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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA, **CASE NO.: 23-03157-CF**

v.

DIVISION: K

THOMAS ISAIAH MOSELY,
Person ID: 3322179, Defendant.
_____/

ORDER ON DEFENDANT'S COMPENTENCY TO PROCEED RE-COMMITMENT TO DEPARTMENT OF CHILDREN AND FAMILIES

THIS MATTER came before the Court on the issue of the Defendant's competence to proceed to trial in accordance with the provisions of Florida Rule of Criminal Procedure 3.210(b), and section 916.115, Florida Statutes. On June 14, 2024, June 20, 2024, June 21, 2024, and June 28, 2024, the Court heard testimony and argument. Having considered the testimony, evidence, argument of the parties, the record, and applicable law, the Court finds as follows:

RELEVANT PROCEDURAL HISTORY

On April 27, 2023, a grand jury charged the Defendant by indictment with two counts of murder in the first degree, a capital felony (counts one and two). On October 11, 2023, the Court found the Defendant incompetent, and on October 18, 2023, the Court issued an order finding the Defendant incompetent to proceed and committed him to the Department of Children and Families (DCF).[1] On December 14, 2023, he was transported to South Florida Evaluation and Treatment Center (SFETC). On January 12, 2024, Dr. Theresa Ascheman Jones, from SFETC, filed a sealed competency evaluation report, indicating the Defendant met the criteria for competency to proceed, and on February 1, 2024, SFTC transported him to the Pinellas County Jail.

On March 27, 2024, the Court issued an order directing examination of the Defendant for competence to proceed and appointing Dr. Precious Ogu, Ph.D., as an expert for the Court. On May 22, 2024, Dr. Ogu filed her amended competency evaluation report, and on May 23, 2024,

[1] Based on evaluations by Valerie R. McClain, Psy. D., Ryan C.W. Hall, M.D., Douglas R. Ramm, Ph.D., and Michael S. Maher, M.D.

she filed her corrected competency evaluation report.[2] On June 11, 2024, the Defense deposed Dr. Ascheman-Jones, which was transcribed; the transcript was filed on June 13, 2024. On June 13, 2024, Dr. Ryan C.W. Hall and Dr. Valerie R. McClain filed competency evaluations.

On June 14, 2024, the Defense filed a Motion to Exclude Testimony of Dr. Theresa Ascheman-Jones and a Motion to Preclude Introduction of Jail Calls, which the Court denied the same day after hearing argument. On June 14, 2024, Dr. Ascheman-Jones testified, on June 20, 2024, Dr. Hall testified, on June 21, 2024, Dr. Ogu testified, and on June 28, 2024, Dr. McClain testified. State investigator Howard Crosby testified as to jail calls introduced at June 14, 2024 hearing. The parties presented oral closing argument on June 28, 2024. The Defendant was present for all hearings on this matter.

FINDINGS OF FACTS

Four mental health professionals testified regarding the Defendant's competence to proceed to trial. Dr. Ascheman-Jones, from the SFETC, found him competent to proceed on all factors under rule 2.211(a)(2) and that he was malingering. The two Defense experts and the court-appointed expert agreed that the Defendant was incompetent to proceed.

Testimony

State Investigator Howard Crosby

On June 14, 2024, the State called Howard Crosby, investigator for the State Attorney's Office. He testified that he pulled jail calls from the Pinellas County Jail (PCJ) using Global Tel Link (GTL) system and accessed the calls by entering the date and the docket number corresponding with the dates and times identified by the State. He stated that each inmate is assigned a personal identification number (hereinafter "PIN"), which is the same as the inmate's docket number at PCJ. Mr. Crosby testified that he accessed the PIN for the Defendant for each call identified and when he accessed the recordings, the Defendant identified himself by voice authentication as "Thomas" with the appropriate PIN; he downloaded thirteen calls to a disc and confirmed that the recordings on the disc were the same as those he reviewed through the GTL system. The State introduced the ICM call file list showing the Defendant's first and last name and his PIN as State's Exhibit 1 and the disc of the thirteen calls as State's Exhibit 2.

