IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
15-00226-CF
SECTION I

STATE OF FLORIDA

vs.

JOHN NICHOLAS JONCHUCK, JR Person ID: 2923683

AMENDED MOTION TO EXCLUDE THE TESTIMONY OF STATE WITNESS, EMILY LAZAROU

The Defendant, by and through undersigned counsel, respectfully requests this Honorable Court enter its Order excluding the testimony of listed State expert witness, Emily Lazarou. As grounds for this motion the Defendant would show:

1. Defendant is currently charged by Indictment with Murder in the First Degree. Defendant filed a Notice of Intent to Rely on Insanity on August 15, 2017, pursuant to Fla R. Crim. Pro. 3.216. In response to that notice, the State filed, and the Court granted, a Motion to Compel Examination of Defendant by State Mental Health Experts. The Order permitted Dr. Michael Gamache, Dr. Peter Bursten, and Dr. Emily Lazarou to evaluate the defendant.

2. The State filed an acknowledgment of additional discovery, listing as expert witnesses, Peter Bursten, Ph.D. and Emily Lazarou, M.D. (Lazarou) on July 12, 2018.

3. Lazarou conducted an evaluation of Defendant over the course of two days, October 24, 2017 and May 15, 2018. Lazarou's forensic report was provided to defense counsel on July 13, 2018. Lazarou's deposition was conducted over the course of two days, August 30, 2018 and September 14, 2018.

4. Lazarou lays out her "expert opinions" as follows:

> SUMMARY CONCLUSIONS: It is my opinion with a reasonable degree of medical and psychiatric certainty that John Jonchuck is a Psychopath. He also meets the DSM 5 Diagnostic Criteria for Sedative Hypnotic Use Disorder, severe (iatrogenic), and Stimulant, Cannabis, Alcohol, Tobacco and Hallucinogen Use Disorders in sustained full remission in a controlled environment.

> I also believe that John is malingering his mental illness at the time of the crime. I do not know the extent of it because john did not participate in the interview fully. John has been non-complaint with treatment in the past and in the present. He is a psychopath who stands to gain something (his life or his freedom) from lying. John's story changes among different interviewers and in different contexts and is also inconsistent with collateral data from before this crime occurred.
>
> I do not believe that Mr. Jonchuck meets the insanity criteria. He does not suffer from a mental illness that would render someone insane at the time of the offense. Psychopathy is a cause for clinical concern, but is not a mental illness that would render someone insane at the time of the offense of murder. I believe that John knew exactly what he was doing. I believe that it was premeditated and the purpose of this senseless, horrific crime was to punish those he perceived to have loved Phoebe over him. Although I do believe that John loved Phoebe on some level, I believe that she was seen as an object that John used to make himself appear more human which allowed him closer access to potential victims. He used Phoebe to get things from others that he would not have been able to get by himself alone. The reason that he killed her at this time was because Phoebe's mother's living situation became more stable and she was going to pursue custody. That would take away financial means from John and the ability to manipulate others for his personal gain. What makes this crime particularly heinous and cruel was because Phoebe cared for John as her father. She was a young child who looked to him to protect her. She trusted him and he abused that trust. He knew that she was fearful of water and to end her life he dropped her from a bridge 60 feet above the frigid sea while in a state of being woken from sleep so she could not fight. She could not swim. Her last moments were of utter fear and of a horror people only experience in their worst nightmare.

Lazarou forensic report, p. 1 (July 11, 2018)

Lazarou provides the following "DSM-5 diagnoses: Psychopathy, malingering (V code), Sedative Hypnotic Use Disorder, severe (iatrogenic), Stimulant, Cannabis, Alcohol, Tobacco and Hallucinogen Use Disorders in sustained full remission in a controlled environment." *Id.*, at 81. Lazarou goes on to state that it is her, "primary opinion that John Jonchuck is a dangerous, cold-blooded Psychopath." *Id.*, at 82.

5. Pursuant to Florida statute § 90.702 (2018), if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in

issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.

6. After the initial filing of this motion, the Florida Supreme Court held in *DeLisle v. Crane Co., et al*, No. SC16-2182 (October 15, 2018), that the 2013 amendment to Florida statute 90.702 (as outlined in paragraph 5) was unconstitutional. The Court held the amendment was procedural in nature and therefore the legislature had infringed on the rule making authority of the Supreme Court when they enacted the amended statute to overrule the Court's decision in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007). Pursuant to § 90.702, Florida Statutes (2012), if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

7. The Florida Supreme Court has consistently held that the proper standard to review the admissibility of expert testimony in Florida is the higher standard of reliability as dictated by *Frye*, versus the more lenient standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Brim v. State*, 695 So. 2d 268 (Fla. 1997). The *Frye* standard requires the trial court make a determination that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community. *Id.*, at 271–72. A *Frye* hearing is only required if an expert intends to offer an opinion derived from new or novel methodology. *Marsh v. Valyou*, at 547.

