IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No. 2022-0779
Plaintiff-Appellee,	*	
-vs-	*	On Appeal from the Lucas County, Court of Appeals,
MIGUEL MILLS,	*	Sixth District
Defendant-Appellant.	*	Court of Appeals Case No: CL-2020-1084
	*	

MERIT BRIEF OF PLAINTIFF-APPELLEE

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ON BEHALF OF DEFENDANT-APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellant Miguel Mills was indicted on July 9, 2019, by the Lucas County Grand Jury and charged with Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2) and (D), along with a specification, under R.C. 2941.145(A), (B), (C), and (F) alleging that Mills displayed, brandished, used or indicated possession of a firearm. Mills was also indicted and charged with Discharge of a Firearm on or Near Prohibited Premises, a felony of the third degree, in violation of R.C. 2923.162(A)(3) and (C)(2).

During the pre-trial proceedings in this case, Mills had a very clear and definite trial strategy which he expected defense counsel to pursue- to obtain a trial date as soon as possible. (*See* TR Sept. 4, 2019, p. 2, Ln 13-14; TR Oct. 23, 2019, p. 2-3). As noted by the Sixth District's Opinion, during his pre-trial proceedings Mills was extremely lucid and he astutely recalled what occurred during his past courtroom appearances. (Opinion at ¶25; s*ee e.g.*, TR Oct. 21, 2019, p. 8, Ln 6-7; TR Nov. 11, 2019, p. 2-5, 7-9). One example of this occurred during a pre-trial conference on November 4, 2019:

> * * * on November 4, 2019, [Mills] * * * said, "But I read my rights to speedy trial rights, and the formalities to speedy trial. They say there is no more than 120 days. Instead you keep pushing my date back." This statement clearly establishes that [Mills] was quite capable of assisting in his own defense, but for his own selectively-timed and deliberate misbehavior. At the conclusion of [Mills'] lengthy arguments in favor of his interpretation of his speedy trial rights, the trial court gave a lengthy response and ended with, "you are welcome to have an appeal on that issue. I need to call my next case because I need to get to trial on the case that is going to trial today, I appreciate you are upset. I am giving you as much deference as I can but I have to move to the next case. Thank you."

(Opinion, p. ¶ 25; TR Nov. 4, 2019 at 9-11). The Sixth District properly concluded that '[]he record shows [Mills] was upset, not incompetent." *Id.*

Prior to the trial date, on November 19, 2019, defense counsel filed a Motion for Competency and General Mental Health Assessment. Defense counsel made this request to determine Mills' competency to understand the charges filed against him and to determine whether he was able to understand the plea offers which the State presented. (Motion for Competency, Trial Record item 19.) As noted by the Sixth District's opinion, "[h]is attorney stated that [Mills'] mental stability had 'completely evaporated,' and [Mills] could no longer have a reasonable conversation with his attorney about the evidence against him, review trial tactics, or review any plea offers." (Opinion at p. 3, ¶ 4.) Defense counsel's Motion for Competency further stated that three to four officers "responded" to one particular meeting after Mills became "verbally violent and physically telegraphing potential violence." (Motion for Competency at p 2; Opinion at p. 3, ¶ 4.) However, defense counsel's Motion supports the conclusion that Mills' behavior was not indicative of incompetency, but rather was an adult temper tantrum-specifically and deliberately designed to ensure that both the trial court and defense counsel would give him exactly what he wanted- a prompt and firm trial date. Defense counsel's Motion asserted that:

> **[t]his occurs with any comments by counsel that isn't in complete agreement with what his predetermined position is on even the smallest issues concerning the proceeding in court or his defense.**

(Motion for Competency at p. 2.)(emphasis added).

The trial court, on November 21, 2019, referred Mills to the Court Diagnostic and Treatment Center for a competency examination. (Opinion at p. 3,¶ 4). On the day that Mills' examination was scheduled, however, he refused to cooperate. While Mills was

promptly referred to Court Diagnostic, he refused to cooperate with having his competency determined by refusing to leave his jail cell. *Id.* The State firmly believes that Mills did not want a competency argument to be made on his behalf, and that he opposed his attorney's Motion in order to demand a prompt, firm trial date. Throughout his pre-trial proceedings, he consistently opposed any delay in the trial date. (*See e.g.*, TR Nov. 4, 2019, p. 9-11). That is why he refused to cooperate with the examination. It was a deliberate choice, not incompetence. The record establishes that Appellant waived and failed to properly maintain his claim of incompetency by refusing to cooperate with Court Diagnostic & Treatment Center's attempt to evaluate him.

Since Mills refused to leave his jail cell, Court Diagnostic was unable to complete the competency evaluation and a letter to that effect was sent to the trial court on December 3, 2019. (Opinion at p. 3,¶ 4). As a result, the case proceeded to trial on December 9, 2019. Not surprisingly, having obtained what he wanted all along, **Mills' behavior issues suddenly disappeared once the trial began.** At no time during trial did defense counsel raise the competency issue despite being given the opportunity to do so. *(See generally*, Trial TR Dec. 9-10, 2019, p. 2-318)(the trial transcript will be referred to hereafter as "TR.")

The trial lasted two days. The Sixth District summarized the evidence presented at trial:

> [T]he prosecution produced video evidence from multiple nearby apartment buildings and a Toledo police sky-cop camera that showed an African-American male chasing the victim's white GMC SUV. He is seen with his right arm extended toward the vehicle. Flashes are seen emanating from his extended hand. Multiple witnesses identified the man in the video as [Mills.] Witnesses heard gunshots. Police at the scene observed a bullet hole in the victim's vehicle.

> The victim did not allow authorities to inspect his vehicle because he did not want to pay for the repairs after the passenger-side door was taken apart by the police. The victim also did not appear for the trial, but the victim was interviewed at the scene and by a police detective.

(Opinion at p. 6, ¶ 7).

Mills' behavior during trial, while indicating confusion and/or lack of understanding of legal procedure at certain times, *see e.g.*, Pretrial Nov. 4, 2019, p 4-5, 8; Arraignment, July 31, 2019, p. 7; TR. p. 119; Sentencing, Jan. 8 2020. p. 3-4, did not indicate incompetence or an inability to assist in his own defense. Any concerns he had were adequately addressed to his satisfaction. *Id.* Once the trial started, Mills appeared to have an adequate understanding of the nature and object of the proceedings against him, and an adequate ability to consult with his counsel, and an adequate ability to assist in preparing his defense. During trial, when asked if there were any issues that needed to be addressed, defense counsel did not raise any issues. *(See e.g*, TR. p. 194, ln. 5-6). Defense counsel failed to raise the issue of competency prior to trial even though he had the opportunity to do so. (TR p. 2-3). At no time during trial did the trial court, or defense counsel raise the issue of competency. (TR 139, Lns 6-17; TR 194, Ln. 5-6; TR 289, Ln. 18-25).

On December 10, 2019, the jury found Mills found guilty of both the Felonious Assault charge and the Discharge of a Firearm charge, along with the firearm specification. Mills was sentenced on January 27, 2020. While defense counsel did argue at sentencing that Mills' mental health issues should mitigate his sentence, as noted above, at no time during trial did defense counsel raise the competency issue despite having opportunity to do so. *(See generally*, TR Dec. 9-10, 2019, p. 2-318).

Mills was sentenced to a minimum term of five years to a maximum of seven and one-half years on the Felonious Assault charge. An additional consecutive term of three years was added for the firearm specification. Mills was also sentenced to 36 months of imprisonment for the Discharge of a Firearm, to be served concurrently to the term imposed for the Felonious Assault, and concurrently to a 14 month reserve prison term imposed in a prior Lucas County case (CR-2019-1347.)

Through counsel, Mills filed a Motion for Delayed Appeal in the Sixth District Court of Appeals on April 24, 2020. (Motion for Delayed Appeal, Appeal record item 1). The State filed a Response on May 4, 2020. (Response of Appellee, Appeal record item 2). On June 18, 2020, the Sixth District granted Mills' Motion for Delayed Appeal. On March 25, 2022, the appellate court affirmed the judgment of the trial court.

Mills then filed a Notice of Appeal to this Court, through the Ohio Public Defender's Office, along with his Memorandum in Support of Jurisdiction. This Court granted jurisdiction and this case follows. For all the reasons which follow, the State respectfully urges the Court to dismiss this case as having been improvidently allowed, or in the alternative, to deny Appellant's Propositions of Law, to find them not well taken and to overrule same.

