerk of Courts for the Eighth District at approximately

12:03pm. Once undersigned counsel became aware of the ruling, counsel immediately proceeded to direct the expert to stop the evaluation. When undersigned counsel arrived to stop the interview, undersigned counsel found that counsel for Michael Madison was already at the jail.

Madison also filed a Writ of Prohibition against the trial court over the same issue, which is currently pending in the Eighth District. *State Ex. Rel., Michael Madison vs. Hon. Nancy R. McDonnell*, Judge, Case No. 101481.

On June 4, 2014, Relator subsequently requested that the Eighth District reconsider its decision granting a stay and denying the Relator's motion to dismiss. The Eighth District denied the Relator's motion on June 5, 2014. The expert subsequently left the state and returned to Arizona without providing counsel for the state any video, notes, recordings, or other material that the expert acquired during the abbreviated examination.

The Eighth District is currently exercising jurisdiction over Michael Madison's interlocutory appeal. Their action is a clear violation of Section 3(B)(2), Article IV of the Ohio Constitution and a Writ of Prohibition should be issued to end this unnecessary delay.

iii. A Writ of Prohibition is appropriate when an appellate court patently and unambiguously lacks jurisdiction.

This Court has previously issued writs of prohibition where appellate courts patently and unambiguously lacked jurisdiction. *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906; *State ex rel. Bates v. Court of Appeals for the Sixth Appellate District*, 130 Ohio St.3d

326, 2011-Ohio-5456, 958 N.E.2d 162. Just as in *Steffen* and *Bates*, this Court should prohibit the Eighth District from continuing to act without jurisdiction.

To “be entitled to the requested writ of prohibition, [Realtor] must establish that (1) the court of appeals judges are about to exercise judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law.” *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶16 citing *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 25. Respondent cannot contest that they have and are continuing to exercise jurisdiction of Michael Madison’s interlocutory appeal.

“For the remaining requirements, “[i]f a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition * * * will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.” *Steffen* at ¶17 citing *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 12. “The dispositive issue is thus whether the court of appeals judges patently and unambiguously lack jurisdiction over the state's pending appeal.” *Id.*

“Where jurisdiction is patently and unambiguously lacking, relators need not establish the lack of an adequate remedy at law because the availability of alternative remedies like appeal would be immaterial.” *State ex rel. Bates v. Court of Appeals for the Sixth Appellate District*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶12 citing *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶15.

Respondent Eighth District patently and unambiguously lacks jurisdiction over Michael Madison's interlocutory appeal because it was not taken from a final, appealable order nor does it involve a constitutional right that would invoke a structural error analysis. If Madison sustains a cognizable injury at trial, that issue can be properly raised and remedied through a direct appeal if he is convicted. Therefore, a writ of prohibition is appropriate and necessary in this case.

iv. The Eighth District patently and unambiguously lacks jurisdiction over Madison's interlocutory appeal.

The trial court's order granting Relator's motion for a psychiatric examination is not a final, appealable order under R.C. 2505.02. The Ohio Constitution prohibits an appellate court from exercising jurisdiction over orders that are not final and appealable. Section 3(B)(2), Article IV, Ohio Constitution. "[T]o decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of 'final order' contained in R.C. 2505.02." *State v. Muncie*, 91 Ohio St.3d 440, 444, 2001-Ohio-93, 746 N.E.2d 1092. R.C. 2505.02(B) provides in pertinent part:

"An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) an order that affects the substantial right in an action that in effect determines the action and prevents a judgment; (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment; ... (4) an order that grants or denies a provisional remedy and to which both of the following apply: (a) the order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy and (b) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

None of these provisions apply to the trial court's order in this case. The Eighth District found that there "appears to be a final appealable order in this case pursuant to R.C. 2505.02(B)(4)." (Exhibit 11.) However, in an effort to be thorough, Relator will discuss the three potentially relevant categories and explain why there is no final, appealable order.

A. The trial court's order does not affect a substantial right nor does it determine the action and prevent a judgment.

No substantial right is implicated by the trial court's order. A "substantial right" is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). While Madison is invoking a general Fifth Amendment protection, the prevailing case law indisputably holds that Madison has no Fifth Amendment protection against rebuttal psychiatric testimony when he puts his mental state at issue. See *Kansas v. Cheever*, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013).