8. Trial courts must act as gatekeepers and exclude evidence unless it is reliable and relevant, "in order to ensure that speculative, unreliable expert testimony does not reach the jury under the mantle of reliability that accompanies the appellation 'expert testimony'." *Crane Co. v. DeLisle*, 206 So.3d 94 (Fla. 4th DCA, 2016) (citing *Hughes v. Kia Motor Corp.*, 766 F.3d 1317(11th Cir. 2014)(quoting *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005)). To properly perform the gatekeeping function under *Daubert*, the Court must determine that the witness is qualified to testify as an expert on the matter, that the expert is employing reliable

methodology, and that the expert's testimony can assist the jury to understand the evidence or fact at issue. *Id.*, at 101.

9. Regardless of whether the *Daubert* language and requirements are stricken from Florida Statute § 90.702, an expert witness' testimony remains subject to the requirements of § 90.401 and §90.402 and is always subject to the balancing test set forth in § 90.403, Florida Statutes (2018), which focuses on legal reliability. *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001). While all relevant evidence is admissible except as provided by law, relevant evidence should be excluded if it is unreliable under the balancing test in § 90.403, or the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. § 90.403, Fla. Stat. (2018). Evidence that is based on a novel scientific theory is inherently unreliable and inadmissible unless the theory has been adequately tested and accepted by the relevant scientific community. *Ramirez*, at 843.

10. Before an expert may render an opinion, the witness must satisfy a four-prong test of admissibility. *Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009). First the court must make two preliminary determinations that, (1) the subject matter will assist the trier of fact in understanding the evidence or in determining a disputed fact, and (2) whether the witness is adequately qualified to express an opinion on the matter. *Id.* If those threshold determinations are affirmatively satisfied, two more requirements must be satisfied before the admission of the expert's testimony; (3) the expert opinion must apply to the evidence presented during the trial, and (4) the danger of unfair prejudice must not outweigh the probative value of the opinion. *Id.*

11. Although an expert may be qualified by experience, that experience, standing alone, does not create a sufficient foundation rendering reliable *any* conceivable opinion the expert may express. *U.S. v. Frazier*, 387 F.3d 1244 (11th Cir. 2004). A witness may be considered an expert but offer unreliable testimony, which is why "the reliability criterion remains a discrete, independent, and important requirement for admissibility." *Id.*, at 1261.

12. The American Academy of Psychiatry and the Law (AAPL), of which Lazarou indicates she is a member, has published guidelines for the forensic psychiatric evaluation of defendants raising the insanity defense. These guidelines provide instruction regarding ethical considerations, the forensic interview, collateral data, the forensic report, and the forensic opinion. *Practice Guideline: Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, The Journal of the American Academy of Psychiatry and the Law, Vol. 42, Number 4, 2014 Supp. According to these guidelines;

    a. Forensic psychiatrists who participate in the evaluation of defendants for the insanity defense are ethically obligated to conduct such evaluations competently. Forensic psychiatrists should have sufficient professional knowledge to understand the relevant legal matters and conduct an evaluation that addresses the specific legal issues involved in the insanity defense.

    b. The forensic psychiatrist should familiarize themselves with the relevant insanity test for the jurisdiction, conduct a forensic interview of the defendant, and review collateral information before rendering an opinion as to legal insanity.

    c. Familiarity with the related literature is important. *Id.*, at S20.

    d. The forensic psychiatrist should be aware of any biases that may distort their objectivity and take appropriate steps to counter them. *Id.*, at S20. Biases for and against defendants, victims, and collateral informants may color the evaluator's judgment and affect the validity of the data collected. *Id.*, at S23.

    e. Forensic psychiatrists should limit their opinions to those within their area of expertise. *Id.*, at S20.

    f. Forensic experts are ethically obligated to learn and apply the legal standards of the jurisdiction. *Id.*, at S21.

    g. When writing the report, the basis of the opinion should focus on whether the defendant suffered from a mental disorder at the time of the offense, whether there was a relationship between the mental disorder and criminal behavior, and if so, whether the criteria was met for the jurisdiction's legal test for insanity. *Id.*, at S26.

    h. The evaluator has the responsibility of including only that information in their report that is relevant to the legal question and is not merely gratuitous or inflammatory. *Id.*, at S20.

13. Lazarou testified in deposition that she was unaware the AAPL even had guidelines for conducting forensic assessments, and therefore unaware of what those guidelines would be. She could not say whether she had ever been trained with regard to the AAPL recommendations. *Lazarou Dep.* 10:6 – 10:24. She further testified she is unfamiliar with the ethics guidelines for the practice of forensic psychiatry issued by the AAPL. *Lazarou Dep.*, 10:25 – 11:3.

