

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

Case No. 135495

AMIR AZIZ SHAHIDEH,
Defendant-Appellant.

BRIEF *AMICUS CURIAE* OF
CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF THE *AMICUS*

Since its founding in 1976, Criminal Defense Attorneys of Michigan [CDAM] has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the state's criminal defense bar in a wide array of matters. CDAM currently has 635 members.

As reflected in its by-laws, CDAM exists to, *inter alia*, “promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy”, “provide superior training for persons engaged in criminal defense”, “educate the bench, bar and public of the need for quality and integrity in defense services and representation” and “guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws”. Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an *amicus curiae* in litigation of relevance to the organization's interests.

As in this case, CDAM is often invited to file briefs *amicus curiae* by Michigan appellate courts.

CDAM has a strong, direct institutional interest in this case because of the implications of the trial court's ruling on the state and federal constitutional rights to the effective assistance of counsel in pretrial preparation and to present a defense.

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STATEMENT OF JURISDICTION

The jurisdictional statement in the Briefs of the parties on appeal is complete and correct.

STATEMENT OF QUESTION PRESENTED

- I. **DOES THE INSANITY NOTICE STATUTE REQUIRE DEFENDANT TO FILE A NOTICE OF INTENT TO ASSERT THE INSANITY DEFENSE WHEN DEFENSE COUNSEL IS ONLY IN THE PROCESS OF INVESTIGATING INSANITY AS A POTENTIAL DEFENSE, AND IF THE STATUTE WERE INTERPRETED TO REQUIRE FILING OF THE NOTICE TO INVESTIGATE THE DEFENSE, WOULD IT VIOLATE THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION?**

Amicus Curiae CDAM answers “Yes.”

STATEMENT OF FACTS

Amicus relies on the parties to provide the Court with the relevant facts.

ARGUMENT

I. THE INSANITY NOTICE STATUTE DOES NOT REQUIRE DEFENDANT TO FILE A NOTICE OF INTENT TO ASSERT THE INSANITY DEFENSE WHEN DEFENSE COUNSEL IS ONLY IN THE PROCESS OF INVESTIGATING INSANITY AS A POTENTIAL DEFENSE, AND IF THE STATUTE WERE INTERPRETED TO REQUIRE FILING OF THE NOTICE TO INVESTIGATE THE DEFENSE, IT WOULD VIOLATE THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION

Standard of Review. Statutory interpretation is a question of law reviewed *de novo*. Constitutional issues are reviewed *de novo*.

Issue Preservation. The issue was preserved in Defendant's pretrial motion.

A. Introduction

The state argues that the statutes governing the insanity defense are triggered when a defense attorney decides to investigate the defense, even before deciding whether to assert it. There is a basic constitutional flaw in the argument: a defendant who has not chosen to assert the defense cannot be compelled to waive his privilege against self-incrimination and answer questions in a court ordered criminal responsibility examination. United States Const, Am VI; Mich Const 1963, Art. 1, § 17.

In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court held that an alibi notice statute did not violate the Fifth Amendment privilege against self incrimination on a theory of "accelerated disclosure," namely that requiring that information regarding the defense is information that the defendant would inevitably be disclosing at trial, and

therefore is not subject to the privilege.¹ A compelled psychiatric examination implicates both the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. *Estelle v. Smith*, 451 U.S. 454, 461-471, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)(1980). A defendant who seeks to introduce expert psychiatric testimony may be compelled to submit to a state examination under an “implied waiver” doctrine. See, e.g., *Battie v. Estelle*, 655 F.2d 692, 701-703 (5th Cir. 1981); Wayne R. LaFave, 5 Criminal Procedure § 20.4(e) (3d ed.), *Self-incrimination: the special case of the insanity defense*.

However, when a defendant is only **investigating** a possible defense but and has not yet decided to **assert** it, the accelerated disclosure/implied waiver rationale collapses. Therefore, compelling a defendant to answer questions in a court ordered examination about his mental state and the facts of the case, as a Forensic Center evaluation certainly requires, would violate the Fifth Amendment.

