

ORIGINAL  
UNDER SEAL

NO. 2014-1091

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IN THE SUPREME COURT OF OHIO

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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

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**MEMORANDUM IN RESPONSE TO PROPOSED INTERVENING RESPONDENT MICHAEL  
MADISON'S MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS**

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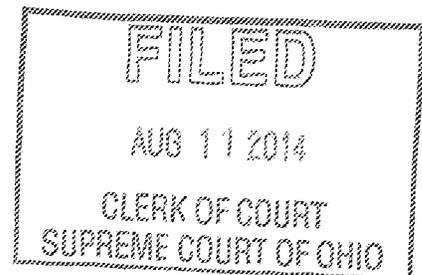
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## MEMORANDUM IN RESPONSE TO RESPONDENT'S MOTION TO DISMISS

This Court should issue a writ or prohibition to prevent further judicial action by the Eighth District Court of Appeals (Respondent) over an interlocutory appeal from an order that is not final or appealable. On July 31, 2014, Michael Madison filed a motion to intervene, a motion to dismiss/motion for judgment on the pleadings, and a motion to supplement the record. This Court has not yet ruled on Madison's motion to intervene. However, without waiving any objections to Madison's filing of motions, Relator responds to and opposes Madison's motion to dismiss/motion for judgment on the pleadings for the reasons more fully stated below.

- i. **Precedent from both this Court and the United States Supreme Court support the trial court's order that Madison submit to a psychological examination.**

*"Courts have the inherent authority to preserve fairness in the trial process, and allowing the defendant to present expert testimony...while denying the prosecution the ability to introduce such evidence would unfairly handicap the prosecution and prevent the trier of fact from making an informed decision." State v. Goff, 128 Ohio St.3d 169, 942 N.E.2d 1075, 2010-Ohio-6317, ¶58. (Emphasis added).*

As he did below, Michael Madison continues to mislead the courts by claiming that he does not intend to place his mental state at issue during trial. The record from the hearing on Relator's motion clearly belies Madison's claim. Madison's lead trial counsel 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). As Relator has previously noted, in order to agree with Madison, this Court would have to find that the penalty phase of a capital trial is not part of the trial. This concept has no legal support. "A capital trial involves essentially four different definable stages: (1) guilt-phase presentation of evidence and arguments, (2) guilt-phase

deliberations, (3) penalty-phase presentation of evidence and arguments, and (4) penalty-phase deliberations.” *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶189.

In furtherance of his disingenuous claim, Madison argues that the instant situation is distinguishable from the United States Supreme Court decision in *Kansas v. Cheever*, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013). *Cheever* is directly on point and, contrary to Madison’s assertion, is not limited to situations where a defendant claims that he lacks the mental state to commit a crime. The *Cheever* court rejected the Kansas Supreme Court’s narrow interpretation and found that the state may present evidence from a compelled psychiatric examination when a defendant’s “mental status” is placed at issue. Specifically, the Court found that “[m]ental-status defenses include those based on psychological expert evidence as to a defendant’s *mens rea*, mental capacity to commit the crime, or ability to premeditate. Defendant’s need not assert a ‘mental disease or defect’ in order to assert a defense based on ‘mental status.’” *Cheever* at 602; see also *Buchanan v. Kentucky*, 483 U.S. 402, 423, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). Nor was the Court persuaded that the “temporary” condition of a mental status claim precluded rebuttal by the prosecution. *Id.*

In the table below, Relator has outlined the similarities between the “mental status” claims raised in *Cheever* and the claims raised by Michal Madison’s psychiatric expert.<sup>1</sup>

<b><u>Kansas v. Cheever, 134 S.Ct. 596</u></b>	<b><u>Dr. Daniel Davis’ Report re: Michael Madison</u></b>
In support of this argument, <i>Cheever</i>	<b>A substantial body of research</b>

<sup>1</sup> On July 31, 2014, Madison moved this Court to supplement the record with the report of his psychiatric expert, Dr. Davis. Because Dr. Davis’s report was submitted under seal to Respondent Eighth District Court of Appeals and because Madison has moved to maintain its privacy in the instant proceedings, the state has moved to file the instant motion under seal.

