

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE JOSEPH HARRIS**

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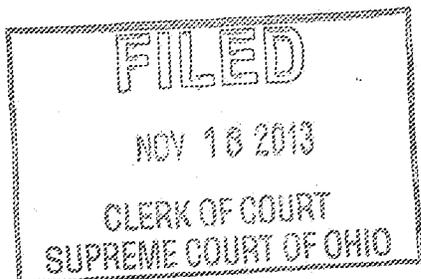
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STATEMENT OF THE CASE AND FACTS

The parties, and the opinion of the court of appeals, have adequately set forth the procedural and factual history of this case.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The mission of the Office of the Ohio Public Defender (OPD) is to represent criminal indigent defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. A key focus of the OPD is on the post-trial phase of criminal cases, including direct appeals and collateral attacks on convictions. The OPD protects the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court may address the legality of admitting, during the State's case-in-chief, the testimony of a court-appointed psychologist regarding his or her finding that the defendant was malingering and feigned mental illness during an evaluation conducted under R.C. 2945.371. The OPD urges this Court to uphold the decision of the First District Court of Appeals. Such testimony, offered in the State's case-in-chief, and offered for the sole purpose of demonstrating the defendant's consciousness of guilt and lack of credibility, is admitted directly in contravention of R.C.

2945.371(J), and in violation of the defendant's rights to a fair trial and due process under the Ohio and United States Constitutions.

ARGUMENT

Amicus Curiae's Proposition of Law

Where a defendant's sanity at the time of the offense is no longer in question, R.C. 2945.371(J) prohibits the introduction of testimony from the court-appointed psychologist who examined the defendant when it is offered for the purpose of demonstrating consciousness of guilt in the State's case-in-chief. Consciousness of guilt is an issue of guilt under R.C. 2945.371(J).

The court below held that the trial court violated R.C. 2945.371(J) and deprived Mr. Harris of his state and federal rights to due process and a fair trial, when it allowed the State to introduce testimony, during its case-in-chief, from the court-appointed psychologist who had evaluated Mr. Harris pursuant to R.C. 2945.371. The prosecution introduced that testimony despite the fact that Mr. Harris had informed the court of his intention to withdraw his not-guilty-by-reason-of-insanity plea, and for the sole purpose of demonstrating Mr. Harris' consciousness of guilt based upon the statements he made during the R.C. 2945.371 examination. The First District's holding is consistent with and upholds R.C. 2945.3.71(J)'s prohibition against the use of a criminal defendant's statements to a court-appointed psychologist during a competency and sanity evaluation on issues of guilt during a criminal trial. This Court should either dismiss this appeal as improvidently granted, or affirm the lower court's decision.

When a court-appointed psychologist conducts an examination under R.C. 2945.371 due to the defendant having entered a NGRI plea, the defendant's state of mind at the time of the offense is at issue and central to the defense expected to be argued at trial. However, faced with a finding of sanity or competence, a criminal defendant has the right to abandon the NGRI defense and pursue a different theory at trial; a decision which may remove the defendant's mental health from his defense entirely. But when that examiner testifies at the

criminal trial in the State's case-in-chief, despite the defendant's abandonment and withdrawal of his NGRI plea, the examiner's testimony is offered solely to demonstrate a consciousness of guilt on the part of the defendant due statements he made during that examination. Ohio Revised Code Section 2945.371(J) operates to bar that type of testimony.

Allowing a criminal trial to proceed as Mr. Harris' did—with the prosecution attacking the defendant's credibility in its case-in-chief based upon statements he made during a court-ordered examination under R.C. 2945.371—will force criminal defendants to choose between foregoing either the right to claim insanity or the right to limit the admissibility of statements made during court-ordered exams under R.C. 2945.371. This result would render the statute unconstitutional, and would establish precedent in contravention to this Court's jurisprudence on related issues.

A. Testimony about a defendant's statements to a court-appointed psychologist during a R.C. 2945.371 examination is admissible only to refute an assertion of mental incapacity.