This constitutional distinction is dispositive of the case. The state’s argument completely ignores this elementary constitutional principal. The insanity notice statute can constitutionally only govern cases where a defendant has already decided to offer the defense at trial and cannot govern defense counsel’s investigation into insanity as a **potential** defense before the decision to assert it.

The state’s novel argument is also without basis in the language of the statute. However, even if the statutory language were construed in the strained manner urged by the state, the interpretation would be unconstitutional.

B. The Statute Does Not and Cannot Govern Pre-Notice Investigation Nor the Order of Events.

¹ *Williams* involved the alibi defense, but the principle applies to defenses generally.

1. The Insanity Notice Statute Does Not Govern Pre-Notice Defense Investigation.

The first question posed by this Court is “whether MCL 768.20a governs a request by an incarcerated defendant for an independent psychiatric evaluation to determine whether an insanity defense may be available where no notice of intention to assert an insanity defense has been filed.” The answer is clearly no, based both upon the constitutional privilege against self-incrimination and the language of the statute.

a. The Constitutional Privilege Against Self-Incrimination.

In *Williams v Florida, supra*, the Supreme Court held that the privilege against self-incrimination was not violated by a requirement, under a Florida notice of alibi rule, that the defendant give notice of alibi defense and disclose his alibi witnesses. The Court reached that conclusion on a theory that disclosure of the information was merely accelerated.²

A compelled psychiatric examination implicates both the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. *Estelle v. Smith, supra*. The Supreme Court held this Fifth Amendment protection is diminished when a defendant raises an insanity defense and introduces expert testimony:

When a defendant asserts the insanity defense and introduces supporting psychiatric

² The Court said, at 399 U.S. at 395:

At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly... under such circumstances, a defendant can be required to submit to a sanity examination conducted the prosecution's psychiatrist. 451 U.S. at 465.

A defendant who seeks to introduce expert psychiatric testimony may be compelled to submit to a state examination under an implied waiver doctrine. See, e.g., *Battie v. Estelle*, 655 F.2d 692, 701-703 (5th Cir. 1981). In *Criminal Procedure*, Professor LaFave describes the theory behind this implied waiver as follows:

Perhaps the most widely accepted rationale as to why a court-ordered psychiatric examination does not violate the Fifth Amendment is that of waiver. Of course, the waiver here is not the traditional waiver by an entirely voluntary relinquishment, but waiver that is produced by conditions that the state attaches to the defendant's use of experts on the psychiatric issue. The state may duly be concerned about allowing the use of fully informed expert testimony on one side only, and therefore may insist that each side's expert have access to the subject of the examination (here the defendant)... The defendant, in choosing to use his own expert testimony, is taken as agreeing to submit the subject of that testimony to the other side for the same use as has been made by his experts. Wayne R. LaFave, et seq, 5 *Crim. Proc.* § 20.4(e) (3d ed.), *Self-incrimination: the special case of the insanity defense*.

Once a defendant gives notice of an intent to assert the insanity defense, he is deemed to have waived his right to refuse to participate in a compelled examination of insanity by the state experts. In *Estelle*, the trial court ordered Ernest Smith, who faced the death penalty for his crimes, to undergo a pretrial psychiatric examination by a state expert to determine whether he was competent to stand trial. After Smith was convicted, the doctor testified at the penalty phase that based on his pretrial examination, he concluded Smith was a sociopath, that no treatment existed for him, that he had no remorse for his crime, and that he would commit similar crimes in the future if given the chance. (*Id.* at pp. 459-460.) On appeal, Smith contended the testimony violated his right against compelled self-incrimination. In response, the State of Texas argued no Fifth Amendment violation occurred because Smith's "communications to Dr. Grigson were nontestimonial in nature."