ARGUMENT:

State's Response to First Proposition of Law: An appellate court considering whether the record on appeal contains "sufficient indicia of incompetence" triggering a competency hearing reviews the record using the preponderance standard, not a lesser standard of review.

In his First Proposition, Mills asserts that the proper standard of review when an appellate court considers whether the record contains "sufficient indicia of incompetence" "triggering" a competency hearing, should be a reasonable doubt standard. While the preponderance standard applies to the review of a defendant's burden of production, (i.e. the burden of actually establishing incompetence), Mills argues that appellate review of his burden of persuasion, (i.e. review of the evidence produced), in support of his right to a hearing should only require the application of a reasonable doubt standard. Thus, Mills seeks to apply a lower standard of appellate review to his burden of persuasion of the evidence which would trigger the right to a competency hearing. Mills also asserts that even though he deliberately refused to cooperate with his scheduled competency examination, the trial court was nevertheless required to hold a competency hearing. It is ironic that Mills now asserts that he was entitled to that he which he firmly opposed. Mills' Proposition is without merit.

A. When reviewing a trial court's decision on competency, the standard of appellate review utilized by Ohio appellate courts is an abuse of discretion standard.

Ohio appellate courts use the abuse of discretion standard in cases involving appellate review of a trial court's decision regarding competency to stand trial. *State v. Sims*, 3d Dist. Seneca No. 13-21-14, 2022-Ohio-3365, ¶ 12-13. *See also, State v. Ahmed,* 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 65-68 (denial of request for

competency hearing after trial had commenced was not abuse of discretion.); and *State v. Smith*, 89 Ohio St.3d 323, 330, 2000-Ohio-166, 731 N.E.2d 645 (holding that the trial court did not abuse its discretion by declining to order a competency evaluation). "A trial court's decision on competency will not be disturbed absent an abuse of discretion.'" *Id.*, quoting *State v. Lechner*, 4th Dist. Highland No. 19CA3, 2019-Ohio-4071, ¶ 24. "An abuse of discretion is more than a mere error in judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157-158, 404 N.E.2d 144 (1980).

Further, '" [a] criminal defendant's competency to stand trial * * * is a question of fact.'" *Sims, supra*, citing *State v. Stutzman*, 9th Dist. Wayne No. 18AP0038, 2019-Ohio-1695, ¶ 13, quoting *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, 998 N.E.2d 1100, ¶ 92. "Deference, therefore, generally ought to be afforded to a trial court's competency determination, as 'factual determinations are best left to those who see and hear what goes on in the courtroom.'" *Sims*, *supra*, quoting *State v. Cowans*, 87 Ohio St.3d 68, 84, 1999-Ohio-250, 717 N.E.2d 298, and citing *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶ 59, 12 N.E.3d 1112 ("As with other witnesses, the trial judge heard all of the expert testimony, and it was his job to judge their credibility and weigh all the evidence in making his findings.").

"Therefore, an appellate court will not overrule the trial court's competency determination if the record contains credible, reliable evidence in support of the trial court's determination that the defendant understood the nature and objective of the proceedings against him." *Sims, supra* citing *State v. Heatherington*, 5th Dist. Richland No. 2021 CA

0021, 2022-Ohio-1375, ¶ 33, citing *State v. Williams*, 23 Ohio St.3d 16, 19, 23 Ohio B. 13, 490 N.E.2d 906 (1986); *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶46, 890 N.E.2d 263 ("A trial court's competency findings will not be disturbed when there is some reliable and credible evidence supporting those findings."); *see also Stutzman* at ¶ 13.

1. The burden of proving incompetence is placed on the defendant.

The burden of production, that is the burden of proving incompetency, is on the defendant. *State v. Scott*, 92 Ohio St.3d 1, 4, 2001-Ohio-148, 748 N.E.2d 11 ("[P]lacing the burden of proof on Scott to prove probable cause or to prove by a preponderance of the evidence that he is incompetent to be executed does not violate Scott's constitutional protections.") The State "may presume that the defendant is competent and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence." *Cooper v. Oklahoma*, 517 U.S. 348, 355, 116 S.Ct. 1373, 134 L. Ed. 2d 498 (1996), citing *Medina v. California*, 505 U,.S. 437, 449, 112 S.Ct. 2572, 120 L. Ed. 2d 353 (1992).

This burden is properly placed on the defendant because he is in the best position to produce evidence of incompetency. *Id.*, at 455.

> After balancing the equities in this case, I agree with the Court that the burden of proof may constitutionally rest on the defendant. As the dissent points out, post, 505 U.S. at 465, the competency determination is based largely on the testimony of psychiatrists. The main concern of the prosecution, of course, is that a defendant will feign incompetence in order to avoid trial. **If the burden of proving competence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution.** A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state. **States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession. The potentially greater overall access to information provided by placing the burden of proof on the defense may outweigh the danger**

that, in close cases, a marginally incompetent defendant is brought to trial.

Medina, 505 U.S. at 455 (J. O'Connor, concurring)(emphasis added)

B. The Due Process Standard:

The conviction of a defendant who is incompetent violates Due Process. *State v. Skatzes,* 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶155, *citing Drope v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 43 L. Ed.2d 103 (1975) ("[A] person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). *See also, State v. Moore,* 8th Dist. Cuyahoga App. Nos. 108962, 108963, 108964, 2020-Ohio-3459, ¶31; *State v. Berry,* 72 Ohio St.3d 354, 359, 1995-Ohio-310, 650 N.E.2d 433 (1995).

"A defendant may not be put to trial unless he 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding * * * [and] a rational as well as factual understanding * * * of the proceedings against him.'" *Cooper v. Oklahoma,* 517 U.S. at 354, citing *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L. Ed.2d 824 (1960).

This standard identifies those defendants who are unable to adequately consult with their lawyers. The standard does not apply to lucid defendants, such as Mills, who willingly choose not to cooperate with their lawyers. Acting against the advice of defense counsel is not indicative of incompetence. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 161. This Court has noted, "[w]e have noted that a defendant's 'refusal to heed his counsel's advice * * * [does] not indicate that he was unable to understand the nature of the charges and proceedings or the gravity of the situation or that he could not

assist in his defense.'" *Id.* **"Indeed, such a refusal generally "evidences [the defendant's] ability to participate in his defense."** *Id.* (emphasis added).

The reasonable doubt "trigger" standard proposed by Mills, if applied to a defendant's burden of persuasion, would lower the standard of review to such a low level that malingering defendants such as Mills, who deliberately refuse to follow their own attorneys' legal advice in order to pursue their own misguided view of the law, would essentially be presumed incompetent. However, the standard of review previously and wisely established by statute and this Court for review of competency findings is the preponderance standard. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, ¶ 28 ("a state may presume that a defendant is competent to be tried and may require him to prove his incompetence by a preponderance of the evidence."); *accord Medina v. California*, 505 U.S. at 442-453. The preponderance standard of review of a trial court's competency findings should be the same, consistent standard which is applied to the defendant's burden of persuasion.

C. The preponderance standard is the proper "trigger" standard which should be applied to a defendant's burden of persuasion.

R.C. 2945.37 (G) provides the standard for review of a competency decision after a hearing has been held.

> A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.

Id.

Utilizing two different standards of review-one for review of a defendant's burden of production and another for review of the defendant's burden of persuasion, would only serve to confuse state trial courts. The State is unaware of any Ohio case law which applies one standard of review to an appellant's burden of production and then a different standard of review to the burden of persuasion. Utilizing the statutorily required preponderance standard for review of the evidence produced in support of the need for a hearing, then utilizing a lower reasonable doubt "trigger" standard of review of the trial court's decision regarding the need for a competency hearing, would be incongruent. Appellant's argument is basically that whenever some doubt of competency arises, no matter how small, the trial court should be required to err on the side of holding a competency hearing. However, Due Process does not require such an incongruous result. "Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L. Ed.2 d 281 (1977). *See also*, *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 (1934)(overruled on other grounds, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964)) (stating that a state procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar"). As stated above, review of the burden of production utilizes a preponderance standard.