Ohio Revised Code Section 2945.371 governs examinations and reports conducted and generated in response to a defendant's suggestion of incompetence or insanity. And, R.C. 2945.371(J) permits either party to introduce testimony from the person who evaluated the defendant in accordance with that section, even though based on the defendant's statements to the evaluator, if the testimony is relevant to the defendant's competence to stand trial or to the defendant's mental conditions at the time of the offense charged. But, under R.C. 2945.371(J), an evaluator's testimony must be strictly limited to the issue of competence or insanity. When the evaluator's testimony breaches that boundary and ventures into the evaluator's opinion of the defendant's overall veracity, the evaluator has

stepped out of his or her limited role and essentially acts as an agent of the state. *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 63.

In *Goff*, this Court held that a court may compel 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.” *Goff*, 2010-Ohio-6317 at ¶ 1. However, the *Goff* opinion establishes that when a State-selected forensic evaluator testifies “about discrepancies regarding the defendant’s recitation of facts and questioning the truth of her representations regarding her own level of fear,” the testimony exceeds proper forensic bounds. *Goff*, 2010-Ohio-6317 at ¶ 59. (quoting *Estelle v. Smith*, 451 U.S. 454, 467, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). In that scenario, the evaluator’s role becomes “essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.” *Id.*

Thus, *Goff* instructs that when a forensic evaluator examines the defendant in response to the defendant’s asserted affirmative defense, the trial court may compel the defendant to submit to an examination by the State’s expert. But the State’s expert may only testify as to whether the defendant’s conduct was the result of or affected by the claimed defense. In the context of an insanity defense, this Court has consistently held that an expert cannot testify as to the statements the defendant made during a court-ordered examination under R.C. 2945.371 if the purpose of that testimony is to show that the defendant committed the acts constituting the offense. *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989), paragraph two of the syllabus, *rev’d on other grounds*, 88 Ohio St.3d 89.

This Court echoed *Cooley*’s holding in *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26. In *Franklin*, the defendant entered a NGRI plea and claimed to be

incompetent to stand trial. *Franklin*, 2002-Ohio-5304, at ¶ 7. The defendant argued that the jury should be able to consider the statements made to his psychologist for the purpose of determining his guilt. *Id.* at ¶ 62. Mr. Franklin wanted the jury to consider the fact that he told his psychologist he killed his uncle because his uncle accused him of being gay. *Id.* Provided the jury was permitted to consider that statement, Mr. Franklin argued it could have reduced his offense to voluntary manslaughter. In determining the issue of his guilt, the trial court instructed the jury that it could not consider any of the statements Mr. Franklin made to the doctors. *Id.* at ¶ 63. This Court held that, under R.C. 2945.371(J), the trial court was correct in instructing the jury that it could only consider the statements Mr. Franklin made to the psychologists as they related to the issue of sanity, but not as to guilt. *Id.* at ¶ 64.

Goff, *Franklin*, and *Cooley* together demonstrate that when a defendant's sanity or other mental state is *at issue*, the State *may refute* the defendant's affirmative defense through the testimony of an evaluator under R.C. 2945.371, as long as the testimony is strictly limited to the evaluator's determination as related to the mental state or illness. However, in each of these cases, at trial the defense maintained an affirmative defense theory—self-defense in *Goff* and insanity in *Franklin* and *Cooley*—throughout trial, and significantly, put forth evidence to bolster the affirmative defense *before the State offered the evaluator's testimony*.

In this case, the State offered the testimony of Dr. Carla Dreyer, the evaluator who examined Mr. Harris in accordance with R.C. 2945.371, in its case-in-chief and after the defense had expressed his intent to withdraw the NGRI plea. Beginning with opening statements, it was no secret that Mr. Harris had abandoned his insanity plea for a defense theory that did not put his mental state at the time of the offense at issue. Thus, before the

defense's case-in-chief, the State offered testimony in the form of an expert opinion that Mr. Harris "was malingering both cognitive and psychiatric difficulties," and further, that in this context, malingering meant "feigning or exaggerating, so basically making up or exaggerating already existing symptoms to seem worse than they are." *State v. Harris*, 1st Dist. No. C-110472, 2013-Ohio-349, 2013 Ohio App. LEXIS 315, at ¶ 12. Even if Mr. Harris had continued to argue his NGRI plea at trial, Dr. Dreyer's testimony went beyond the strict limits recognized in *Goff*, and became an opinion on Mr. Harris' general character for truthfulness.