In *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, this Court addressed whether a defendant could appeal a ruling under Civ. R. 35(a) which orders the defendant to submit to a physical examination. This Court "examined case law pertaining to the issue, after which it determined that a party in an action whose physical condition is in controversy does not retain a substantial right to prevent a court from ordering a physical examination." *Barber v. Ryan*, 12 Dist. Butler No. CA2010-01-006, 2010-Ohio-3471, ¶ 22 citing *Id.* at ¶ 22. "The court concluded that an order compelling such a party to submit to a medical examination for good cause shown does

not affect a substantial right. *Id.* Consequently, an order of this sort is not a final, appealable order under R.C. 2505.02(B)(2).” *Id.*

The Eighth District distinguished *Myers* on the basis that *Myers* was a civil matter and, because this was a criminal matter, “a testimonial privilege arising out of a constitutional right is at issue.” (Exhibit 11.) While *Myers* involved a civil suit, its reasoning is equally applicable here. Crim. R. 57(B) states that if no procedure is specifically prescribed by the criminal rules, the court shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists. Multiple cases-including one from the Eighth District-have discussed Civ. R. 35(a) in criminal appeals. See *State v. Ervin*, 8th Dist. Cuyahoga No. 80473, 2002-Ohio-4093 (defendant requested independent medical examination of victim, no good cause shown pursuant to Civ. R. 35(A); *State v. Pearce*, 10th Dist. Franklin No. 92AP-1761, 1993 WL 150501 (May 6, 1993) (defendant requested independent psychological examination of child but child was not a party to the criminal case); *City of Toledo v. Tillimon*, 6th Dist. Lucas No. L-91-433, 1993 WL 102498 (April 9, 1993) (defendant requested independent psychological examination of child but court denied as irrelevant); *State v. Gladding*, 72 Ohio App.3d 16, 593 N.E.2d 415 (1991) (found that trial court had authority to grant states motion for court-appointed psychiatric examination of defendant for continued commitment); *State v. Craver*, 2nd Dist. Montgomery No. 11101, 1989 WL 43079 (April 24, 1989) (defendant requested independent medical examination of victim, no good cause shown pursuant to Civ. R. 35(A); *State v. Verdine*, 10th Dist. Franklin No. 85AP-696, 1986 WL 2482 (Feb. 20, 1986) (defendant requested independent psychiatric examination of victim, no good cause shown pursuant to Civ. R. 35(A); *State v. Jones*,

12th Dist. Butler No. 80-10-0108, 1982 WL 6030 (Jan. 29, 1982) (defendant requested independent psychiatric/psychological examination of complaining witness who was found not to be a party as required under Civ. R. 35).

In *Kansas v. Cheever*, 134 S.Ct. 596, 601, 187 L.Ed.2d 519 (2013), the Court held that where “a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal.” The Court found that their holding “harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination.” A defendant “has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.” *Id.* at 601 citing *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S.Ct. 944, 44 L.Ed. 1078 (1900).

Michael Madison agreed on the record that he intends to present psychiatric evidence of his mental state during the penalty phase of his capital trial. (Exhibit 3, Tr. 22). Because of this, Relator is entitled to present psychiatric evidence in rebuttal. And, as the United States Supreme Court recognized, “[o]rdinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony; and for that purpose ... the basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject.” *Cheever* at 601-602.

There is no Fifth Amendment implication in the trial court’s order. In order to even further prevent any potential Fifth Amendment implication, the trial court prohibited the state’s expert from inquiring into the facts of Madison’s offenses. (Exhibit 5). Because

there is no constitutional implication, there is no substantial right, and jurisdiction fails under R.C. 2505.02(B)(1).

Even if this Court were to disregard *Cheever* and find that the Fifth Amendment is implicated, that does not automatically convert the trial court's order into a final, appealable order. As this Court has previously noted, "[n]ot every issue in a criminal case is subject to an interlocutory appeal." *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, ¶23. This Court has found interlocutory appeals appropriate where structural error is implicated. *Id.* But Madison cannot claim structural error from the trial court's order. See *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶37 citing *Arizona v. Fulminante*, 499 U.S. 279, 308-312, 111 S.Ct. 1246, 113 L.Ed.2d 302 (harmless error rule applied to admission of involuntary confessions). The trial court's ruling also fails to satisfy the second prong of R.C. 2505.02(B)(1) because it does "not determine the action, i.e. the criminal case." *State ex rel. Bates v. Court of Appeals for the Sixth Appellate District*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶30. The order in this case is from a limited underlying issue that does not have constitutional implications nor in any way rise to the level of structural error.