14. Lazarou lists in her forensic report under the "DSM-5 Diagnoses," "psychopathy." When asked in deposition to explain the criteria for diagnoses of psychopathy, she responded, "multiple step process and there is not necessarily a criteria. Not a DSM-5 diagnosis. It's a subject of clinical concern... It's not a diagnosis, no. It's a clinical characterization of somebody." When asked to explain what foundation the DSM-5 requires to make that clinical characterization, she testified, "the DSM-5 talks about psychopathy I believe briefly in the section on anti-social personality disorder, but there is no guideline or anything like that in the DSM-5. They stay away from that." *Id.*, 22:22 – 23:10. She goes on to state that "clinical characteristic / characterization" is her term, not one taken from the DSM-5, and she uses the Hare Psychopathy Checklist Revised as the only criteria to make a psychopathy characterization. *Id.*, 23:22 – 24:6.

15. Lazarou did not conduct any malingering testing during her evaluation, though she opines that the defendant was malingering. The malingering testing that was done in this case, both at North Florida Evaluation and Treatment Center upon defendant's admission and by the experts hired regarding the issue of insanity, show no signs of malingering.

16. Lazarou used no psychometric testing in forming her opinions. She indicates that she partly relied on the Hare criteria to form her "primary opinion that [defendant] is a dangerous, cold-blooded psychopath." *Lazarou forensic report*, at 82 – 86. In deposition, Lazarou testified she was unaware of the fact that the PCL-R was designed as a tool to use in determining future risk assessment of criminal offenders. She additionally testified she was unaware that Florida courts rarely, if ever, allow testimony regarding future dangerousness in criminal jury trials.

17. Lazarou testified in deposition that the credibility, or lack thereof, of the collateral sources and witnesses would not affect any of her opinions.

18. Lazarou testified in deposition that if certain facts of the case she held to be true were in fact not true, and vice versa, that none of her opinions would be affected.

19. Lazarou testified in deposition that she could not define, even generally, what "confirmation bias" means, and could not provide any examples of techniques she would / could utilize to protect against confirmation bias. Additionally, she testified she has never felt sympathy for a defendant or a defendant's family post-verdict, though she often publicly sympathizes with victims. *Lazarou Dep.*, 32:10 – 32:16. Lazarou went further explaining that she feels Florida law does not do enough to take into account victim impact, and that when she is working on a case the rights of the victim are always on her mind. *Lazarou Dep.*, 29:3 – 29:14. She considers herself a victim advocate. *Lazarou Dep.*, 18:14.

20. Ryan Wagoner, MD, is a board-certified Forensic Psychiatrist and current Chief of Forensic Psychiatry at University of South Florida in Tampa, Florida. He is currently the program director of the Forensic Psychiatry Fellowship at University of South Florida. Dr. Wagoner has reviewed the video-recorded evaluation of Defendant conducted by Lazarou in this case. His opinion is that the evaluation falls outside of the recommendations of the AAPL and also outside the bounds of typical professional standards for conducting forensic interviews. Dr. Wagoner describes the evaluation generally as being very biased and coercive in nature. He summarizes the issues he observed as falling into three general categories: coercive, judgmental, and leading; and questions whether an opinion formulated based on this evaluation would be reliable.

21. Because no scientific testing was completed, the credibility and reliability of the collateral data has no bearing on her opinion, and the forensic interview was conducted in a fashion that would produce unreliable and biased information, it is unclear upon what Lazarou has based her opinons. Defense counsel argues Lazarou's testimony does not satisfy the four-prong test of admissibility as outlined by the Florida Supreme Court in *Chavez*, and therefore should be excluded in this case.

22. If the court were to find Lazarou did rely on her evaluation of the defendant to form her opinion in this case, defense counsel argues a *Frye* hearing would be appropriate at that time, because her "evaluation" was conducted so far outside the generally accepted practices and principles in the field. (See *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001), where court found the admissibility of expert testimony constituted reversible error, despite several State expert's testifying during the Frye hearing that the underlying principle employed was generally accepted in the field.) A bald assertion by an expert that her deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness' *application* of these principles is untested and lacks indicia of acceptability. *Ramirez*, at 844.

23. An expert's testimony should not be admitted to summarize what the expert has been told by lay witnesses. *Angrand v. Key*, 657 So.2d 1146 (Fla. 1995).

24. Opinions based on speculation and assumptions, rather than the application of reliable methodology to the facts of the case, should be excluded. *Sanchez v. Cinque*, 238 So.3d 817 (4th DCA, 2018).

25. The sum of Lazarou's opinions amount to inadmissible character evidence that would severely prejudice the defendant and mislead the jurors, in violation of Florida statutes §90.404, §90.401, and §90.403.

26. The State, being the proponent of Lazarou's testimony, has the burden to establish its admissibility by a preponderance of the evidence.

The defendant files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: The Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Florida Constitutions generally, and specifically the Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article I, sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution.

NOTICE OF HEARING

YOU ARE NOTIFIED that the above will be heard before the Honorable Chris Helinger, County Justice Center, 14250 49th Street North, Clearwater, Fl 33762, on **December 17th at 8:30 a.m**.

I do certify that a copy hereof has been furnished by email/physical delivery to the State Attorney, County Justice Center, Clearwater, Florida, **on December 5, 2018**.

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