The Defense moved to preclude the introduction of the jail calls on the basis that the calls did not contain any direct evidence of whether the Defendant has sufficient present ability to

[2] Dr. Ogu later testified that she filed the corrected report to remove the word "amended" from the title of the report.

consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational understanding of the proceedings. The Court denied the motion finding that extrinsic information is relevant in competency proceedings[3] and that the Court would weigh the value of the jail calls.

The Defense objected at the hearing to introduction of the jail calls on the basis of improper authentication. Section 90.901, Florida Statutes requires as a condition precedent to admissibility that evidence be identified or authenticated, which can be satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Jackson v. State, 979 So. 2d 1153, 1154–55 (Fla. 5th DCA 2008) (quoting § 90.901, Fla. Stat.). "Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication." Id.; see also Walker v. Harley-Anderson, 301 So. 3d 299, 301 (Fla. 4th DCA 2020). "[A]uthentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic..." Mullens v. State, 197 So. 3d 16, 25 (Fla. 2016).

The State sufficiently authenticated the jail calls through Howard Crosby's testimony that he accessed the calls through the jail's GTL system and identified the Defendant's calls through his PIN. Upon listening to the calls, the Defendant was identified by the GTL system through voice authentication when he provided his name, "Thomas," and his unique PIN.

Dr. Theresa Ascheman-Jones

The State called psychologist Theresa Ascheman-Jones from SFETC.[4] Her testimony was introduced over the objections of the Defense based on staleness and her failure to provide raw data for the tests she administered to the Defendant: the Inventory of Legal Knowledge (ILK) and Inventory of Malingered Symptomatology (SIMS).[5] She testified that she met with the Defendant for a team meeting on December 15, 2023, the day after he was admitted; the team included herself as psychologist, the attending psychiatrist, social worker, recovery plan coordinator, and possibly the unit nurse. She stated that she saw the Defendant again on December 18, 2023 for an additional

[3] The two experts hired by the Defense and the court-appointed expert all agreed that when considering a person's competency to proceed it is important to consider extrinsic and historical information.
[4] Dr. Jones's full *curriculum vitae* was introduced as State's Exhibit #4.
[5] SFETC eventually provided the raw data to the Defense shortly before Dr. McClain testified.

team meeting because a covering psychiatrist met with him initially and the regular psychiatrist wanted to meet with him. Dr. Jones testified that at intake, the admitting psychiatric provider's diagnostic impression was unspecified mood disorder and cannabis use disorder. She stated she evaluated him twice on January 9, 2024, once during the regular monthly meeting and once for her formal competency evaluation. She stated that at the time of his arrival at SFETC, the Defendant was on psychotropic medications for mood and psychosis, as well as medication for anxiety, and depression and that he remained compliant on the same medications during his stay at SFETC. Despite reports from unit nurses that the Defendant demonstrated "restful sleep," the attending psychiatrist prescribed trazadone for sleep after the Defendant reported difficulty sleeping.

She stated that the Defendant's self-reported hallucinations were atypical because they were fairly continuous and severe but acknowledged that on January 4, 2024, a student update reported that the Defendant denied having hallucinations at that time. She reported he had poor cooperation and made no attempt to respond to even basic questions like the roles of the judge and of his attorneys. In addition, she noted that at the first team meeting, she asked the Defendant if he needed a copy of the charges in this case and he stated he knew about his case and did not need documents. However, when Dr. Jones asked him about the charges against him on a later date, he could not recall, then recalled one of the charges and told her he would have to call his public defender to see what the charges are, despite having previously stated that he did not trust his public defender. He told her he had been on probation but did not know the difference between a misdemeanor and a felony.