There are no facts or law to justify a finding that "postjudgment appeal would not provide a meaningful or effective remedy." *Id.* at ¶33. While Relator is confident that Madison's convictions (if obtained) will be upheld on appeal, there is simply no support for his argument that he would not be provided with meaningful relief in a later direct appeal. "[W]hether a substantial right is *affected* by an order requires a more exacting inquiry than simply whether a substantial right is involved in an action. For an order to

affect a substantial right, the appellant must as a threshold matter establish that vindication of that right on appeal after final judgment is not available.” *State v. Chalender*, 99 Ohio App.3d 4, 649 N.E.2d 1254 citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 616 N.E.2d 181 (1993). As the Second District Court of Appeals stated in *Chalender*:

“In other words, a substantial right is affected when, absent an immediate, albeit arguably interlocutory appeal, the impact of the order upon the appellant's legal rights cannot effectively be examined by the appellate court and appropriate relief granted if warranted. [*Bell v. Mt. Sinai Med. Ctr.*,] at 63, 616 N.E.2d at 183-184. A substantial right is not affected merely because an order has the immediate effect of restricting or limiting that right. Rather, a substantial right is affected when there is virtually no opportunity for an appellate court to provide relief on appeal after final judgment from an order that allegedly prejudiced a legally protected right.”

Even if considered a substantial right, that right is not affected by the trial court's actions, and Madison will have an effective remedy by means of an appeal if convicted.

To allow the Eighth District to exercise interlocutory jurisdiction over an issue where there is, at most, a hypothetical constitutional implication will open the floodgates and cause undue delay in both capital and non-capital prosecutions. “Allowance of appeals from interlocutory criminal orders would result in piecemeal appeals that would ultimately delay and impede criminal justice administration.” *State v. Serednesky*, 7th Dist. Mahoning App. No. 99 CA 77, 1999 WL 1124763, at *2 citing *City of Middletown v. Jackson*, 8 Ohio App.3d 431, 457 N.E.2d 898 (12th Dist., 1983). It is imperative to prohibit the Eighth District from exercising unauthorized authority and delaying justice for the three deceased women, their families, and society.

Both precedent and public policy support granting a Writ of Prohibition against the Eighth District. The trial court's order is not final, Madison's substantial rights are not implicated, and Madison will have an adequate remedy by means of a direct appeal if convicted.

B. The trial court's order does not affect a substantial right or involve a special proceeding.

The trial court's order does not qualify as one made during a special proceeding. The term "special proceeding" is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). This is not a special proceeding, there is no statutory component of the court's order. Criminal actions are not 'special proceedings' as that term is defined" in the Ohio Revised Code. See *State v. Anderson*, 11th Dist., 2013-Ohio-339, ¶20; *State v. Williams*, 6th Dist. Lucas, 2003-Ohio-2533 ¶21 citing *Polikoff v. Adam*, 67 Ohio St.3d 100, 616 N.E.2d 213 (1993). The trial court's order is based on basic principles of equality in the adversarial process. *Kansas v. Cheever*, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013). And, as previously discussed, the ruling does not affect a substantial right. Therefore, the lower court cannot claim that the order satisfies R.C. 2505.02(B)(2).

C. The trial court's order is not a provisional remedy and Madison would not be deprived of meaningful relief on appeal.

The trial court's ruling is also not a final, appealable order pursuant to R.C. 2505.02(B)(4). This is the provision that the Eighth District relied upon, opining that

“there appears to be a final appealable order in this case pursuant to R.C. 2505.02(B)(4).” (Exhibit 11.)