The analytical approach adopted by the United States Supreme Court is found in *Patterson v. New York*, *supra*. In *Patterson*, the Supreme Court rejected "a due process challenge to a New York law which placed on a criminal defendant the burden of proving

the affirmative defense of extreme emotional disturbance. " *Medina*, 505 U.S. at 445. The Court held that a more narrow inquiry provided the appropriate standard. *Id.*

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134, 98 L. Ed. 561, 74 S. Ct. 381 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958); *Leland v. Oregon*, 343 U.S. 790, 798, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 (1934)." *Patterson v. New York*, 432 U.S. at 201-202.

Medina, 505 U.S. at 445. *Accord, Martin v. Ohio*, 480 U.S. 228, 232, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).

Utilizing the same preponderance standard applicable to the burden of production to the defendant's burden of persuasion strikes an appropriate balance between competing interests. The reasonable doubt standard proposed by Mills would make it too easy for lucid but obstreperous defendants to intentionally disrupt their court proceedings in the hope that witnesses and victims will eventually give up over time and fail to appear in court, resulting in a dismissal of the case.

Such an inconsistent "trigger" standard would also result in a waste of mental health and court resources by delaying trials with competency hearings and mental health examinations for those who are not incompetent but only malingering, seeking to control their defense lawyers' trial strategy, and/or seeking to control the trial judge's handling of their case. *See e.g., State v. Laghaoui*, 12th Dist. Warren App. No. CA2017-06-098, 2018-

Ohio-2261, at ¶5, 17-18 (trial court did not err finding that defendant did not meet his burden of establishing incompetence where defendant was unwilling to talk to psychologist retained to determine his competency); *State v. Miller*, 10th Dist. Franklin App. No. 10AP-420, 2010-Ohio-5876, ¶14 (defendant's erratic or disruptive behavior or outbursts during the hearing did not suggest that the trial court erred in concluding the defendant was competent); *Ohio v. Simon*,4th Dist. Galilia App. No. 20CA14, 2021-Ohio-3090, ¶26, 31-34, discretionary appeal not allowed, 2021-Ohio-4515 (finding that Appellant's uncooperative behavior with the trial court and "absurd defense" based on status as Moorish American, did not require trial court to order a competency evaluation); and *United States v. Hood*, E.D. Tenn. No. 1:16-cr-119-HSM-CHS, 2019 U.S. Dist. LEXIS 26135, at *9-15 (Jan. 24, 2019)(where defendant who was disruptive at hearings, unresponsive at hearings, refused to talk to or cooperate with counsel, and refused to cooperate with psychologist engaged in a manipulative strategy was not incompetent).

A lower reasonable doubt trigger standard would intrude upon the State's administration of justice, as noted by the United States Supreme Court in *Patterson*. The State of Ohio has the power to regulate the procedures under which its competency laws are carried out, and that power includes the burden of producing evidence and the burden of persuasion. *Medina*, 505 U.S. at 443-444 ("'[I]t has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.'") If the State wanted to place a lower "trigger" standard on appellate review of a defendant's burden of persuasion, that decision should be implemented by the Ohio legislature, not the judicial system. The State maintains that Due Process is satisfied by a preponderance "trigger" standard when

considering whether there is sufficient indicia of a defendant's incompetence. Any decision to invoke a different standard should come from the Ohio legislature.

D. Mills was deliberately difficult, not incompetent.

Mills' behavior, as contained in the record, fits the pattern of someone striving to manipulate and control the legal process and to control his attorney's handling of the case. Mills was stubbornly determined from the outset of his case to obtain a quick trial date. (TR Sept. 4, 2019, p. 2, LN 13-15; TR Nov. 4, 2019, p. 2, Ln 15-19, p. 9, Ln 3-11). He refused to discuss tactics or plea offers with his attorney. (Defendant's Motion for Competency, trial record item #19, p.2). He became upset whenever the case was continued because continuances and delays did not fit his predetermined course of action. (TR Nov. 4, 2019, p. 2, Ln 15-19, p. 9, Ln 3-11). Defense counsel's Motion for Competency supports the conclusion that Mills' behavior was not indicative of incompetency, but rather was an adult temper tantrum-specifically and deliberately designed to ensure that both the trial court and defense counsel would give him exactly what he wanted- a prompt and firm trial date with no delays. With regard to Mills' behavior, defense counsel's Motion asserted that:

> **[t]his occurs with any comments by counsel that isn't in complete agreement with what <u>his predetermined position</u> is on even the smallest issues concerning the proceeding in court or his defense.**

(Motion for Competency at p. 2.)(emphasis added).

Mills' strategy and deliberate behavior is not unknown to the Ohio court system. *See e.g.*,*State v. Laghaoui*, 2018-Ohio-2261, at ¶5, 17-18 (trial court did not err finding that defendant did not meet his burden of establishing incompetence where defendant was

unwilling to talk to psychologist retained to determine his competency); *State v. Miller*, 10th Dist. Franklin App. No. 10AP-420, 2010-Ohio-5876, ¶14 (defendant's erratic or disruptive behavior or outbursts during the hearing did not suggest that the trial court erred in concluding the defendant was competent); *Ohio v. Simon*, 4th Dist. Galilia App. No. 20CA14, 2021-Ohio-3090, ¶13, 26, 31-34, discretionary appeal not allowed, 2021-Ohio-4515 (finding that Appellant's uncooperative behavior with the trial court and "absurd defense" based on status as Moorish American, did not require trial court to order a competency evaluation); *United States v. Hood*, E.D. Tenn. No. 1:16-cr-119-HSM-CHS, 2019 U.S. Dist. LEXIS 26135, at *9-15 (Jan. 24, 2019)(where defendant who was disruptive at hearings, unresponsive at hearings, refused to talk to or cooperate with counsel, and refused to cooperate with psychologist was engaged in a manipulative strategy and was not incompetent); *United States v. deBerardinis*, W.D.La. No. 18-cr-00030-01, 2020 U.S. Dist. LEXIS 80290, at *50 (Apr. 3, 2020)(finding that while defendant "may frustrate his lawyers, * * * he is not incompetent.")

While Mills did express some feelings of being "bamboozled" or "railroaded" by the court system, (TR July 31, 2019, P. 7, Ln 8-13), many lucid people also share such feelings about the state of the court system. Skepticism and criticism of the court system does not necessarily equate with incompetence. Refusing to cooperate with a competency evaluation likewise, does not necessarily equate with incompetence. *Laghaoui, supra.*

1. Mills' case is similar to State v. Johnson, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144.

In *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 161, this Court affirmed a trial court's denial of a defendant's motion for a competency evaluation.

Johnson asserted that the trial court erred by not granting his defense counsel's oral request for a competency evaluation in light of certain behavior prior to trial. Johnson asserted the following in support of the need for a hearing: "his attempt to fire his attorneys; his statements to the court regarding his belief that the newspapers misquoted him; his expression to the court of his desire to receive the death penalty; and his May 13 demand to testify and proceed pro se after defense counsel rested." *State v. Johnson*, 112 Ohio St.3d 210, at ¶ 156-158.

When defense counsel moved for the competency hearing, the trial court conducted its own examination of Johnson to determine his competence. During the court's inquiry:

> Johnson accurately recited the charges against him and acknowledged the possibility of a death sentence, and he acknowledged that he understood the stage of the proceedings and that his testimony, argument, and questioning of witnesses would be governed by rules. Johnson also stated that he had spoken with his counsel and that he understood that his counsel had advised him against testifying or representing himself. Johnson nonetheless reaffirmed his desire to testify and to represent himself.

Johnson, supra at ¶157.

After Johnson's defense counsel renewed the motion for a competency hearing, the trial court concluded, "I have no reason to believe that you are not proceeding competently. You may not be proceeding wisely but there is no requirement of that in the

law. * * * The Court finds the defendant competent. If he wishes to testify in this matter that is also his constitutional right." *Id.*

In affirming the denial of Johnson's motion for a competency examination, this Court held:

> The trial court did not abuse its discretion by denying counsel's * * * motion for a competency evaluation, **because the indicia of incompetence did not rise to a level that demanded a hearing or an evaluation. Johnson's anger regarding the newspaper articles, his refusal to heed his counsel's advice, and his abandoned request to fire his counsel did not indicate that he was unable to understand the nature of the charges and proceedings or the gravity of the situation or that he could not assist in his defense**. Even Johnson's desire to receive the death penalty did not necessarily signal incompetency."