Based on the atypical hallucinations and poor cooperation, Dr. Jones testified that she suspected malingering so she administered the SIMS, a 75-page instrument consisting of true and false statements, and the ILK, which consists of 61 questions requiring a verbal response. She stated that the Defendant scored a 39 on the SIMS and a 26 on the ILK, and that the scores indicated he was feigning, exaggerating, or guessing.[6] She acknowledged that the SIMS was based on white female college students faking bad on the test and required a fifth grade reading and comprehension level; she was unaware of the Defendant's reading level at the time she administered the SIMS. She also acknowledged that the SIMS manual indicates that a diagnosis

[6] Dr. Jones initially testified that she was precluded by test protocols from revealing the test scores but after reviewing the test manuals at the request of the defense, she provided the scores.

of malingering should not be based on the SIMS alone and provides for specific options for additional testing, but the ILK is not one of the recommended tests. She also acknowledged that the SIMS may over report feigning in some individuals. She stated that she did no testing for cognitive impairment because nothing she observed required it and because the Defendant was uncooperative the results would be unreliable.

Dr. Jones testified that the first time the Defendant was scheduled for competency training classes was the week of January 4, 2024. After reviewing the Defendant's progress notes, Dr. Jones testified that the Defendant's progress notes indicated his objectives for competency training and adult basic education and reading skills were unmet but improving; the progress notes showed the Defendant was very quiet in class and had a lack of participation and poor attention. She noted but disagreed with Dr. MClain's report indicating the Defendant had a history of a learning disability and apparent cognitive deficits, Dr. Mayer's report that the Defendant's cognitive functions were impaired and had psychotic thinking, an Dr. Hall's finding of intellectual deficiencies dating to childhood.

After evaluating the Defendant, Dr. Jones diagnosed him with unspecified mood disorder and malingering. She stated that she based her diagnosis on the Defendant's depressed mood, reported history of agitation, reported atypical hallucinations, poor cooperation and effort, inconsistencies between claimed distress or symptoms and observations, deceitfulness, impulsivity or failure to plan ahead. Dr. Jones found the Defendant competent to proceed as to all relevant factors.

Dr. Ryan C. W. Hall

On June 20, 2024, the Defense presented Dr. Ryan C.W. Hall, a psychiatrist with published articles on psychopharmacology. He testified he is board certified in general psychology and has sub-certification in forensics.[7] He explained that psychopharmacology is the study of how medications can affect the mind and interact with the body. He saw the Defendant four times over the course of a year. He met the Defendant on May 16, 2023, for three hours and administered standard screens, which indicated there could be a cognitive limitation. On June 22, 2023, they met for one hour for a second evaluation; after the two meetings, he diagnosed the Defendant with psychosis, not other specified, rule out schizophrenia versus major depression with psychotic features.

[7] Dr. Hall's full *curriculum vitae* was introduced as Defendant's Exhibit #4.

On March 5, 2024, after the Defendant had returned from SFETC, Dr. Hall met with him for two hours and repeated the evaluations from the first time since the Defendant exhibited similar symptoms. He stated that when the Defendant returned from SFETC, his condition was much better in some regards; he was less overtly psychotic, and the paranoia and active hallucinations were much better, although he was still having simple hallucinations, a voice telling him to kill himself. He stated that the Defendant was still very depressed, he had trouble making eye contact, his responses were minimal and slow, and he had issues with sleep, but his appetite was good; the Defendant not endorsing every symptom of depression. He noted that the Defendant was difficult to understand with a flat affect and that flat affect is a symptom of schizophrenia, depression, and some medications, but in this case it was more likely due to the Defendant's mental health condition. Dr. Hall observed that at SFETC, the Defendant's lab work showed an abnormal thyroid hormone value that was supposed to be followed up on but he saw no follow up in the notes. He explained that the thyroid is the thermostat for the body so if the thyroid is not well regulated "we can put him on medicines until the cows come home, he's not going to respond." He stated that people with hypothyroidism look very depressed.