(*Id.* at p. 463.) In support, Texas analogized to cases involving voice and handwriting exemplars, lineups, and blood samples. (*Ibid.*) The United States Supreme Court flatly rejected Texas’s argument:

“Dr. Grigson’s diagnosis, as detailed in his testimony, was not based simply on his observation of [defendant Smith]. Rather, Dr. Grigson drew his conclusions largely from [Smith’s] account of the crime during their interview, and he placed particular emphasis on what he considered to be [Smith’s] lack of remorse. Dr. Grigson’s prognosis as to future dangerousness rested on statements [Smith] made . . . in reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against [Smith] the substance of his disclosures during the pretrial psychiatric examination.” (*Estelle v. Smith, supra*, 451 U.S. at pp. 464-465, fns. omitted.)

The Court found the Fifth Amendment’s protections applied because Smith’s disclosures in the compelled pretrial psychiatric examination were testimonial in nature. A defendant’s statements, uttered in a mental examination, are clearly testimonial and protected by the Fifth Amendment. The privilege against self incrimination is inextricably linked to the insanity notice.³

The state’s argument, and that of amicus PAAM, do not address this dispositive constitutional issue. Under *Williams* and *Estelle*, the constitutional privilege against self-incrimination is only waived when a defendant asserts a defense such as insanity, and not before. Until a defendant makes that choice by filing the statutorily required notice, the state cannot compel

³ Perhaps the clearest statement is found in *United States v. Byers*, 740 F.2d 1104, 1115 (D.C. Cir. 1984) (*en banc*), where then-judge Scalia, writing for an *en banc* court, explained why the privilege must yield, but only when a defendant raises an insanity defense. After a long analysis of the Fifth Amendment issue and review of caselaw, Scalia concluded:

“We hold that when a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists without the necessity of recording; and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received (on that issue) as well.”

him to undergo a court ordered mental health examination in which he must give up his privilege and discuss testimonial matters regarding his mental state and the facts of the case.

b. The Statutory Language.

Against this constitutional backdrop, the plain language of the insanity notice statute makes sense. The insanity notice statute governs only cases where a defendant has already decided to offer the defense of insanity at trial: notice is required when a defendant “proposes to offer” evidence to establish insanity at trial. MCL 768.20a(1). The statute is clearly intended to govern cases where the decision to claim insanity has already been made by the defense.⁴ This language gives no indication that the Legislature also intended the notice requirement to extend to cases where defense counsel has not decided whether or not to assert the defense and is still investigating whether there is a basis for it.

The issue of a defendant’s insanity is a complex question, and in most cases is beyond the ability of attorneys to determine themselves merely through contact with the client. A mental health expert is almost always necessary. See, e.g., *People v. Martin*, *supra*, at 386 Mich.427 (the unique characteristics of the insanity defense require that the defendant be evaluated and probed by an expert). Defense counsel in this case was simply doing what was necessary to investigate and assess the defense before deciding whether to assert it and file the notice.

The state’s argument also conflicts with other rules and law. Lawyers are required to have a basis in fact after having made a “reasonable inquiry” for asserting a position before signing their

⁴ In *People v. Martin*, 386 Mich. 407, 428, 192 N.W.2d 215, 226 (1971), *cert. den.* 408 U.S. 929, 92 S.Ct. 2505, 33 L.Ed.2d 342 (1972), which dealt with a predecessor to the current notice statute, the Michigan Supreme Court held that a defendant who asserts the insanity defense must submit himself to an examination by the state’s experts.

names to a pleading, and are subject to sanctions if they sign a pleading without first having made a reasonable investigation to form the basis for a belief in fact in the position taken in the document. MCR 2.114(D)(2). Criminal defense lawyers are potentially subject to such sanctions under this rule. MCR 2.114(E) and (F).⁵ A criminal defense lawyer who submits an insanity notice merely as a means to investigate the defense, as the state argues, is in violation of the court rule.⁶ The lawyer would also be in breach of his or her duty to protect, not endanger, the client's interests.

It is elementary that a criminal defense lawyer has a duty to investigate a case before taking a position which could affect his client detrimentally. Filing a notice of insanity is a party admission which concedes that a defendant was present at the time and scene of the crime, because to claim the defense, a defendant must admit commission of the act. While the "statements" made by a defendant undergoing an examination at the State Center for Forensic Psychiatry are not admissible against a defendant⁷, there is no bar to the state's impeachment use at trial of the fact that the defendant filed the notice if the defense asserts a trial defense that he was not present at the scene. Such impeachment use of a notice of intention to assert a defense is permitted. See, e.g., *People v*

⁵ See, e.g., *In Re Minock*, 441 Mich 881, 491 N.W.2d 824 (1992).

