Supreme Court of Ohio Clerk of Court - Filed July 25, 2018 - Case No. 2018-0909

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**
**Plaintiff-Appellee,**

**v.** **CASE NO.: 2018-0909**

**BRITTANY R. PILKINGTON,**
**Defendant-Appellant.**

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**ON APPEAL FROM THE LOGAN COUNTY COURT OF APPEALS**
**THIRD APPELLATE DISTRICT, App. No. 8-17-38**

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# STATE OF OHIO'S MEMORANDUM IN RESPONSE TO SUPREME COURT JURISDICTION

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## WHY THIS CASE FAILS TO PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD BE DENIED

The Defendant in this case has confessed to murdering her three young sons: Gavin (4 years old), Niall (3 months old) and Noah (3 months old). She was interviewed by law enforcement on August 18, 2015 after her third son was found dead.

Niall was found dead on July 22, 2014. In her interview with law enforcement Brittany initially claimed that she had accidently rolled over on Niall while sleeping and suffocated him to death. She stated that she moved his body to the pack-n-play before her husband Joe came home and was scared to tell anyone what happened. Later on in the interview, Brittany admitted that Niall's death was not an accident. She suffocated him to death like her other sons by placing a blanket over his nose and mouth and applying pressure.

Gavin was found dead on April 6, 2015. For Gavin, Brittany stated that she was suffering from depression after Niall's death and was stressed out. She said that Gavin was not listening to her and would not go to bed. She then took him to bed and put a blanket over him. She said she put pressure on his nose over the blanket. Brittany stated that killing Gavin was the hardest as he struggled while she suffocated him. She stated that she had to hold his legs down while killing him and that it took a few minutes. She told officers that after Gavin died she needed to get help.

Noah was found dead on August 18th, 2015, exactly one week after custody of him was returned to Brittany. For Noah, she said around 1AM Noah was fussy and crying. She said that she covered his nose and mouth with a blanket and held it there for a minute until he stopped breathing. She then sat at the table and waited for Joe to come home.

Brittany stated that her husband Joe adored his boys and she believed that he loved them more than their daughter Hailey. She said that Gavin was his favorite and that bothered her. She stated that her father beat her when she was growing up and that caused her to have bad feelings towards her sons. After each boy's death, Joe got closer to his remaining sons which bothered Brittany even more. Her desire was to have the boys out of the way so that Joe would pay more attention to her and Hailey.

Brittany stated that she covered the faces of each of the boys while she suffocated them so she would not have to see them die. She also admitted that she wanted Joe to be the one to find the boys so he would feel the pain of losing them. When asked if she had any remorse, she said yes, and wished she would have killed herself before killing her sons.

A suppression hearing was held in this case and the Trial Court overruled the Defendant's motion to suppress her statements. The Defense filed a second motion to suppress seeking to put on evidence of the Defendant's mental state at the time of her confession to show that her will was overborne by the police and she gave a false confession. The Defense is essentially trying to put on two experts who will testify that during parts of Brittany's interview with the police she was telling the truth and during parts of the interview she was lying to the police. The trial court's order granting a second suppression hearing to permit experts opine on when Brittany was telling the truth and when she was lying is "uncharted territory." Ohio has long recognized that the issue of whether a witness or defendant is telling the truth is up to the trier of fact - not experts, which is why Ohio does not permit polygraph evidence at trial.

Upon learning that Pilkington would be presenting expert evidence on her mental health, the State moved to have her undergo an independent psychological evaluation. The trial court granted the State's motion and ordered Pilkington to "submit to a

psychological evaluation on the issues raised by the defense." Judgment Entry, Sept. 14, 2017. The court explained that Pilkington's "mental capability and any psychological or physiological abnormalities are now relevant to this case." Id. As authority for the evaluation, it relied on Rule 57(B) of the Rules of Criminal Procedure, which allows a court to look to the civil rules where no applicable criminal rule exists, and Rule 35(A) of the Rules of Civil Procedure, which allows a court to order mental and physical evaluations when a party's mental or physical condition is in controversy. Id. The court also cited case law recognizing the constitutional propriety of such an order. Id. The court clarified that the independent evaluator would not be permitted to ask "any questions regarding the facts and circumstances of the alleged offenses." Id.

Since the Defense has raised the Defendant's mental state as an issue, this Court's ruling in *State v. Goff*, 128 Ohio St. 3d 169, 2010-Ohio-6317 is controlling. This Court has specifically held that the prosecution may utilize evidence from a compelled examination to rebut the defendant's own psychological evidence. As this Court has already decided this issue, the State requests that the Court decline jurisdiction.