Id. at ¶161(emphasis added). Johnson's request for a competency determination, by itself, did not trigger an automatic right to a hearing. *Id.* Notably, *Johnson* was decided by the this Court **after** the *Were* case. Mill's Brief fails to discuss or even cite to *Johnson.*

Similar to the *Johnson* case, Mills' anger and refusal to cooperate with defense counsel did not indicate that he was unable to "understand the nature of the charges and proceedings or the gravity of the situation or that he could not assist in his defense." The Sixth District properly concluded that '[]he record shows [Mills] was upset, not incompetent." (Opinion at ¶ 25.)

As noted by the Sixth District's Opinion, during his pre-trial proceedings Mills was extremely lucid and he astutely recalled what occurred during his past courtroom appearances. (Opinion at ¶25; s*ee e.g.*, TR Oct. 21, 2019, p. 8, Ln 6-7; TR Nov. 4, 2019, p 2-5, 7-9). One example of this occurred during a pre-trial conference on November 4, 2019:

> * * * on November 4, 2019, [Mills] * * * said, "But I read my rights to speedy trial rights, and the formalities to speedy trial. They say there is no more than 120 days. Instead you keep pushing my date back." This statement clearly establishes that [Mills] was quite capable of assisting in his own defense, but for his own selectively-timed and deliberate misbehavior. At the conclusion of [Mills'] lengthy arguments in favor of his interpretation of his speedy trial rights, the trial court gave a lengthy response and ended with, "you are welcome to have an appeal on that issue. I need to call my next case because I need to get to trial on the case that is going to trial today, I appreciate you are upset. I am giving you as much deference as I can but I have to move to the next case. Thank you."

(Opinion, p. ¶ 25; TR Nov. 4, 2019, p. 9-11). The Sixth District properly concluded that '[]he record shows [Mills] was upset, not incompetent." *Id.*

Mills did not establish sufficient indicia of incompetence. Mills was a man on a mission. He was not incompetent. He opposed any action by his attorney or the trial court which did not grant him a firm, quick trial date. His behavior issues magically disappeared once his trial began. At no time during trial did defense counsel renew the competency issue despite being given the opportunity to do so. *(See generally*, TR December 19, 2019, p. 2-318). As a result, Mills did not meet either his burden of production or his burden of persuasion.

2. This Court has previously recognized the significance of defense counsel's failure to continue raising the issue of competency during further proceedings.

Additionally, this Court, when considering whether a defendant's behavior at trial raises sufficient indicia of incompetency, has given considerable weight to the failure of defense counsel to continue raising the issue of competency in further court proceedings.

In *State v. Ahmed*, this Court stated:

> **Nor did defense counsel enter an insanity plea or suggest that appellant lacked competency, unlike counsel in *State v. Were* (2002), 94 Ohio St.3d 173, 176, 2002 Ohio 481, 761 N.E.2d 591, who continually raised the issue**

> **of defendant's competency.** Counsel had ample time to become familiar with appellant, since they represented him from June 2000 through the February 2001 sentencing. Although appellant repeatedly complained about his counsel--making allegations that counsel disputed--counsel never questioned his competency. **If counsel had some reason to question appellant's competency before the filing of appellant's handwritten motion, counsel surely would have done so.** *See State v. Spivey* (1998), 81 Ohio St.3d 405, 411, 692 N.E.2d 151.
>
> Neither appellant's behavior at trial nor any testimony presented on his behalf provided "good cause" to hold a hearing on his competency or "sufficient indicia of incompetence." Moreover, deference on such issues should be granted to those "who see and hear what goes on in the courtroom." *State v. Cowans*, 87 Ohio St.3d at 84, 717 N.E.2d 298; *State v. Smith*, 89 Ohio St.3d at 330, 731 N.E.2d 645.

State v. Ahmed, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 67-68 (emphasis added). *See also, State v. Lawson*, 165 Ohio St. 3d 445, 2021-Ohio-3566, 179 N.E.3d 1216 (2021), ¶ 64 (in affirming the denial of a competency hearing, noting that "nobody on the spot thought [Lawson's] behavior raised any question as to his competence.")

E. The adoption of a reasonable doubt "trigger" standard, when reviewing a defendant's burden of persuasion, would essentially require the trial court to assume the incompetence of any and all deliberately and intentionally obstreperous defendants, thus allowing them to play the system.

The reasonable doubt "trigger" standard proposed by Mills, on appellate review of a defendant's burden of persuasion, would result in the appellate courts being required to presume incompetence, based on a defendant's refusal to engage in the competency evaluation. Being able to cooperate with defense counsel and being unwilling to do so are two very different matters. The adoption of a reasonable doubt "trigger" standard would presume that those unwilling to cooperate with their lawyers must be incompetent. Such a presumption would waste valuable judicial and mental health resources. And as noted above, the adoption of a reasonable doubt "trigger" standard would ironically require that

Mills be forced to undergo an evaluation and an evidentiary hearing which he firmly opposed.

1. The adoption of a preponderance "trigger" standard would establish a fair balance between competing interests.

The "sufficient indicia of incompetence" standard should require enough indicia to meet the preponderance standard, not the reasonable doubt standard. The adoption of a reasonable doubt "trigger" standard would result in a waste of both judicial and mental health resources. The preponderance standard establishes a fair balance, consistent with Due Process. *See* R.C. 2945.37 (G). A preponderance "trigger" standard would review the record for sufficient "indicia" of incompetence. It would be consistent with the standard for the defendant's burden of production. *See* R.C.2945.37 (G). It is not a stringent standard which is likely to result in an erroneous decision. *See Cooper v. Oklahoma*, 517 U.S. at 362-363. Because quantifying the exact amount of evidence needed to establish "sufficient indicia" in such cases is so difficult, *Vreeland v. Zupan*, D.Colo. Civil Action No. 14-cv-02175-PAB, 2016 U.S. Dist. LEXIS 175797, (Dec. 20, 2016), at *92, citing *Drope*, 420 U.S. at 180, cases such as Mills should continue to be analyzed on a case-by-case basis.

F. *Bock's* "sufficient indicia of incompetence" standard does not need further clarification. A trial court's consideration of the issue of competence should be determined on a case-by-case basis.

Contrary to Appellant's assertion, competency cases do not lend themselves to the establishment of a bright line rule or "quantification" regarding the amount or type of "indicia" required. **"There are no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed [to trial]; the question is**

often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Vreeland v. Zupan*, D.Colo. Civil Action No. 14-cv-02175-PAB, 2016 U.S. Dist. LEXIS 175797, (Dec. 20, 2016), at *92 (emphasis added), citing *Drope*, 420 U.S. at 180.

As a result, cases such as Mills' case need to be reviewed on a case-by-case basis. *Johnson v. Commonwealth,* 103 S.W.3d 687, 693 (Ky.2003)(stating that with regard to competency, "no single factor is determinative, and the issue should be decided on a case-by-case basis."); *State v. Bock*, 28 Ohio St.3d 108, 109-110, 502 N.E.2d 1016 (1986) (citing with approval the case by case review of competency cases, citing *Pate v. Robinson*, 383 U.S. 375, 376, 86 S.Ct. 836, 15 L. Ed.2d 815 (1966)); and *United States v. Marks*, M.D.Fla. No. 6:17-cr-257-PGB-LHP, 2022 U.S. Dist. LEXIS 164261, at *14 (Sep. 12, 2022), fn. 9 (citing with approval a magistrate's decision which applied the standard in *Dusky*, 362 U.S. 402, to the unique facts of each case cited by defendant in support of his claim of incompetency.) Deciding such cases on a case-by-case basis would consider the individual facts and circumstances of each defendant's case, instead of establishing a "one size fits all" quantification standard.

G. The trial court's failure to hold a formal competency hearing was harmless error, if error at all.

Even if the failure to hold a competency hearing was erroneous despite Mill's refusal to cooperate, it was harmless error since there was no indicia of incompetence. *Lawson*, *supra* at ¶67. Mills criticizes the trial court for failing to hold a competency hearing in this case despite his refusal to submit to and cooperate with the competency evaluation. Clearly, if the trial court had done so, Mills would have objected. That would further delay

his trial date. However, in Ohio, "'the failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.'" *State v. Bock,* 28 Ohio St.3d 108, 110, 28 Ohio B. 207, 502 N.E.2d 1016 (1986).