For an “order to qualify as a final appealable order [pursuant to R.C. 2505.02(B)(4)], the following conditions must be met: (a) the order must grant or deny a provisional remedy, as defined in R.C. 2505.02(A)(3), (b) the order must determine the action with respect to the provisional remedy so as to prevent judgment in favor of the party prosecuting the appeal, and (c) a delay in review of the order until after final judgment would deprive the appellant of any meaningful or effective relief.” *State ex rel. Bates v. Court of Appeals for the Sixth Appellate District*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶31 citing *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711, ¶15. R.C. 2505.02(A)(3) “defines ‘provisional remedy’ as ‘a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [or] suppression of evidence.’ A ‘proceeding ancillary to an action’ is ‘one that is attendant upon or aids another proceeding.’ *State v. Muncie* (2001), 91 Ohio St.3d 440, 449, 746 N.E.2d 1092, quoting *Bishop v. Dresser Industries, Inc.* (1999), 134 Ohio App.3d 321, 324, 730 N.E.2d 1079.” *Bates* at ¶32.

While the trial court’s ruling is one that will ultimately aid the main proceeding, it is not one of the proceedings specifically listed in R.C. 2505.02(A)(3). Nor is it similar to forced medication or treatment for an incompetent defendant. See *State v. Muncie*, 91 Ohio St.3d 440, 746 N.E.2d 1092 (2001) (forced medication); *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711 (order for restoration of competency). The trial court’s order does not affect Madison’s liberty, as was the case in *Muncie* and

Upshaw. Muncie at 1096 (forced medication implicates a liberty interest); *Upshaw* at ¶17 (Upshaw's liberty is affected by the order of commitment). The ruling merely has Madison participate in an evaluation, it is not a "legally recognized proceeding separate from the criminal proceeding itself." *Bates* at ¶32.

In *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, this Court held that a Civ.R. 35(A) motion for a medical examination is not a provisional remedy. This Court reasoned that while a discovery order for privileged material is a provisional remedy, the General Assembly did not include all discovery orders in that definition. *Id.* at ¶24. And as previously discussed, *Myers* is applicable via Crim. R. 57(B).

The Eighth District, relying on Madison's misrepresentation, found that if Madison is not putting his mental condition at issue, his compelled submission to a psychiatric examination may constitute a violation of his Fifth Amendment rights and a corresponding testimonial privilege. (Exhibit 11.) But contrary to the Eighth District's order, Madison's examination by the state's expert does not implicate any Fifth Amendment protections or testimonial privilege. *Kansas v. Cheever*, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013). The information, which does not include any questions about the offense, is not incriminatory. See *State v. Jenkins*, 15 Ohio St.3d 164, 228, 473 N.E.2d 264 (1984) citing *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980) (the question to which a person asserts such privilege must pose substantial and real-not merely trifling or imaginary-hazards of incrimination). There is no privilege implicated in the trial court's order and there is no real hazard of incrimination from the limited evaluation. Any harm at this point is purely hypothetical

because there has been no testimony. Even if a constitutional right were implicated, that does not render the trial court's order final and appealable in and of itself. *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, ¶23.

Not only was the trial court's order not a provisional remedy, it also fails to satisfy the other prongs of R.C. 2505.04(B)(4). Madison can take a direct appeal of his convictions. In doing so, he can obtain meaningful and effective relief of the trial court's order if it is deemed erroneous; his convictions and/or sentence may be reversed. Delay in reviewing the order would not preclude this result. Unlike cases where a defendant's liberty is at stake, any mistake would be correctible through the ordinary appellate course. See *Upshaw* at ¶18 (if he is correct that his confinement was mistaken, without immediate judicial review, that mistake is uncorrectable). Fifth Amendment claims are frequently reviewed on appeal and, when error is found, convictions are either affirmed or reversed.

The trial court's order granting the state's motion to have defendant submit to a psychological examination is not a provisional remedy and is an order that Madison can appeal and obtain meaningful relief if convicted. The Eighth District improperly relied on this section in exercising jurisdiction over this matter. Because no final, appealable order exists, this Court should grant a writ of prohibition and allow this matter to proceed to examination and trial.

v. Conclusion

The Eighth District patently and unambiguously lacks jurisdiction over this interlocutory appeal. The order does not impact any constitutional rights and Madison is not precluded from obtaining meaningful relief if he is convicted. A writ of prohibition is

necessary to prevent this unauthorized delay of justice. Therefore, Relator respectfully requests this Court grant a writ of prohibition and all further relief that may be just and appropriate.

Respectfully submitted,



By: Timothy J. McGinty (0024626)
Cuyahoga County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800