Because Mr. Harris' mental state at the time of the offense was no longer at issue, there was no other purpose for which the State could have offered Dr. Dreyer's testimony other than to demonstrate Mr. Harris' guilt. Testimony about a defendant's statements to an evaluator during an examination under R.C. 2945.371 is prohibited when used for that purpose. Accordingly, because the First District's decision was correct, this Court should dismiss this case as improvidently accepted, or should affirm the lower court's decision.

B. Evidence of malingering, especially when the insanity defense is not at issue, is highly prejudicial.

The State of Ohio contends that because a "defendant's credibility is always relevant to the case[.]" Dr. Dreyer's testimony about her finding Mr. Harris as a malingerer and a feigner of mental illness was harmless. Merit Brief of Plaintiff-Appellant, p. 11. The State's argument is flawed for a number of reasons.

First, challenges in the diagnosis of "malingering" abound. A forensic assessment of malingering "is beset by a variety of clinical and conceptual difficulties that are often overlooked by forensic specialists who are called upon to make such determinations."

Drob, Meehan, and Waxman, *Clinical and Conceptual Problems in the Attribution of Malingering*

in Forensic Evaluations, 37 J.Am.Acad.Psychiatry and Law 98, 98 (2009). There are a great number of difficulties inherent in a psychologist's assessment of malingering, including problems with assessing truthfulness in general, insufficient methodology used in evaluation, complications brought about by other disorders, ethical issues apparent in the rate of misclassification, and complications dependent on the interaction between the assessing clinician and the examinee. *Id.*

Most relevant to the issues in this case is the inherent problem with the assessment of malingering as lie detection, which is precisely what the psychologist's testimony in Mr. Harris' case imparted to the jury. One recent statistical analysis looked at the ability and the accuracy of psychologists' detection of intentional lying. *Id.* at 99. The results of that meta-analysis "found that psychologists are only slightly more accurate in deception detection than are student research participants." *Id.*, citing Aamodt and Custer, *Who can best catch a liar?—a meta-analysis of individual differences in detecting deception*, 15 Forensic Exam. 6-11 (2006). Ultimately, as Drob, Meehan, and Waxman conclude, the high number and frequency of complications inherent in a diagnosis of malingering means that "when psychologists make judgments about malingering they are venturing outside the normal bounds of the science of psychology and are actually making a judgment about an individual's motives, intentions, and behavior." *Id.* at 99-100.

The inherent difficulties in assessing malingering and its relationship to the general concept of lie detection support the First District's decision in this case. Because the State offered Dr. Dreyer's testimony in its case-in-chief, it was not offered in response or rebuttal to any theory of defense actually pursued at the trial or to any specific testimony from Mr. Harris or any other defense witness. *Harris*, 2013-Ohio-349, at ¶ 27. Thus, as the research

cited above suggests, Dr. Dryer's testimony could only be her judgment about Mr. Harris' motives, intentions, and behaviors, which goes beyond Dr. Dreyer's scientific training.

In addition, as argued by the State, Dr. Dreyer's testimony was offered for the sole purpose of establishing Mr. Harris' consciousness of guilt, since he was no longer pursuing a theory of insanity by the time of her testimony. However, the State further argues that "consciousness of guilt" is not equal to an "issue of guilt," and thus, not prohibited under R.C. 2945.371(J). State's Brief, p. 10. To the contrary, this Court has long defined such acts by defendant, including "flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct" showing a consciousness of guilt, *as circumstantial evidence of guilt itself*. (Emphasis added.) *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897, 905 (1969), *citing* 2 Wigmore on Evidence (3d. Ed. 1979), 111, Section 276; *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, at ¶ 167 (citations omitted). As such, no reasonable interpretation of R.C. 2945.371(J) would allow testimony of circumstantial evidence of "consciousness of guilt" based upon the defendant's statements to an evaluator during a competency or insanity examination, but not testimony on the issue of the defendant's guilt itself.

In addition, as pointed out by the First District, Dr. Dreyer's testimony preceded the testimony of Messrs. Brown, Johnson, Anderson, and Gray, all of whom were incarcerated with Mr. Harris at some point. *Id.* at ¶ 12-16. Given the intrinsic credibility issues present with all incarcerated criminal witnesses, Dr. Dreyer's testimony was critical to the State. Had Dr. Dryer's testimony, undeniably imparting to the jury her opinion that Mr. Harris' character was one of deception and lying, not been introduced, the jury would have been faced with weighing only the State's incarcerated witnesses against Mr. Harris' testimony.