⁶ There are conceivable exceptions where an attorney could file an insanity notice without consulting an expert, for example, cases where a defendant has previously been found not guilty by reason of insanity, or where a defendant's severe mental illness is readily apparent and/or documented. But in most cases determination of the issue requires an expert opinion. *People v Martin*, *supra*.

⁷ *People v Toma*, 426 Mich 281, 613 N.W.2d 694 (1999). MCL 768.20a(5) reads:

Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense.

McCray, 245 Mich App 631 (2001) (impeachment use of withdrawn notice of alibi).⁸ Thus the premature filing of an insanity notice without adequate investigation could result in defense counsel materially damaging his client's interests without adequate prior investigation, should it be concluded defendant was criminally responsible, because it could inhibit pursuing other theories of defense.⁹

The larger issue is that even though a defendant's statements in the examination are not admissible, since a defendant ordered to undergo a court ordered psychological examination for criminal responsibility admits the alleged act and must answer questions about the facts of the offense, the examiner is not precluded from disclosing the defendant's statements in the report of the examination. Thus, a defense lawyer who files a notice of insanity without first doing an independent investigation may provide ineffective assistance of counsel, since the court ordered examination provides the state with the defendant's version of the case. For example, if the examiner concluded that the defendant was criminally responsible and as a consequence the defendant withdrew the defense and instead asserted another defense, such as self-defense, the premature insanity notice would have provided the prosecution with a statement by the defendant

⁸ In its amicus brief, PAAM asserts, without citation of any authority or explanation, that such impeachment would be error. That assertion does not bind any prosecutor from arguing the contrary in the future.

⁹ It could not be questioned that a defense lawyer who filed an alibi notice without first determining whether the defense was viable (such as by interviewing the alibi witnesses) would not be fulfilling his/her duty to investigate and to protect the client's interests. Yet the logic of the court's ruling and the state's argument here also extends to alibi notice: in order to ensure that a defense lawyer not "contaminate" alibi witnesses, and to ensure the "integrity" of the investigation, if a defense lawyer becomes aware that alibi is a potential defense, he/she should file a notice of alibi and allow the state to interview the witnesses first. That argument is no less absurd than the argument made here.

to which it is not entitled. The decision to file the notice can only be competently made by a defense lawyer after independent investigation indicating the defense is viable.¹⁰

2. The Insanity Notice Statute Does Not Require that a Defendant be Examined at the State Center for Forensic Psychiatry Prior to Being Evaluated by a Defense Expert.

The second question posed by the Court is: “If the statute governs, whether the subsections of MCL 768.20a are to be construed seriatim, such that an independent psychiatric evaluation may not be requested under subsection (3) without first complying with subsections (1) and (2).”

Amicus submits that the language of the statute and the history and legislative intent of Michigan’s insanity defense clearly indicate the statute does not govern pre-notice investigation, as argued in Part IB1, *supra*.

Further, the question posed appears to have a false premise: the statute does not say that a defendant must “request” permission to undergo a psychiatric or psychological evaluation to assist

¹⁰ The anecdotal representation made by PAAM in its amicus brief that defense lawyers often use the insanity notice as an investigative tool is beside the point. There is no evidence in this record to support that statement.

Furthermore, even if it were true that some lawyers misuse the procedure, a defense lawyer who practiced in such a manner would clearly not be fulfilling his duties to his client nor providing effective assistance: what possible justification could there be for allowing the defendant to be interviewed regarding the facts of the case in a compelled, unprivileged, and thorough interrogation before the defense lawyer knows whether the insanity defense is viable?