## STATEMENT OF THE FACTS

On March 30, 2010, Brittany R. Cummins married Joseph Pilkington and thereafter assumed his surname. They had four children together: 1) Gavin Pilkington (DOB: 06/12/2010), 2) Hailey Pilkington (DOB: 08/24/2011), 3) Niall Pilkington (DOB: 04/11/2014), and 4) Noah Pilkington (DOB: 05/14/2015). At all times pertinent, they resided together as a family in a second floor apartment, # 215, at 868 E. Sandusky Avenue, in the City of Bellefontaine, Logan County Ohio.

In less than two years, all three of Pilkington's male children died under suspicious circumstances. In each case, shortly after Pilkington's husband returned from work, a call was placed to 911 reporting that a boy was not breathing and that one of the parents was attempting CPR. At each death, Pilkington was unemotional. Niall Pilkington was three months old when he died in July 2014; Gavin was four years old when he died in April 2015; and Noah Pilkington was four months old when he died in August 2015.

Before Noah's death, Pilkington and her husband had lost custody of Noah and his older sister Hailey. Noah and his sister had been returned to the Pilkingtons' home the week before Noah died, with orders that Noah be placed on a sleep apnea machine and movement monitor. The morning that Noah died, Pilkington was brought to the Bellefontaine Police Department for questioning. After waiving her Miranda rights, Pilkington participated in a lengthy interview during which she admitted to intentionally killing all three boys.

At the evidentiary hearing on the motion to suppress, Pilkington claimed that her statement was involuntary for multiple reasons, including that the officers "knew of her background, knew of her - - any deficits or any lack of mental acuity" and of history "that

concerned her mental functioning." Tr., p. 5. During the cross-examination of Bellefontaine Police Detective Dwight Salyer, Pilkington's attorney referred to childhood diagnoses of lead poisoning and a learning disability, and allegations that Pilkington's mother did not properly care for her, but the detective was not aware of any of those claims. Tr., p. 40-41, 45-46. He also did not agree that Pilkington acted younger than her age and he was unaware she had a "mental state" that required accommodation. Tr. 47, 123. He did recall that, during the interview, Pilkington mentioned that she had post-traumatic stress disorder and depression. Tr. 123-24. Bellefontaine Police Chief Brandon Standley, who participated in a later part of Pilkington's interview, recalled that Pilkington told him she had depression and suicidal thoughts. Tr. 220. But she listened and responded to questions "very normally of anyone that would be in the same position that I can think of." Tr. 217. He was not aware of any issues regarding Pilkington's social or intellectual function on the day of her interview. Id. Although Pilkington's civil attorney testified, she was not asked any information about Pilkington's mental status or abilities. Tr. 185-92.

In denying Pilkington's motion to suppress, the trial court noted that there were "hearsay quotes . . . about her mentality" during cross-examination, but no direct evidence was presented. Judgment Entry, Nov. 18, 2016, p. 4. "[F]rom observing the recorded interview, given Defendant's ability to communicate and her vocabulary," the court concluded "that [Pilkington] is low normal or average intelligence." Id. Approximately eight months after the trial court denied her motion to suppress, Pilkington filed a motion to reopen the suppression hearing, arguing that she was entitled to present "new evidence," including two mental health evaluations. She explained that, "[t]he critical findings" of the two experts "go to the heart of the issues relating to" whether her waiver of rights and subsequent statements were voluntary.

Motion for Leave to Reopen, July 10, 2017, pp. 2-3. The trial court granted the motion to reopen. Judgment Entry, Aug. 10, 2017.

Upon learning that Pilkington would be presenting expert evidence on her mental health, the State moved to have her undergo an independent psychological evaluation. The trial court granted the State's motion and ordered Pilkington to "submit to a psychological evaluation[] on the issues raised by the defense." Judgment Entry, Sept. 14, 2017. The court explained that Pilkington's "mental capability and any psychological or physiological abnormalities are now relevant to this case." Id. As authority for the evaluation, it relied on Rule 57(B) of the Rules of Criminal Procedure, which allows a court to look to the civil rules where no applicable criminal rule exists, and Rule 35(A) of the Rules of Civil Procedure, which allows a court to order mental and physical evaluations when a party's mental or physical condition is in controversy. Id. The court also cited case law recognizing the constitutional propriety of such an order. The court clarified that the independent evaluator would not be permitted to ask "any questions regarding the facts and circumstances of the alleged offenses." Id.