Even when the Appellant makes a request for a competency evaluation and where it is properly raised and maintained, "'the failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.'" *Id.*

Mills' behavior during trial, while at times indicating confusion and/or lack of understanding of legal procedure, *see e.g.*, Pretrial Nov. 4, 2019, p 4-5, 8; Arraignment, July 31, 2019, p. 7; TR. p. 119; Sentencing, Jan. 8 2020. p. 3-4, his behavior did not indicate incompetence or an inability to assist in his own defense. Mills appeared to have an adequate understanding of the nature and object of the proceedings against him, and an adequate ability to consult with his counsel, and an adequate ability to assist in preparing his defense. He asked questions of the trial court. Lack of understanding and asking questions of the court about trial procedures is not the same as a lack of competence. And as noted by the Sixth District's opinion, during pre-trial proceedings Mills was extremely lucid and he astutely recalled what occurred during his past courtroom appearances. (Opinion at ¶25; s*ee e.g.*, TR Oct. 21, 2019, p. 8, Ln 6-7; TR Nov. 4, 2019, p. 2-5, 7-9). Even assuming for sake of argument only that the failure to hold a competency hearing was erroneous, despite Mills' refusal to cooperate, it was harmless error since there was no indicia of incompetence shown during the course of trial. As stated above, Mill's pretrial behavior was a deliberate pretrial strategy designed to get him a quick, firm trial date despite what his attorney or the trial court said. Undoubtedly, Mills hoped that the

quicker the trial date, the less likely it would be that witnesses and the victim would appear, resulting in a dismissal of the charges.

H. Mills violated his duty to cooperate with the competency examination. His refusal should be deemed to be a waiver of his right to a competency hearing.

As noted by the Sixth District, Mills violated his statutory duty to cooperate with his competency examination. (Opinion at ¶17). Mills had a statutory duty to cooperate with the competency evaluation which he requested through counsel. R.C. 2945.371(C)(1).

Mills also had a duty to cooperate with the scheduled transportation from the Lucas County jail to the place of the evaluation. R.C. 2945.371(D)(2). Mills violated these both of these duties. After Mills intentionally refused to attend the competency evaluation, he then failed to argue the issue of competency between the date of the scheduled examination and the start of trial. *Id.* He further failed to raise the issue during trial.

Under R.C. 2945.371, the trial court did not need his consent to order the examination. But he did have a statutory duty to cooperate with the competency examination once it was ordered. R.C. 2945.371(C)(1) & (D). The statute provides in relevant part:

> (C)(1) **If the court orders an evaluation under division (A) of this section, the defendant shall be available at the times and places established by the examiners who are to conduct the evaluation.** The court may order a defendant who has been released on bail or recognizance to submit to an evaluation under this section.
>
> (2) If a defendant who has been released on bail or recognizance refuses to submit to a complete evaluation, the court may amend the conditions of bail or recognizance and order the sheriff to take the defendant into custody and, except as provided in division (E) of this section, deliver the defendant to a center, program, or facility operated or certified by the department of mental health and addiction services or the department of developmental disabilities where the

> defendant may be held for evaluation for a reasonable period of time not to exceed twenty days.
>
> (D)(1) A defendant who has not been released on bail or recognizance may be evaluated at the defendant's place of detention.
>
> (2) **Upon the request of the examiner, the court may order the sheriff to transport the defendant to a program or facility operated or certified by the department of mental health and addiction services or the department of developmental disabilities, where the defendant may be held for evaluation for a reasonable period of time** not to exceed twenty days, and to return the defendant to the place of detention after the evaluation. A municipal court may make an order under this division only upon the request of a certified forensic center examiner.

R.C. 2945.371 (Page, Lexis Advance 2022)(emphasis added).

"It is axiomatic that when used in a statute, the word 'shall' denotes that compliance with the commands of that statute is mandatory unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage." *State ex rel. Botkins v. Laws*, 69 Ohio St.3d 383, 385, 1994-Ohio-518, 632 N.E.2d 897 (emphasis added). The word "shall" as used in R.C. 2945.371(C)(1) mandates that a defendant cooperate with a court ordered competency examination and transportation to that examination. "If the court orders an evaluation under division (A) of this section, the defendant shall be available at the times and places established by the examiners who are to conduct the evaluation." *Id.* The words "shall be available" clearly indicate the Legislature's intent to require a defendant's cooperation. This is especially true where the defendant, through counsel, makes the request. A defendant should be required to comply with a competency evaluation which he requests through counsel. To hold otherwise would be a waste of judicial time and resources.

Similarly R.C. 2945.371(D)(2) requires a defendant to cooperate with the transportation to and from the competency examination. "Upon the request of the examiner, the court may order the sheriff to transport the defendant to a program or facility operated or certified by the department of mental health and addiction services or the department of developmental disabilities, where the defendant may be held for evaluation for a reasonable period of time." *Id.* The provision presumes that a defendant who is released on bail or bond will arrange for transportation to the examination, and that a defendant in custody will be transported by the sheriff.

Thus, Mills had a statutory duty to cooperate with the competency evaluation which he requested through counsel. R.C. 2945.371(C)(1). Mills also had a duty to cooperate with the scheduled transportation from the Lucas County jail to the place of the evaluation. R.C. 2945.371(D)(2). To the extent that Mills refused to cooperate with the competency examination which he requested through counsel, his actions should be deemed a waiver of his right to a hearing.

The record in this case indicates that after the Motion for a competency determination was filed, Mills was promptly referred to Court Diagnostic and Treatment for evaluation. But because Mills refused to cooperate and refused to leave the jail, he intentionally "waived" his claim and failed to maintain it. Given Mills' refusal to be evaluated, no competency report was ever issued. As a result, the State asserts that trial court fully met its obligations under R.C. 2945.37(B). Further, as previously stated defense counsel did not raise the issue of competency prior to trial, nor did he ever address the court about the Motion for Competency in other conferences with the trial court. *See e.g*, TR. p. 2-3.

Based on the above, Appellant waived and failed to properly maintain the issue of competence.

I. The trial court is in the best position to determine whether the behavior of a defendant refusing a competency exam is incompetent or whether it is intentional behavior designed to achieve a certain objective.

Additionally, the State maintains that the trial court is in a superior position to determine whether the behavior of a particular defendant, refusing a competency exam, is incompetent or whether it is intentional behavior designed to achieve a certain objective. *See, e.g., State v. Brown*, 6th Dist. Lucas No. L-21-1220, 2022-Ohio-3683, ¶ 22 ("[T]he judge who was a witness to appellant's behavior at both the change of plea hearing and the sentencing hearing * * * was in a superior position to assess appellant's competency, found appellant had an understanding of the nature of the charge, the effect of his plea and the maximum penalty involved."); *Vreeland v. Zupan*, *supra* at 92 ("Accordingly the Court must afford the state court's finding of competency a presumption of correctness [pursuant to 28 U.S.C. § 2254(e)(1) unless [Applicant] rebuts the presumption by clear and convincing evidence.") "Deference on [competency] issues should be given 'to those who see and hear what goes on in the courtroom.'" *Laghaoui*, 2018-Ohio-2261, at ¶ 15 citing *Were*, 2008-Ohio-2762, at ¶46, quoting *State v. Cowans*, 87 Ohio St.3d 68, 84, 1999- Ohio 250, 717 N.E.2d 298 (1999).

The trial court in Mills' case was in the best position to determine whether his behavior in refusing to comply with a competency exam, and his behavior at pre-trial conferences was incompetent or whether it was intentional behavior designed to achieve a certain legal objective. In determining that Mills' behavior was competent, the Sixth

District's Opinion noted that during his pre-trial proceedings Mills was extremely lucid and that he astutely recalled past events. (TR Oct. 21, 2019, p. 8, Ln 6-7; TR Nov. 4, 2019, p. 2-5, 7-9). The trial court was in the best position to determine whether Mills' behavior raised any competency concerns. Neither the court nor defense counsel raised any issue concerning competency during or after the trial. Therefore the Sixth District's decision should stand.

J. Mills waived and/or forfeited the "trigger" standard of review issue by failing to raise it in the Sixth District Court of Appeals below.