Dr. Hall diagnosed the Defendant with a major depressive disorder based on sleep changes, anhedonia/lack of interest or motivation, apathy, self-esteem or pathologic guilty concerns, lack of energy, poor concentration, appetite changes, psychomotor retardation, and a passive death wish. He was concerned but found the Defendant's capacity to appreciate the charges acceptable, and found his capacity to understand the range of possible penalties, understand the adversarial nature of the proceedings, ability to disclose important and relevant facts to counsel, and his ability to testify relevantly unacceptable, and his ability to manifest appropriate courtroom behavior questionable.

He felt the Defendant's ability to understand the range of possible penalties was worse than the first time he was the Defendant because he did not understand mitigating and aggravating factors and seemed to think the death penalty was only option. The Defendant saw death as a good thing, and he was confused about death row, believing that death row was a separate location than prison. Dr. Hall felt the Defendant's capacity to understand the adversarial process was unacceptable because he did not understand the concept of different attorneys all paid by the government performing different roles and noted that the Defendant received minimal training at SFECT.

Dr. Hall opined that the Defendant's capacity to disclose to counsel was impaired. The Defendant would not answer questions even though he might factually know the answers. When he saw the Defendant in March, 2024, he felt there still might have been some delusional element. He explained that a delusion is a false fixed idiosyncratic idea but there is also magical thinking. He gave an example of magical thinking as putting the bible to your forehead and believing it will make your headache go away, even though you know through science this is not true. This is also different than intrusive thoughts and it is difficult to discern between a delusion and an intrusive thought and obsessive thoughts, which overlap in a gray area. He explained that intrusive thoughts are more classic for depression and that magical thinking is much more related to cognitive functioning. He stated that those with lower IQs are more prone to magical thinking, as well as those with obsessive compulsive disorder (OCD), but he did not think the Defendant has obsessive thoughts to that level. Dr. Hall opined that the Defendant's significant depression interfered with his capacity to disclose to counsel. He testified that the Defendant believes it will not make a difference so he found no reason to put forth the effort or get into conversations if it would only bring him pain and possibly lead to a bad outcome that he already anticipated. Dr. Hall felt the Defendant's capacity to manifest appropriate courtroom behavior was questionable because although he would not be disruptive, he might not be able to participate. Dr. Hall felt the Defendant's capacity to testify relevantly was unacceptable because he did not always answer questions based on his belief that the answers would lead to harm or a bad outcome.

Dr. Hall testified that a review of the records indicated the Defendant has a history of depression, suicidal ideation, and multiple hospitalizations. Dr. Hall testified that the Defendant was sent to SFETC for three to four weeks and he continued on Zyprexa; a maximum dose of Mercazapine/Remeron, an anti-depressant and for sleep and appetite; and hydroxazone/Visteral for sleep. On January 10, 2024, Trazadone an additional sleep aid and anti-depressant, was prescribed at SFETC. He noted that SFETC but did not sign up the Defendant for groups until January, after he had been at SFETC for approximately two weeks. Although Dr. Hall observed an improvement in symptoms after the Defendant returned from SFETC, he did not know how the Defendant would react if taken off Zyprexa so he still felt that schizophrenia needed to be ruled out; he might be doing better because he is partially treated.

With regard to malingering, Dr. Hall testified that it is difficult to diagnose so evaluators have to be cautious. Dr. Hall stated that in forensics, he always considers malingering because

there is by definition always a legal context. He looks at records prior to the person's arrest, their history, collaterals, and how they present to other people; he also asks questions and administers tests of effort. He explained that the Rey assessment is a screen of effort and if someone is trying to fake memory difficulties they often do poorly on it. The first time Dr. Hall saw the Defendant, he administered the Rey assessment but the Defendant did not fail. He did not think the Defendant was malingering because he was improving and was not exaggerating symptoms.