The extreme imbalance resulting from the State's introduction of this inadmissible testimony cannot be ignored, and this Court should affirm the lower court's decision.

C. Policy disfavors adopting the State's interpretation of R.C. 2945.371(J).

The State's interpretation of R.C. 2945.371, as applied in this case, urges this Court to interpret subsection (J) in a way that guarantees that future defendants will be put "to the choice of foregoing either [the] right to a competency [or sanity] exam or [the] right to limit the admissibility of statements [made] during such an exam." *Porter v. McKaskle*, 484 U.S. 984, 986, 104 S.Ct. 2367, 80 L.Ed.2d 838 (1984) (citation omitted). In *McKaskle*, the defendant requested the trial court to order a psychiatric examination due to a recently disclosed presentence report that described a psychiatric episode in the defendant's past. *Id.* at 985. The prosecutor agreed to the defendant's request, but only if the results would be admissible in any phase of trial (penalty or mitigation) and for any purpose. *Id.* The lower court granted the prosecutor's request, and upon that ruling, the defendant immediately withdrew his request for the competency exam. *Id.* Recognizing the fundamental rule that forbids the admission at trial against the defendant of any statements made by him in the course of a court-ordered competency exam on the issue of guilt, the Court reasoned that no balance could be struck that put such an untenable choice before a criminal defendant.

This Court has also previously recognized that a balance must be maintained between the State meeting its burden of proof and protecting the constitutional rights of the defendant. *See State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, at ¶ 56-58; and *State v. Wilcox*, 70 Ohio St.2d 182, 436 N.E.2d 523 (1982). In *Wilcox*, this Court held that a defendant is not permitted to offer expert testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental

state required for a particular crime or degree of crime. *Wilcox*, 70 Ohio St.2d at syllabus, ¶ 2. Expert testimony that opines on the defendant's *mens rea* or expresses a lay opinion is inadmissible. *Id.*; *State v. Slagle*, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992); Evid.R. 702(A).

These cases prohibit a criminal defendant from being put in a situation in which he or she is forced to choose between foregoing one constitutional right in order not to forego another one. That principle is underscored by Mr. Harris' case. If this Court accepts the State's position on the meaning of R.C. 2945.371(J), it will undercut the precedent recognizing that in order to provide a defendant with due process and the right to a fair trial, certain limitations must be placed on expert testimony. In other words, experts may not be permitted to testify as to whether a complainant is truthful or whether a defendant is a malingerer and feigner of mental illness, especially when the issue of his sanity is no longer at issue in the case.

Had the safeguards inherent in R.C. 2945.371(J) been heeded by the trial court in this case, Dr. Dreyer would not have been allowed to testify in the State's case-in-chief, and only allowed in rebuttal if Mr. Harris's testimony raised the issue of his competence or sanity. As noted by the First District, because Dr. Dreyer's testimony in the State's case-in-chief went solely to whether Harris feigned symptoms of mental illness, "it emphasized Harris' questionable credibility[,]” before he even took the stand. *Harris*, 2013-Ohio-349, at ¶ 27. And, "such questions about his credibility could have reasonably affected how the jury viewed Harris's explanation of the shooting and his contention that he had not intended to rob Gulleman." *Id.*

CONCLUSION

Because Mr. Harris' sanity was no longer at issue when Dr. Dreyer testified, and because the psychologist's testimony was not offered for any purpose but to impart to the jury her conclusion that Mr. Harris had a character for deception, R.C. 2945.371(J) flatly prohibited the admission of that testimony. Given the highly prejudicial nature of Dr. Dreyer's testimony as to Mr. Harris' penchant for malingering it could not have been harmless to Mr. Harris' defense. As amicus curiae, the Office of the Ohio Public Defender asks this Court to dismiss this case as improvidently allowed, or after consideration, to affirm the decision of the First District Court of Appeals granting Mr. Harris a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Joseph Harris* was sent by regular U.S. mail, postage prepaid to the offices of Judith Anton Lapp, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, Counsel for Appellant State of Ohio; and to Wendy R. Calaway, Attorney at Law, 2089 Sherman Avenue, Suite 20, Cincinnati, Ohio 45212, Counsel for Appellee Joseph Harris, this 18th day of November, 2013.



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