The State asserts that Mills waived and/or forfeited the "trigger" standard of review issue by failing to raise it in the Sixth District Court of Appeals below. "The failure to raise an issue on appeal usually constitutes waiver and precludes review of that issue under the principle of res judicata. " *In re D.S.*, 148 Ohio St.3d 390, 2016-Ohio-7369, 71 N.E.3d 223, ¶ 27, citing *State v. Broom*, 40 Ohio St.3d 277, 281, 533 N.E.2d 682 (1988). "'[Y]et we must also retain power to sua sponte consider particular errors under exceptional circumstances * * * under our plain error standard of analysis.'" *In re D.S.*, *supra*, citing *State v. Greer*, 39 Ohio St.3d 236, 244, 530 N.E.2d 382 (1988), *State v. Rogers*, 32 Ohio St.3d 70, 512 N.E.2d 581 (1987), and *State v. Zuern*, 32 Ohio St.3d 56, 512 N.E.2d 585 (1987).

"Under the adult-criminal plain-error standard, 'we have [the] power to recognize '[p]lain errors or defects [affecting] substantial rights * * * although they were not brought to the attention of the court.'" *In re D.S.*, at ¶ 29, citing *State v. Campbell*, 69 Ohio St.3d 38, 41, 1994 Ohio 492, 630 N.E.2d 339 (1994), quoting Crim.R. 52(B). An alleged error is

not a plain error unless the error clearly changed the outcome of the case. *In re D.S.*, at ¶ 29.

1. There is no plain error in this case.

As stated above, an alleged error does not rise to the level of plain error unless the error clearly changed the outcome of the case. *In re D.S.*, at ¶ 29. For the reasons stated above, there is no plain error in this case. The record shows that Mills was deliberately difficult, not incompetent. Mills' behavior, as contained in the record, fits the pattern of someone striving to manipulate and control the legal process and to control his attorney's handling of the case. Mills' was stubbornly determined from the outset of his case to obtain a quick trial date. He rejected all plea offers, consistently with that goal. He became upset whenever the case was continued because continuances and delays did not fit his predetermined course of action. Mills' behavior was not indicative of incompetency, but rather was an adult temper tantrum-specifically and deliberately designed to ensure that both the trial court and defense counsel would give him exactly what he wanted- a prompt and firm trial date with no delays. Even if the "trigger" standard issue had been raised in the appellate court below, Mills behavior, including his ability to astutely recall what occurred in his past courtroom appearances, (Opinion at ¶25; s*ee e.g.*, TR Sept. 4, 2019, p. 8, Ln. 6-7; TR Nov. 4, 2019, p. 2-5, 7-9), would have precluded a finding of incompetency even under the proposed, relaxed reasonable doubt standard which he now proposes. There is no error, plain or otherwise with respect to the "trigger" standard issue.

K. The Sixth District reached the correct decision and utilized the proper legal standard.

Mills further asserts that the Sixth District's decision was incorrect because "[t]he Sixth District's demanding burden of persuasion resulted from three analytical errors: it failed to properly consider both prongs of *Drope's* substantive competency standard, it mistakenly concluded that R.C. 2945.37(G) controlled the standard of review on appeal, and it incorrectly believed that it was required to construe all factual ambiguities against Mr. Mills." (Appellant's Brief at 20.) Each assertion will be dealt with in turn below. The State asserts that the Sixth District's opinion is legally sound and contains no analytical errors.

1. The Drope standard:

The federal standard of competency as stated in *Drope* is "whether a criminal defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'" *Drope v. Missouri*, 420 U.S. at 172.

In R.C. 2945.37 the Ohio legislature codified a slightly different competency standard. R.C. 2945.37 (G) provides:

> A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant **or** of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.

Id. (emphasis added). *See also, Bock*, 28 Ohio St.3d at 110.

Mills asserts that the Sixth District erred by interpreting the *Drope* competency standard as a "disjunctive rule allowing for a finding of competence if *either* a defendant

understands the proceedings *or* the defendant is able to rationally assist in his defense." (Appellant's Brief at 20) (emphasis sic). Mills cites *Pate v. Robinson*, 383 U.S. 375, 385-386, 86 S. Ct. 836, 15 L. Ed.2d 815 (1966), in support of this assertion. Mills' challenge here seems to be based on the fact that the federal *Drope* standard uses the conjunction "and" while the Ohio standard, codified in R.C. 2945.37 uses the conjunction "or."

However, the State is not chained to a federal standard and it can utilize a variation of its own.

> "[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958); *Leland v. Oregon*, 343 U.S. 790, 798, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 (1934)."

Medina, 505 U.S. at 445, citing *Patterson v. New York*, 432 U.S. at 201-202.

While the Ohio Constitution has been determined to be a document of independent legal force, *State v. McAlpin*, ___ Ohio St. 3d. ___, 2022-Ohio-1567, __ N.E.3d ___, ¶ 60, it "may not provide a criminal defendant with fewer rights than the United States Constitution grants." *Id.* "In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall." *Id.* Ohio's competency standard, as contained in R.C. 2945.37(G), is not an unconstitutionally "lower" standard.

The competency standard in R.C. 2945.37 (G) is merely a different competency standard which uses the term "or" instead of "and." *Compare* R.C. 2945.37(G) *with Drope*,

420 U.S. at 172, citing *Dusky v. United States*, 362 U.S., at 402. "**Accordingly, <u>as to federal cases</u>**, [the United State Supreme Court has] approved a test of incompetence which seeks to ascertain whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'" *Drope*, 420 U.S. at 172 (emphasis added). The Ohio competency test is not a lesser standard than that required by the federal constitution- merely a different one. *See Clark v. Jones*, N.D.Ohio No. 3:14CV1370, 2016 U.S. Dist. LEXIS 186228, at *32-35 (Feb. 1, 2016) (where the Sixth Circuit failed to find that Ohio's competency law was "contrary to" clearly established Supreme Court precedent.) And notably Mills does not assert that R.C. 2945.37 is an unconstitutionally lower standard. His failure to assign this as error in the appellate court below, waives the issue. *North v. Beightler*, 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶ 6.

Additionally, *Mills'* reliance on *Pate v. Robinson*, is distinguishable. *Pate v. Robinson* does not affect state competency standards like that contained in R.C. 2945.37(G). *United States ex rel. Evans v. La Vallee*, *supra*.

> *Pate* did not render unconstitutional the procedures provided for in the New York Code of Criminal Procedure which the trial court followed and applied in this case. **We do not understand *Pate* to mean that a trial court must always hold a sanity hearing, on its own motion, no matter what the evidence is and regardless of whether or not a defendant requests one**. Since *Pate* was decided, this court has refused to find a violation of due process by a New York trial court in not holding a sanity hearing where the facts did not require it.

(citation omitted)(emphasis added). *United States ex rel. Evans v. La Vallee*, 446 F.2d 782, 786 (2d Cir.1971).

The United States Supreme Court has upheld state competency statutes while considering whether the facts of a particular case met those standards. *See e.g., Pate v. Robinson*, 383 U.S. 375 (1966)(holding that the failure to observe Illinois state procedures, adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial, deprived him of his due process right to a fair trial.); *Drope v. Missouri*, 420 U.S. at 173, 183 (holding that while "Missouri's statutory scheme "jealously guards" a defendant's right to a fair trial," the facts indicated that the defendant was entitled to a competency hearing.) In effect, the United States Supreme Court has been willing to apply state competency standards to criminal cases and has not solely applied federal competency standards in those cases.

2. R.C. 2945.37(G) is relevant to this appeal:

Mills also asserts that R.C. 2945.37 "controls trial-level proceedings, not appeals." However, Mills ignores the fact that this Court has previously considered statutory provisions when determining on appeal whether or not legal error was made. This Court has utilized this approach when considering the Ohio public records laws. *See e.g, Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 37.

> Whether a particular record is by statute exempt from disclosure as a public record fundamentally presents an issue of law, **although the application of the statutory exemption will necessarily depend on its factual application to the record in question.**

Id., (emphasis added).

As stated above, the facts of this case, as noted by the Sixth District, indicate that Mills was in fact competent. His pre-trial behavior was an adult temper tantrum which was

designed to get what he wanted- a prompt trial date without any delays. Once the trial began, neither defense counsel, nor the trial court raised any concerns about his competency. His competency issues disappeared once the trial began.