PAAM also incorrectly states that the defense is not entitled to investigate the defense without disclosure to the prosecution, because of reciprocal discovery. That statement conflates the investigative stage of the defense with the decision to assert the defense. It is entirely conceivable that an adequate defense investigation into the defendant’s mental state might reveal the insanity defense is not viable, and no law requires that that be disclosed to the prosecution.

PAAM also incorrectly asserts that the only means for indigent defendants to investigate is to file the insanity notice. A defense lawyer living up to the standard of practice would instead make an *ex parte* motion for expert services at court expense without disclosing the details of the services sought or the reason therefor to the prosecution, since there is no disclosure requirement. See, *e.g.*, the federal Criminal Justice Act, 18 USC 3006(A)(e)(1).

defense counsel. It merely says a defendant “may” obtain an independent evaluation. MCL 768.20a(3). The statute does not require a motion to conduct the evaluation.¹¹ The only reason this issue came to a head in this case is that the defense expert would not have been permitted access to the jail without a court order.¹² A defendant who is admitted to bail could have such a preliminary evaluation by a defense expert at any time prior to filing a notice of insanity.¹³

Assuming, for the sake of discussion only, that the statute does apply to pre-Notice defense investigation, nothing in the language of the statute sets the order of events. The statute does not state explicitly or implicitly that the examination by the State Center for Forensic Psychiatry must occur first. This was entirely a construct laid upon the statute by the trial court at the urging of the

¹¹ If a defendant is indigent, the statute requires a request for funds for the expert. That request should be done *ex parte*. See, *e.g.*, 18 USC 3006A.

MCL 768.20a(3) codifies the holding of *Ake v Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)(when a defendant has made a preliminary showing that his sanity is likely to be a significant factor at trial, due process requires that a state provide access to a psychiatrist's assistance if a defendant cannot otherwise afford one).

¹² While Defendant's motion in this case only referenced counsel's need for the expert in evaluating the possibility of an insanity defense, it should be noted that a defense lawyer may require the assistance of a mental health expert to evaluate a defendant for numerous other purposes. A mental health expert could be necessary to assess a defendant's ability to make a voluntary statement, *People v Hamilton*, 163 Mich App 661, 415 N.W.2d 653 (1987), or to assess a defendant's capacity to consent to a search. A mental health expert could be necessary to assess and explain to a jury a defendant's mental condition not affecting criminal responsibility, *e.g.*, battered spouse syndrome, or to explain something unusual about a defendant's demeanor while testifying. A mental health expert could be necessary to assist defense counsel in preparing mitigation arguments for sentencing. This list is not exhaustive.

The expert's assistance could be necessary on more than one issue in the same case, including criminal responsibility.

¹³ Notice to the prosecutor of the defendant's plan to obtain an evaluation five days in advance of the evaluation pursuant to MCL 768.20a(3) only applies to post-Notice evaluations. It cannot apply to a pre-Notice evaluation, because no notice is required until a defendant decides to assert the defense.

state but completely without basis in the statutory language.

Subsection (1) merely requires a notice of intent to assert the defense. Subsection (2) provides that upon filing of the notice, the court must order the evaluation at the State Center. Subsection (3) merely says a defendant who has already filed the notice may secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity and must provide the prosecutor notice of the intent to seek such an evaluation.¹⁴

The trial court read the order of events into the statute based upon a purpose the court perceived as underlying the statute, namely to assure the “integrity, accuracy, and reliability of evidence regarding insanity.” The state more bluntly expressed the basis for reading such a purpose into the statute: unless the State Center gets first crack at examining a defendant, a defense expert might coach the defendant into producing false evidence of insanity.¹⁵

This distrust of the integrity of the defense bar only reflects the attitude of the trial judge and the prosecutor. But there is no indication in the text of the statute, implicit or explicit, that the Legislature intended to set the order of events. Where the text of a statute is clear, courts must apply it without resorting to judicial construction. See, e.g., *People v McIntire*, 461 Mich 147, 153, 599 NW2d 102 (1999); *People v Hawkins*, 468 Mich 488, 500 (2003). Nothing in the text of the statute sets the order of events.