<p>offered testimony from Roswell Lee Evans, a specialist in psychiatric pharmacy and dean of the Auburn University School of Pharmacy. <b>Evans opined that Cheever's long-term methamphetamine use had damaged his brain.</b> Id. at 599.</p>	<p><b>documents the negative impact of the effects of abuse and trauma upon the developing brain...</b>These effects are physical and chemical in nature that result in subsequent psychological dysfunction. Specifically, exposure to violence, verbal and physical abuse results in an imbalance in an important chemical, cortisol, in the <b>brain that results in damage to structures of the brain such as the hippocampus that is responsible for the control of memory, emotions, and attention.</b> Exposure to abuse has also been shown to affect the limbic system (the emotional seat of the brain) especially the amygdala, <b>an area of the brain critically involved in moods, emotions such as anger and fear and emotional learning.</b> Pp. 34-35.</p> <p>As well, exposure to abuse during critical times <b>can result in damage to structures such as the frontal lobes that are critical for executive functions such as attention, working memory, motivation and behavioral inhibition.</b> P. 36.</p>
<p>Cheever's psychiatric evidence concerned his mental status because he used it to argue that he <b>lacked the requisite mental capacity to premeditate.</b> Id. at 602.</p>	<p>As well, exposure to abuse during critical times can result in damage to structures such as the frontal lobes that are critical for executive functions such as attention, working memory, motivation and behavioral inhibition. <b>What this results in is an inability to plan and anticipate outcomes, to be flexible, to self-monitor and show good judgment and be aware of one's self and one's impact on others.</b> P. 35.</p> <p>Youth who come from markedly abusive and dysfunctional environments <b>do not have the chance to learn appropriate social coping skills, skills to regulate emotions, skills to control impulses</b> and skills to relate in positive, socially appropriate ways. P. 36.</p>

<u>State v. Cheever, 295 Kan. 229</u>	<u>Dr. Daniel Davis' Report re: Michael Madison</u>
<p>He said that the neurotoxic effect of long-term use <b>can change the structure of the brain</b>, resulting in the loss of gray matter and <b>consequential loss of brain function, including loss of cognitive functions that deal with planning, assessing consequences, abstract reasoning, and judgment.</b> Id. at 236-237</p>	<p><b>A substantial body of research documents the negative impact of the effects of abuse and trauma upon the developing brain...These effects are physical and chemical in nature that result in subsequent psychological dysfunction.</b> Specifically, exposure to violence, verbal and physical abuse <b>results in an imbalance in an important chemical, cortisol, in the brain that results in damage to structures of the brain such as the hippocampus that is responsible for the control of memory, emotions, and attention.</b> Exposure to abuse has also been shown to affect the limbic system (the emotional seat of the brain) especially the amygdala, an area of the brain critically involved in moods, emotions such as anger and fear and emotional learning. Pp. 34-35.</p> <p>As well, exposure to abuse during critical times <b>can result in damage to structures such as the frontal lobes that are critical for executive functions such as attention, working memory, motivation and behavioral inhibition.</b> P. 36.</p>
<p>Evans testified that long-term use can cause paranoid psychosis which, <b>due to impairment of the brain functions responsible for judgment and impulse control</b>, can result in violence. Id. at 237.</p>	<p>Available research documents conclusively that children exposed to early childhood neglect and abuse are at much greater risk for <b>significant psychological problems such as impulse control disorders[.]</b> P. 33.</p> <p>Youth who come from markedly abusive and dysfunctional environments <b>do not have the chance to learn appropriate social coping skills, skills to regulate emotions, skills to control impulses</b> and skills to relate in positive, socially appropriate ways. P. 36.</p>

	As an adult, he [Madison] presented with substance abuse, <b>behavioral instability as well as antisocial behaviors.</b> P. 36.
<b><u>State v. Cheever, 295 Kan. 229</u></b>	<b><u>Dr. Daniel Davis' Report re: Michael Madison</u></b>
Ultimately, Evans testified it was his opinion that at the time Cheever committed these crimes, Cheever was both under the influence of recent methamphetamine use and impaired by neurotoxicity due to long-term methamphetamine use, <b>which affected his ability to plan, form intent, and premeditate the crime.</b> Id. at 237.	As well, exposure to abuse during critical times can result in damage to structures such as the frontal lobes that are critical for executive functions such as <b>attention, working memory, motivation and behavioral inhibition. What this results in is an inability to plan and anticipate outcomes, to be flexible, to self-monitor and show good judgment and be aware of one's self and one's impact on others.</b> P. 35.

*Cheever* makes clear that the fact that Madison is not claiming some type of mental diagnosis is irrelevant to the state's ability to rebut his testimony. The Court specifically rejected such a limited reading of its prior decisions. Madison's psychiatric expert covers much of the same claims that were addressed in *Cheever* and that decision is directly applicable to this case.