As a result, there was no analytical error in the Sixth District's application of the *Drope* standard. Ohio's competency standard, as codified in R.C. 2945.37(G) requires that the trial court must find by a preponderance of the evidence that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant **or** incapable of assisting in the defendant's defense. The Ohio statute requires one or the other, not both. Therefore, the statute properly guides appellate review of a competency challenge. The statute's application is not restricted to trial level decisions only.

3 . The standard in Bock:

As with *Drope*, *Bock* likewise cites the Ohio competency standard using the disjunctive "or." *Bock,* 28 Ohio St.3d at 110. For the same reasons discussed immediately above, there was no analytical error in the Sixth District's application of the *Bock* standard. Ohio's competency standard, as codified in R.C. 2945.37(G) requires that the trial court must find by a preponderance of the evidence that the defendant is incapable of understanding the nature and objective of the proceedings against the defendant **or** incapable of assisting in the defendant's defense. The Ohio statute requires one or the other, not both. The statute properly guides appellate review of a competency challenge. The statute's application is not restricted to trial level decisions only.

4. Factual ambiguities in Mills' case were properly construed against him.

Mills also asserts that the Sixth District's decision erroneously construed factual ambiguities against him. (Appellant's Brief at 23.) Appellant asserts that the Sixth District's opinion shows that it believed all factual ambiguities had to be resolved against him. (*Id.*).

The factual ambiguities in Mills' case were properly construed against him since he bears the burden of production under R.C. 2945.37(G). Given that R.C. 2945.37(G) places the burden of the production of evidence of incompetency on the defendant, construing factual ambiguities against him is both reasonable and logical. Construing ambiguities against a defendant bearing the burden of proof is reasonable. *See e.g., State v. Johnson*, 10th Dist. Franklin No. 12AP-35, 2013-Ohio-353, ¶ 39 ("In light of the factual ambiguity in the record, we do not find that appellant met his burden of establishing that he released [the victim] unharmed or that the result of the trial would necessarily have been different had appellant sought [a jury instruction on a reduction in the level of felony]. The trial court did not commit plain error in failing to reduce appellant's kidnapping conviction from a first-degree felony to a second-degree felony pursuant to R.C. 2905.01(C)(1)").

Because Mills properly bore the burden of production of incompetency under R.C. 2945.37(G), factual ambiguities were properly resolved against him. Simply because the appellate court could have resolved them differently, does not mean that it was obligated to do so, or that its failure to do so was reversible error.

In summation, the burden of production was on Mills to establish his incompetency by a preponderance of the evidence. He failed to do so. In fact, he did not want a competency exam or hearing at all- he wanted a prompt, firm, quick trial date. His

appellate counsel now seeks in this appeal to compel him to submit to that which he firmly opposed. He refused to leave his jail cell, because a delay to assess his competency was **not** what he wanted. Once his case proceeded to trial, his behavior issues magically disappeared and neither his defense attorney, nor the trial court raised any further concerns about competency. This is not a case involving a true issue of incompetency. It is a case involving a man throwing an adult temper tantrum in order to manipulate his defense attorney and the trial court. As noted above, this is not a strategy unknown to Ohio trial courts. Such behavior should not be tolerated as it wastes both judicial and mental health resources.

State's Response to Second Proposition of Law: A defendant waives and fails to properly maintain their right to a competency hearing by refusing to cooperate with a scheduled competency examination, in violation of their statutory duty to do so.

Mills asserts in his Second Proposition of Law that a defendant cannot waive the issue of competency "on a silent record." The State takes issue with the assertion that the record in this case "is silent." On the contrary, Mills' behavior and colloquies with the trial court speak volumes about his behavior and his motivation. As argued above, Mills refused to leave his jail cell to have his competency determined, thereby violating his statutory duty to cooperate with a competency assessment. *See* R.C. 2945.371(C) & (D). His refusal was a violation of his duty to cooperate. It was this action and refusal that waived his request, made through counsel, for a competency assessment. The record is not silent; his behavior speaks volumes.

A. The Sixth District's opinion did not hold that Mills "implicitly waived his right to a competency hearing by refusing to submit to an evaluation." (Appellant's Brief at 27.)

First, Mills asserts in his Second Proposition of Law that the Sixth District erroneously "held that Mr. Mills implicitly waived his right to a competency hearing by refusing to submit to an evaluation." (Appellant's Brief at 27, citing *Mills*, 2022-Ohio-969, ¶19.)

However, Mills misinterprets the appellate court's opinion. Nowhere in the Sixth District's Opinion does it use the word "waiver"[1] with respect to competency. *(See generally* Opinion, March 25, 2022). Nor is the word "waiver" ever used in the Sixth District's Opinion denying the Application for Reconsideration. (*See generally*, Decision and Judgment May 12, 2022). As a result, the appellate court did not "hold" that Mr. Mills implicitly waived his right to a competency hearing by refusing to submit to an evaluation. This Court should dismiss this Proposition as being improvidently granted on this ground alone.

B. Mills did not show any indicia of incompetence and he waived and/or forfeited the issue of competency by failing to properly maintain the issue in the trial court.

As stated above, incompetency has been defined as the defendant's inability to understand "* * * the nature and objective of the proceedings against him or of presently assisting in his defense." *Bock*, 28 Ohio St.3d at 110. "Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may

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[1] The word "waiver" as used in ¶19 of the Opinion refers only to Appellant's waiver of preliminary hearing, not to a waiver of a competency hearing.

be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *Id.*

R.C. 2945.37 and 2945.371 outlines the procedure a trial court is to follow when conducting competency evaluations and when making competency determinations. The defendant is presumed competent unless it is demonstrated by a preponderance of the evidence that the defendant is incapable of understanding the nature and objective of the proceedings against him or her **or** of assisting in his or her own defense. (Emphasis added). R.C. 2945.37(G); *Moore,* ¶32. *See also State v. Were,* 118 Ohio St.3d 448, at ¶ 45.

When the prosecutor or the defense raises the issue of competence, "the court shall hold a hearing on the issue." *Moore* at ¶ 33. R.C. 2945.371(A) provides that "[i]f the issue of a defendant's competence to stand trial is raised * * * the court may order one or more evaluations of the defendant's present mental condition." The court must hold a competency hearing within 30 days after the competency issue is raised, **unless the defendant has been referred for evaluation**, in which case, the court shall conduct the hearing within ten days after the filing of the report of the evaluation. R.C. 2945.37(C).

"The right to a competency hearing is constitutionally guaranteed only where the record contains 'sufficient indicia of incompetence,' "such that an inquiry into the defendant's competence is necessary to ensure the defendant's right to a fair trial." *Moore*, at 34, (emphasis added) *citing Berry,* 72 Ohio St.3d at 359, 650 N.E.2d 433 (The right to a competency hearing rises to the level of a constitutional guarantee only where the record

contains "sufficient indicia of incompetence."); *see also State v. Minifee,* 8th Dist. Cuyahoga App. No. 108331, 2019-Ohio-4464, at ¶15.

The Eight District Court of Appeals has held that held that the competency issue "can be waived" and that a hearing is not necessarily required in all situations. *Moore*, at ¶36, *citing Minifee*, at ¶14. *See also*, *State v. Smith*, 8th Dist. Cuyahoga No. 95505, 2011-Ohio-2400, ¶ 5 ("The competency issue is one that can be waived by the parties. A competency hearing is required only where the competency issue has been "raised **and maintained**.")(emphasis added.) *Minifee at ¶14*; *Moore*, at ¶36.

Essentially, the Eighth District requires a defendant to comply with their statutory duty, under R.C. 2945.371(C)(1) and (D)92), to cooperate with any court ordered competency exam. The failure to do so results in the defendant having "failed to maintain" the claim of incompetency. The refusal to cooperate with an ordered competency examination constitutes behavior that is consistent with an intended waiver or forfeiture of the right.

Waiver by virtue of behavior is not a foreign concept in Ohio case law. *See e.g., State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 188 (holding that a court may infer a waiver of *Miranda* rights from a suspect's behavior, when viewed in light of the surrounding circumstances.) As stated above, while some refusals of competency evaluation could be the result of mental illness, mental illness is not the equivalent of incompetency. *State v. Berry,* 72 Ohio St.3d 354, 362, 1995-Ohio-310, 650 N.E.2d 433 ("[T]he term "mental illness" does not necessarily equate with the definition of legal incompetency."); *State v. Prophet*, 10th Dist. Franklin No. 14AP-875, 2015-Ohio-4997, ¶ 21

("It is now well established, however, that having a mental illness or taking medications to treat a mental illness, does not equate with a finding of legal incompetency.")