¹⁴ Again, because of the constitutional privilege against self-incrimination, Subsection (3) cannot be read to apply to cases where the notice has not already been filed. A defendant who has not yet asserted the defense cannot constitutionally be compelled to disclose his investigation into the defense.

¹⁵ This argument does not make practical sense. It is extremely doubtful that a defendant could be coached into faking insanity or that trained mental health examiners could be fooled, particularly when one considers how extreme a person’s mental illness must be before a finding of no criminal responsibility.

Reading the order of events into the statute transforms the forensic examination into an inquisitorial and investigative tool. If a defendant who wishes to determine *whether* a potential insanity defense is viable is compelled to first file a notice and be examined at the State Center, the defendant must submit to the examination or waive the defense.¹⁶ If the defendant submitted, the state would then obtain the defendant's statement under compulsion before defense counsel even knows whether there is a basis for the defense.

The prosecutor's answer to this consequence, that the prosecution could not use anything learned during the evaluation for any reason other than to refute a claim of insanity is disingenuous. The statute merely says that a defendant's *statements* in the examination are not admissible in court on any issue but insanity. MCL 768.20a(5). The statute does not prohibit the prosecuting attorney from using the defendant's statements in the examination outside the courtroom for investigative purposes or to plan trial strategy.

The statute is silent as to the order of events. There is no basis to read an order of events into the statute where none exists in the text of the statute, based merely upon the state's unsupported fear that a defendant could be coached into faking insanity.

C. The Trial Court Ruling Interfered With Defendant's Constitutional Rights to the Effective Assistance of Counsel and to Present a Defense.

The third question posed by this Court is: "(3) If the statute does not apply, whether defendant's constitutional rights were violated by the trial court's decision to deny access to defendant for an independent psychiatric evaluation while he was in jail."

¹⁶ MCL 768.20a(4); *People v Hayes*, 421 Mich 271, 364 N.W.2d 635 (1984).

The trial court ruling effectively converts the criminal process from accusatorial to inquisitorial. It interfered substantially with defense counsel's role as advocate and with Defendant's right to present a defense.

The constitutional right to counsel entitles a criminal defendant to the effective assistance of counsel. Mich Const 1963, Art. 1, § 20; United States Const, Am VI; *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 2d 158 (1932). Included in counsel's duties are a duty to investigate and prepare, including the assessment of possible defenses and advising the client as to the choices involved. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 US 668, 691, 104 SCt 2052, 80 LEd2d 674 (1984). Strategic choices are those "made after thorough investigation of law and facts relevant to plausible options." *Id.* Defense counsel must explore and investigate before deciding not to do further investigation will be absolved as strategic. *Wiggins v Smith*, 539 US 10, 123 S Ct 2527, 156 L Ed 2d 471 (2003). It is not sufficient that a lawyer make *some* effort to investigate a case; the proper inquiry is "whether the known evidence would lead a reasonable attorney to investigate further." 123 S. Ct. at 2538.

Intertwined in this case with the right to the effective assistance of counsel and counsel's duty to investigate potential defenses is the right to present a defense:

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, 467 U.S. [479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)] . . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed. 682 (1948); *Grannis v.*

Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also *Washington v. Texas*, *supra*, at 22-23, 87 S.Ct., at 1924-1925." *Crane v. Kentucky*, 476 U.S. 683, 690-691, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986).¹⁷

Applied to this case, defense counsel was thwarted in his investigation of a potential, complex defense by the trial court order that he file a notice of intent to assert the insanity defense where counsel had not determined whether the defense was viable. As a consequence, Defendant's right to the effective assistance of counsel was substantially impeded by the state. In addition, defense counsel and Defendant were placed in an impossible position: either Defendant had to submit to a state examination for criminal responsibility before even knowing if there was a basis for it, or forego the defense. Not surprisingly, defense counsel chose the latter course.

RELIEF REQUESTED

For all the reasons above, the Court of Appeals decision below should be affirmed, or the case dismissed for leave improvidently granted.

Dated: September 24, 2008

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¹⁷ See, also, *e.g.*, *People v Barrera*, 451 Mich 261 (1996).