## STATEMENT OF THE CASE

The Logan County Grand Jury indicted Brittany Pilkington for three counts of Aggravated Murder, each with two death penalty specifications, in August 2015. (Indictment, Aug. 25, 2015). In October 2016, upon Pilkington's motion to suppress, the trial court held a two-day evidentiary hearing regarding statements that Pilkington made to the police on August 18, 2015. Judgment Entry, Nov. 21, 2016, p. 1; Suppression Transcript, Oct. 18-19, 2016 (Tr.). The court concluded that the statements were admissible because Pilkington waived her Miranda rights and made her statements voluntarily. Judgment Entry, Nov. 21, 2016, pp. 2, 5. Almost eight months later, Pilkington asked the trial court to reopen the suppression hearing to allow her to present expert testimony regarding her mental health and re-argue the voluntariness of her Miranda waiver and subsequent statements. Motion for Leave to Reopen, July 10, 2017. The trial court granted that motion. Judgment Entry, Aug. 14, 2017. The following month, on the State's motion, the trial court ordered Pilkington to undergo a psychological evaluation by Dr. Barbra Bergman regarding "her competency to waive Miranda rights on August 18, 2015, the voluntariness of her statements to law enforcement on August 18, 2015, an IQ test (if necessary), and to review issues raised by the defense experts Dr. Jeffrey Madden, and Dr. Howard Fradkin." Judgment Entry, Sep. 27, 2017, App'x A-3.

Pilkington appealed the trial court's order of an independent psychological evaluation to the Third Appellate District. Notice of Appeal, Oct. 10, 2017. On May 14, 2018, the Third District overruled the Defendant's appeal and affirmed the trial court's order.

## ARGUMENT

## RESPONSE TO APPELLANT'S PROPOSITION OF LAW

***I. The Defendant-Appellant's Fifth Sixth, and Fourteenth Amendment Rights will not be Violated by Compelling a Psychological Evaluation.***

The trial court properly and lawfully granted the State's motion to have Pilkington psychologically evaluated. Pilkington placed her mental condition at issue when she asked to present expert testimony on whether her particular condition made her Miranda waiver and subsequent statements to police involuntary. The trial court's inherent authority to ensure a balanced presentation of the evidence in the pursuit of the truth permits it to order an independent evaluation. See *State v. Goff*, 128 Ohio St. 3d 169, 2010-Ohio-6317 ¶ 58. The procedural rules that govern Ohio trial courts also lend support.

### A. An independent psychological evaluation would not violate Pilkington's Fifth Amendment right against self-incrimination.

The trial court's order raises no constitutional concerns. As to the Fifth Amendment claim raised in this appeal, when Pilkington requested that the trial court reopen the suppression hearing to introduce "critical" testimony about her mental health, she opened a door into that issue through which the State could properly follow. "The State may "permissibly follow[] where the defense [has] led." *Cheever*, 134 S. Ct. at 602. Both the United States Supreme Court and the Ohio Supreme Court have held that a defendant who places her mental state at issue provides a limited waiver of her Fifth Amendment right against self-incrimination with respect to that issue. See *Kansas v. Cheever*, 134 S. Ct. 596, 601-02 (2013); *Goff*, 2010-Ohio-6317 ¶ 58. Both courts have also held that the prosecution may utilize evidence from a compelled examination

to rebut the defendant's own psychological evidence. In accord with this authority, the trial court's order authorizing the examination is carefully tailored to permit inquiry into "the issues raised by the defense" and specifically forbids questions about "the facts and circumstances of the alleged offenses."

The Fifth Amendment right applies to statements made in a psychiatric examination. "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Estelle v. Smith*, 451 U.S. 454, 468 (1981). But that right is limited when a defendant places his mental state at issue. "[I]f a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this" evidence. *Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987) (emphasis added). Thus, "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." *Cheever*, 134 S. Ct. at 601 (allowing evidence from a court-ordered examination). This rule protects "the adversarial process" and the courts' truth-seeking function. *Id.*; see also *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (Scalia, J.) (rejecting argument that use of compelled competency evaluation to rebut insanity defense would violate Fifth Amendment "because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability").

The Ohio Supreme Court has interpreted Article I, § 10 of the Ohio Constitution in a similar manner. In *Goff*, the Court upheld an order compelling a defendant to

undergo 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. 2010-Ohio-6317 (applying Ohio and United States constitutional provisions). The Court concluded that "a court may compel the defendant" who puts battered-woman syndrome in issue by presenting psychiatric evidence on that subject "to submit to an examination by another expert without violating" the defendant's self-incrimination rights. Id. ¶ 58. "By putting her mental state directly at issue and introducing expert testimony based upon her own statements to the expert, the defendant opens the door to a limited examination by the state's expert." Id. It rested on the same grounds as *Buchanan, Cheever, and Byers*: "[A]llowing the defendant to present expert testimony on the specific effects of battered-woman syndrome . . . 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." *Id*.; see also *Madison*, 2015-Ohio-4365 (allowing compelled psychiatric examination to rebut mitigation evidence).