The Eighth District's approach safeguards judicial and mental health resources by providing competency examinations and hearings only to those defendants who intend to exercise and "maintain" their right to those hearings. As previously stated, the State finds it ironic that Mills' appeal asserts a right to that which he firmly opposed. Essentially his appeal claims he should either have been forced to submit to a competency evaluation over his objection, or that the competency issue should have been decided without the benefit of an evaluation.

The record in this case, as supplemented, indicates that a Motion for a competency determination was filed by defense counsel, and that Mills was promptly referred to Court Diagnostic for the examination. But Mills refused to cooperate with having his competency determined. He refused to leave the jail. Not because he was incompetent, but because Mills did not want a competency argument to be made on his behalf. Taking time for a competency evaluation would further delay his trial. That is why he refused to cooperate with the examination. He therefore waived and/or forfeited his competency claim and he failed to properly maintain it. Given Mills' refusal to be evaluated, no competency opinion could be be issued. *See* Court Diagnostic and Treatment Center letter, December 3, 2019 (item 40, trial court record).

The record also reflects that from the time he filed the Motion for Competency Evaluation on November 19, 2019, defense counsel never raised the issue again. He did not raise the issue of competency at any time during trial, nor did he ever address the

court about the Motion for Competency in any additional conferences held after November 19, 2019, despite having a number of opportunities to do so. *(See e.g*, Trial TR. p. 2-3; TR 139, Lns 6-17; Trial TR 194, Lns. 5-6; TR 289 Lns. 18-25.) When asked prior to trial if there were any issues that needed to be addressed, defense counsel did not raise any concerns. (*E.g.*, Trial TR p. 139, Lns 16-17; TR p. 194, Ln 5-6).

Based on the above, Mills waived and/or forfeited his competency claim. His behavior supports this conclusion. He failed to properly maintain the issue of competence. His behavior during trial, while indicating some confusion and/or lack of understanding at times, *see e.g.*, Pretrial Nov. 4, 2019, p 4-5, 8; Arraignment, July 31, 2019, p. 7; TR. at p. 119; Sentencing, Jan. 8 2020. p. 3-4, does not indicate incompetence or an inability to assist in his own defense. Lack of understanding and asking questions of the court about trial procedures is not the same as a lack of competence. Likewise, his attorney's failure to raise the issue of competence at any time before or during the trial also waived and/or forfeited the issue. His attorney's failure to raise the issue during trial shows that the competency issue went away once Mills saw that he was going to have the trial he desired.

C. Even if the failure to hold a hearing was erroneous, it was harmless error since there was no indicia of incompetence.

Even when a defendant makes a request for a competency evaluation and where it is properly raised and maintained, "'the failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.'" *Moore,* at 37, quoting *Bock,* 28 Ohio St.3d at 110.

As stated above, Mills' behavior during trial, while indicating confusion and/or lack of understanding of legal procedure at times, *see e.g.*, Pretrial Nov. 4, 2019, p 4-5, 8;

Arraignment, July 31, 2019, p. 7; TR. p. 119; Sentencing, Jan. 8 2020. p. 3-4, did not indicate incompetence or an inability to assist in his own defense. Mills appeared to have an adequate understanding of the nature and object of the proceedings against him, and an adequate ability to consult with his counsel, and an adequate ability to assist in preparing his defense. TR Nov. 4, 2019, p. 3-9. He was able to discuss his concerns about voir dire and peremptory challenges. TR Dec. 9, 2019, p. 119, Ln. 6. Asking questions of the court about trial procedures, and a lack of understanding regarding those procedures is not the same as a lack of competence. Mills' discussions with the trial court indicate his competence.

D. A defendant can waive certain rights implicitly by virtue of the person's behavior.

Mills asserts that the record is "silent" on the issue of waiver, because he never verbalized such a desire. However as stated above, the idea that a person's behavior can result in an implicit waiver is not a foreign concept in the practice of law. "The Fifth Amendment to the United States Constitution provides that no one 'shall be compelled in any criminal case to be a witness against himself.' *Miranda v. Arizona* was established to secure this privilege against compulsory or involuntary self-incrimination." *State v. Roberts*, 32 Ohio St.3d 225, 233, 513 N.E.2d 720 (1987), citing *Michigan v. Tucker*, 417 U.S. 433, 438-439, 94 S.Ct. 2357, 41 L. Ed.2d 182 (1974).

However, it has been determined that a *Miranda* waiver need not be expressly made in order to be valid. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L. Ed.2d 286 (1979). A court may infer the waiver of *Miranda* rights from the suspect's behavior, when viewed in light of the surrounding circumstances. *See State v. Murphy*, 91 Ohio St. 3d 516,

518, 2001-Ohio-112, 747 N.E.2d 765 (2001); *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 188.

If a suspect's *Miranda* right can be waived based on a person's behavior, in the light of the surrounding circumstances, the same rule should also be applied to a defendant's intentional refusal to cooperate with a court ordered competency examination, and where he violates his statutory duty to cooperate with a court ordered competency examination.

Based on the above, the State maintains that a defendant waives and fails to properly maintain the right to a competency hearing by refusing to cooperate with a scheduled competency examination, in violation of their statutory duty to do so. Both Mills' behavior and his attorney's failure to raise the issue before or during trial effectively waived and/or forfeited the right. Based on Mills' behavior and his attorney's failure to re-assert the issue, the record is not "silent." Mills' behavior speaks volumes.

CONCLUSION

Based upon the foregoing facts and case law presented, the State of Ohio respectfully requests this Court to find Propositions of Law not well taken, to overrule same, and to affirm the judgment of the lower court.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: _____

Brenda J. Majdalani (0041509)
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary e-mail this 28th day of November, 2022, to Kimberly E. Burroughs at kimberly.burroughs@opd.ohio.gov, Counsel for Defendant-Appellant:

By: _____

Brenda J. Majdalani (0041509)
Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No. 2022-0779
Plaintiff-Appellee,	*	
-vs-	*	On Appeal from the Lucas County, Court of Appeals,
MIGUEL MILLS,	*	Sixth District
Defendant-Appellant.	*	Court of Appeals Case No: CL-2020-1084
	*	

APPENDIX TO

MERIT BRIEF OF APPELLEE

THE STATE OF OHIO

USCS Const. Amend. 14,

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall

have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

USCS Const. Amend. 14

ORC Ann. 2941.145

Current through File 132 of the 134th (2021-2022) General Assembly; acts signed as of as of July 29, 2022.

- **Page's Ohio Revised Code Annotated**
- **Title 29: Crimes — Procedure (Chs. 2901 — 2981)**
- **Chapter 2941: Indictment (§§ 2941.01 — 2941.63)**
- **Form and Sufficiency (§§ 2941.01 — 2941.35)**

§ 2941.145 Specification that offender displayed, brandished, indicated possession of or used firearm.

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a)(ii) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form: "SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a)(ii) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year, eighteen-month, six-year, fifty-four-month, or nine-year mandatory prison term on the offender under division (B)(1)(a)(i), (iii), (iv), (v), or (vi) of that section relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) Imposition of a mandatory prison term of fifty-four months upon an offender under division (B)(1)(a)(v) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed a firearm, or used the firearm to facilitate the offense and that the offender previously has been convicted of or pleaded guilty to a firearm specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed a firearm, or used the firearm to facilitate the offense and that the offender previously has been convicted of or pleaded guilty to a firearm specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code.)"

(E) Imposition of a mandatory prison term of fifty-four months upon an offender under division (B)(1)(a)(v) of section 2929.14 of the Revised Code is precluded if the court imposes a one-year,

eighteen-month, three-year, or nine-year mandatory prison term on the offender under division (B)(1)(a)(i), (ii), (iii), (iv), or (vi) of that section relative to the same felony.

(F) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

History

146 v S 2 (Eff 7-1-96); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3. Eff 1-1-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2016 sb97, § 1, effective September 14, 2016.

R.C. 2941.145 (Page, Lexis Advance through File 132 of the 134th (2021-2022) General Assembly; acts signed as of as of July 29, 2022)