This Court's precedent further supports the trial court's order. *State v. Goff*, 128 Ohio St.3d 169, 942 N.E.2d 1075, 2010-Ohio-6317. In *Goff*, this Court was "asked to determine whether a court order compelling a defendant to submit to a psychiatric examination conducted by a state expert in response to the defendant raising a defense of self-defense supported by expert testimony on battered-woman syndrome violates the defendant's right against self-incrimination under Section 10, Article I of the Ohio Constitution and the

Fifth Amendment to the United States Constitution.” *Id.* at ¶1. This Court unanimously held that it did not.

Even though *Goff* was released three years before *Cheever*, this Court recognized the need for the state to be able to adequately rebut evidence presented by a defendant’s expert. This Court cited to a prior decision by then judge Antonin Scalia, who wrote that courts had “asserted numerous reasons why testimony from the state’s expert did not violate the defendant’s Fifth Amendment right against self-incrimination: waiver, estoppel, ‘the need to maintain a ‘fair state-individual balance,’ a matter of ‘fundamental fairness,’ or ‘merely a function of ‘judicial common sense.’....[the court’s] have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society’s conduct of a fair inquiry into the defendant’s culpability. \* \* \* We agree with this concern, and are content to rely upon it alone as the basis for our rejection of the Fifth Amendment claim.” *Goff* at ¶57 citing *United States v. Byers*, 239 U.S.App.D.C. 1, 740 F.2d 1104, 1113 (1984).

It is the basic principles of fairness and reliability that allow the state to adequately rebut a defendant’s use of expert psychiatric testimony. In order to do so, the court may compel the defendant to submit to a limited examination by the state’s expert. *Goff* at ¶58. Madison clearly expressed his intent to present expert psychiatric testimony at trial. (Exhibit 3, Tr. 22). The trial court merely exercised its inherent authority in this case and ordered that Madison submit to a compelled psychiatric examination so that the state may adequately rebut his expert testimony regarding his mental status. *Goff* at ¶58. The trial court narrowly tailored its order to prevent the state from inquiring into the circumstances of the offense. This limited approach is consistent with *Goff*.

The trial court appropriately applied *Cheever* and *Goff* to the instant case. Any other ruling would have been fundamentally unfair to the prosecution and to society. Therefore, a writ of prohibition is appropriate in order to proceed with this lawful examination and trial.

- ii. **The trial court's order of a psychiatric examination by the state's expert does not force Madison to sacrifice any constitutional rights. Neither Section 10, Article I of the Ohio Constitution nor the Fifth Amendment of the United States Constitution are violated because Madison has expressed his intent to introduce expert testimony from a psychiatric examination regarding his mental status.**

Madison's claim that his Eighth Amendment rights will be violated is unfounded. Madison is not in any way prohibited from introducing evidence in mitigation. R.C. 2929.04(B) permits capitally charged defendants to present a wide array of mitigating factors, including:

- Whether the victim of the offense induced or facilitated it. R.C. 2929.04(B)(1)
- Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. R.C. 2929.04(B)(2)
- Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law. R.C. 2929.04(B)(3)
- The youth of the offender. R.C. 2929.04(B)(4)
- The offender's lack of a significant history of prior criminal convictions and delinquency adjudications. R.C. 2929.04(B)(5)
- If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim. R.C. 2929.04(B)(6)
- Any other factors that are relevant to the issue of whether the offender should be sentenced to death. R.C. 2929.04(B)(7)

Madison has, through counsel, expressed his intent to present expert psychiatric testimony regarding some of these factors. The report issued by Madison's expert is replete

with reference to subjects within the parameters of what the United States Supreme Court has defined as “mental status.” See *Kansas v. Cheever*, 134 S.Ct. 596, 602, 187 L.Ed.2d 519 (2013). It is Madison’s decision to present this evidence, and the state will not attempt to prohibit the admission of proper mitigation. In doing so, Madison implicates the states right to rebut the expert testimony and society’s right to a full and fair adjudication.

But just because the state has the right to have Madison examined by its expert does not mean that Madison is forced to give up another right. To the contrary, both this Court and the United States Supreme Court have held that a defendant’s Fifth Amendment rights are *not* violated when the state presents testimony from a compelled psychiatric examination to rebut expert psychiatric testimony presented by the defendant. The *Cheever* 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.” *Cheever* at 601.

In light of *Cheever*, there is no question that Madison’s submission to a psychiatric evaluation by the state does not violate his Fifth Amendment rights. Any concern was even further limited by the trial court’s ruling which prohibited the state’s expert from inquiring into the facts of the offense.