The limits of the examination imposed by the Trial Court protect the Defendant's Fifth Amendment right. "The limitation on a defendant's bedrock constitutional right against self-incrimination must be carefully tailored to avoid any more infringement than is necessary to ensure a fair trial." *Goff*, 2010-Ohio-6317 ¶ 59. Thus, any evaluation must not "exceed[] the boundaries of what [is] necessary to provide a level playing field between the state and the defense as to expert testimony." Id. ¶ 66. The trial court's order is carefully tailored to ensure that the examination considers only the relevant issues, and specifically prohibits the examiner from asking questions about the underlying crime. Judgment Entry, Sept. 14, 2017. The order levels the playing field between the state and the defense.

Pilkington's claim that raising her mental health to challenge the voluntariness of her confession is meaningfully distinct from the cases cited, in which the defendants raised their mental health as an affirmative defense, is unpersuasive. The underlying principles that guided the decisions in Buchanan, *Cheever, Byers*, and *Goff* are not limited to affirmative defenses. See, e.g., *Cheever*, 134 S. Ct. at 601 (stating that Buchanan "did not turn on whether state law referred to extreme emotional disturbance as an 'affirmative defense'"). Rather, they evince concerns with fundamental fairness and protecting the court's ability to ascertain the truth. Those concerns apply as much when deciding the validity of a defendant's confession as they do when deciding the validity of a defendant's defenses. The suppression of evidence bearing on guilt or innocence always imposes a great cost on the truth-seeking function of the judicial system. It is just as critical that the playing field be level when the court is considering the admissibility of evidence as it is when a jury is considering its verdict.

**B. Sixth Amendment**

The Sixth Amendment right to the assistance of counsel applies to psychiatric interviews that take place post-indictment and pre-trial. See *Smith*, 451 U.S. at 469-71. The U.S. Supreme Court has held that a defendant has the right to the assistance of counsel "before submitting to [a] pretrial psychiatric interview." Id. at 469 (emphasis added); see also *Satterwhite v. Texas*, 486 U.S. 249, 251 (1988) (recognizing that "defendants formally charged with capital crimes have a Sixth Amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness" (emphasis added)). The Sixth Amendment right to counsel extends to state-level prosecutions through application of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Pilkington has not cited, and the State has not identified, any opinion that recognized a right to have counsel present during a compelled psychiatric evaluation.

In *Smith*, the Supreme Court noted that its Sixth-Amendment holding did not extend to counsel's presence. See 451 U.S. at 470 n.14. It observed that "the Court of Appeals did not find[] any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that 'an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.'" Id. (citation omitted).

Federal appellate courts have expounded on this and explicitly rejected the right to the presence of counsel during a psychiatric examination. Byers spoke of Smith's analysis: "The line it drew was one between the right to counsel before the interview and the right to counsel during the interview." See 740 F.2d at 1119 n.16. It noted that "[a]n examining psychiatrist is not an adversary," and also considered "the pragmatic effects of presence of counsel upon" a psychiatric examination. Id. at 1119-20. "[O]ne can scarcely imagine a successful psychiatric examination in which the subject's eyes move back and forth between the doctor and his attorney." Id. at 1120. The Fifth Circuit has also rejected the right to the presence of counsel during a psychiatric interview, while recognizing that the Sixth Amendment right applies to "deciding whether to undergo a psychiatric evaluation." See *Crawford v. Epps*, 353 F. App'x 977, 982 (5th Cir. 2009).

A psychological evaluation in which counsel was not present would not violate Pilkington's Sixth Amendment right. Pilkington's counsel has received ample notice that there will be a psychological examination of their client and, therefore, they have the opportunity to advise their client about the risks and benefits of undergoing such an examination. This satisfies the Sixth Amendment requirements outlined in *Smith*. Pilkington's Sixth Amendment rights were not violated by the trial court's order and would not be violated by the ensuing examination.

## II. *The trial court acted within its authority when it ordered Pilkington to undergo a psychological evaluation*

The trial court has the authority to order an evaluation of Pilkington in these circumstances. Pilkington argues that the lack of a specific authorizing statute for this type of evaluation "by implication negate[s] the State's request," and also that the trial court erred by relying on the Criminal and Civil Rules. To the contrary, the trial court's power to order the evaluation was rooted in its inherent authority to protect the trial's truth-seeking role, and in the procedural rules that govern Ohio trial courts.

First, the trial court has the "inherent authority to ensure fairness in the trial process." *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317 ¶ 58. Courts have the power to take lawful steps necessary to ensure the trier of fact may "mak[e] an informed decision." Id. To that end, the Ohio Supreme Court has permitted a court-ordered psychiatric examination in similar circumstances, even where no statute specifically provided for one. *Id*.

In *Goff*, the statute governing battered-woman-syndrome defenses made no provision for an examination of the defendant by the State's expert, although it did provide for an examination by the defendant's own expert. See *id*. ¶¶ 39-40 (discussing R.C. 2901.06(B)). The Ohio Supreme Court did not find the lack of a statutory authorization to be an obstacle to requiring the defendant to submit to an examination where the defendant placed her own mental state in controversy. It was instead concerned with the impediment to inquiry created by allowing only a one-sided presentation of evidence. See *id*. ¶¶ 57-58. It reached its conclusion over Justice O'Donnell's lone, contrary view that "the state should be precluded from obtaining a mental examination in this case because the General Assembly has not authorized such an exam to be conducted." Id. ¶ 74 (O'Donnell, J., concurring in judgment).

The same concerns about courts' truth-seeking function that guided *Goff* are present here. Pilkington's argument that the lack of a specific statute prevents any court-ordered evaluation did not carry the day before the Ohio Supreme Court, and should be rejected by this Court, too.

Second, the trial court also has the authority to order the psychiatric evaluation under the Criminal Rules of Procedure. See Judgment Entry, Sept. 14, 2017. Rule 57(B) of the Ohio Rules of Criminal Procedure provides that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." No rule of criminal procedure governs mental examinations of a criminal defendant. The Rules of Civil Procedure, however, allow a court to order a "mental examination" "[w]hen the mental . . . condition . . . of a party . . . is in controversy." Civ. R. 35(A). "The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Id. The Eighth District has relied on these rules, along with a trial court's "inherent authority," to uphold a court-ordered psychiatric examination of a capital defendant. See *State v. Madison*, 8th Dist. No. 101478, 2015-Ohio-4365 ¶¶ 12-25. In *Madison*, the court allowed an examination by the State's expert after the defendant said he would introduce mitigating evidence about how his childhood abuse and neglect led to brain damage. See id. ¶ 10. Because the defendant had "made his mental condition a relevant factor in determining whether a death sentence [was] appropriate," the court considered the defendant's mental state to be "in controversy" within the meaning of the applicable rules. See id. ¶¶ 14-16. "[T]o allow Madison to present expert evidence of his mental condition without allowing the state to investigate Madison's claims and

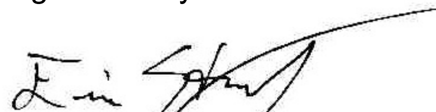
present a case in rebuttal is not fair and 'would undermine the adversarial process, allowing a defendant to provide the jury . . . a one-sided and potentially inaccurate view,' unfairly tipping the weight of the evidence in his favor." Id. ¶ 22 (quoting *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013)).

An independent psychological evaluation under these circumstances does not run afoul of Pilkington's constitutional rights. The State has shown "good cause" for an examination; without it, the State would lack "the only effective means of challenging" the defendant's psychological evidence: "testimony from an expert who has also examined [her]." *Cheever*, 134 S. Ct. at 601. The trial court would then be left with "a one-sided and potentially inaccurate view" of Pilkington's mental state. *Id*.

## CONCLUSION

The Defendant in this case has placed her mental state at issue. Both the United States Supreme Court and the Ohio Supreme Court have held that a defendant who places their mental state at issue provides a limited waiver of their Fifth Amendment right against self-incrimination with respect to that issue and they may be compelled to undergo a psychological examination. As *State v. Goff*, 128 Ohio St. 3d 169, 2010-Ohio-6317 is controlling precedent, the State respectfully requests that the Court decline jurisdiction.

Respectfully submitted,
Logan County Prosecutor



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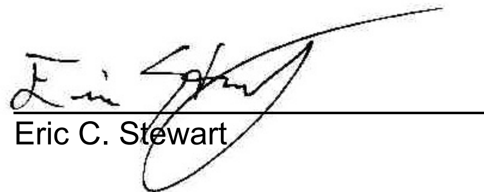

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