Madison relies on *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) to support his position. In *Simmons*, the Court held that the state could not use a defendant’s suppression hearing testimony against the defendant on the issue of his guilt. First, the *Simmons* Court specifically referenced their holding to “these circumstances.” *Id.* at 394. Second, the language in *Simmons* was further limited by a later decision from the Court in which it declared that the “criminal process, like the rest of the legal system, is

replete with situations requiring ‘the making of difficult judgments’ as to which course to follow. [citation omitted]. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.” *MaGautha v. California*, 402 U.S. 183, 212-13, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), overruled on other grounds by *Crampton v. Ohio*, 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972). Madison does not have to choose between two constitutional rights and none of his rights will be impaired. He can present mitigating evidence and subject himself to a limited examination by the state’s expert without violating his Fifth Amendment rights.

Madison’s constitutional rights are not implicated, limited, or violated. Therefore, it was improper for Respondent to claim jurisdiction over Madison’s interlocutory appeal. A writ of prohibition should be granted to prevent further delay in this case.

**iii. The trial court’s order was permissible under basic principles of fairness. A specific statutory procedure was not required.**

Madison also argues that the trial court could not order the examination because there is no statutory procedure for it. The case law in this area has held that the state may examine the defendant under basic notions of fairness. In fact, the United States Supreme Court found that “[a]ny other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime.” *Cheever, supra*. (Emphasis added). A statute is not required.

Even without a statute, the Rules of Procedure are instructive. 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. Multiple cases-including one from the Eighth District-have discussed Civ. R. 35(a) in criminal appeals. See *State v. Ervin*, 8<sup>th</sup> Dist. Cuyahoga No. 80473, 2002-Ohio-4093; *State v. Pearce*, 10<sup>th</sup> Dist. Franklin No. 92AP-1761, 1993 WL 150501 (May 6, 1993); *City of Toledo v. Tillimon*, 6<sup>th</sup> Dist. Lucas No. L-91-433, 1993 WL 102498 (April 9, 1993); *State v. Gladding*, 72 Ohio App.3d 16, 593 N.E.2d 415 (1991); *State v. Craver*, 2<sup>nd</sup> Dist. Montgomery No. 11101, 1989 WL 43079 (April 24, 1989); *State v. Verdine*, 10<sup>th</sup> Dist. Franklin No. 85AP-696, 1986 WL 2482 (Feb. 20, 1986); *State v. Jones*, 12<sup>th</sup> Dist. Butler No. 80-10-0108, 1982 WL 6030 (Jan. 29, 1982).

The fact that *Myers* was a civil matter does not render it meaningless for this Court's analysis. As previously discussed, Madison's Fifth Amendment rights are not violated as a result of the compelled examination. *Myers* is applicable via Crim. R. 57(B) which 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.

The trial court's order was a necessary and appropriate exercise of its inherent authority. Respondent Eighth District Court of Appeals patently and unambiguously lacks jurisdiction over Madison's interlocutory appeal and a Writ of Prohibition should be granted.

**iv. Respondent Eighth District Court of Appeals patently and unambiguously lacks jurisdiction over Michael Madison's interlocutory appeal.**

In Relator's Memorandum in Support of Writ, Relator discussed each aspect of R.C. 2505.02 and explained why Respondent patently and unambiguously lacks jurisdiction over Madison's interlocutory appeal. Relator relies on his prior filings with respect to this

argument. In addition, Relator notes that Madison clearly has a meaningful or effective remedy by means of a direct appeal.

Madison relies on *State v. Goff*, 128 Ohio St.3d 169, 942 N.E.2d 1075, 2010-Ohio-6317, to support earlier portions of his argument. In *Goff*, this Court addressed nearly the same issue and found that the state was entitled to have the defendant submit to a psychiatric evaluation but ultimately reversed finding that the states expert improperly testified regarding inconsistencies in statements the defendant had made. *Goff* is a direct appeal from the defendant's conviction and the defendant was able obtain meaningful relief. Madison will similarly be able to seek meaningful relief should he be convicted.

Because the trial court's ruling is not a final, appealable order, Respondent patently and unambiguously lacks jurisdiction over Madison's interlocutory appeal. A writ of prohibition should be issued.

**v. Conclusion**

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 prevent a judgment by later appeal. A writ of prohibition is appropriate and necessary in this case.

Therefore, Relator respectfully requests this Court grant a writ of prohibition and all further relief that may be just and appropriate.

Respectfully submitted,  
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**SERVICE**

A copy of the foregoing Memorandum in Response to Respondent's Motion to Dismiss has been mailed this 11<sup>TH</sup> day of August, 2014, to:

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