He explained that the ILK can be helpful but should not be used in a vacuum; it should be part of a comprehensive evaluation looking at history, changes over time, and how the person performs when not being watched. Dr. Hall did not find a clear indication of malingering and noted that symptoms of a major depression could just as easily explain poor performance on the ILK and be mistaken for malingering. Dr. Hall explained that one of the biggest symptoms of depression is apathy; someone who does not want to answer questions or does not care or has poor concentration due to apathy, or has more irritable anxiety may be mistaken for intentionally not wanting to answer questions. He felt that the hallucination of seeing blood was a yellow flag because it was not a common hallucination. However, if the Defendant has intellectual disabilities it could account for this because people with intellectual disabilities often misreport and it is difficult to tell whether it is a hallucination or a misreport due to their internal thoughts or monologue.

Dr. Hall understood Dr. Jones's diagnosis of unspecified mood disorder but thought there were symptoms of depression. He stated that symptoms of depression need to be present for two weeks and he opined that the Defendant presented with many those symptoms. He explained that you need to have five of nine symptoms for depression: sleepless issues, loss of interest, self-esteem or pathologic guilt, decreased energy, concentration problems, issues with appetite or weight changes, psychomotor agitation or retardation, and suicidal ideation. He disagreed with Dr. Jones's diagnosis of malingering and thought she could have instead have found poor effort or not taking the test seriously, which are reasonable conclusions from the Defendant's ILK score and are also symptoms of depression. He had concerns about cognitive functioning when he saw the Defendant and others did too, so he questioned whether the Defendant was an appropriate candidate for the SIMS and ILK performed by Dr. Jones. Dr. Hall stated that the records show he has a tenth grade education but it appeared there was a lot of social promotion and that the Defendant was not at a true tenth grade level. He also had concerns about the Defendant's ability

to read and he did not believe anyone gave him a reading test. He suggested that the Woodcock-Johnson test could have been given.

Dr. Hall stated that he would like to see more cognitive testing done on the Defendant. He noted that the Defendant's depression could negatively impact scores, leading to opinions that he is malingering. He explained that you want to get a true baseline without the interference of medications. He did not believe the Defendant was malingering because he was consistent, with no great fluctuation, except the psychosis was better based on being on Zyprexa for a longer time. The Defendant acknowledged improvement and that someone who is malingering usually thrusts forth symptoms and calls attention to them. He had concerns about the Defendant's ability to work for the best outcome of case because depression would limit his ability to engage in that work, appreciate consequences, to weigh factors, to make decisions such as accessing plea bargains and reasonable outcomes and expectations, particularly since this is a death case.

Dr. Hall was shown notes from the previous hearing indicating the Defendant was playing tic-tac-toe with counsel and asked to evaluate. Dr. Hall opined that this was indicative of trouble maintaining focus; they were not notes related to the hearing indicating he was engaged. Instead, Dr. Hall, who was present for the previous hearing, noted that the Defendant spent most of the hearing with his head in his lap.

Dr. Hall testified that it is important to look outside of testing when diagnosing malingering such as consistency of prior hospital records. He felt the Defendant's depression and suicidal thoughts are more than just the result of his legal issues because he has a history of depression and suicidal ideation. He noted that people who are malingering talk about symptoms they think are good for their case, but it was difficult to get information from the Defendant. He opined that if the Defendant is malingering it is at a very sophisticated level because his overall pattern over several days and weeks apart is consistent and those who are malingering forget what they told the evaluator at a previous evaluation. Dr. Hall testified that the Defendant's depression is effecting his judgment and ability to respond to questions; he is not just depressed because he is charged with murder and facing the death penalty, although, this could cause depression on its own.

Dr. Hall testified that after making sure that the Defendant's thyroid was properly functioning, he would try a different major anti-depressant. He was unsure why Remeron was chosen but noted it was an atypical anti-depressant, and records reflect the Defendant has been on Prozac in the past with some improvement. He indicated that there were multiple options,

including the addition of a mood stabilizer. He also recommended group therapy or some sort of psychotherapy if the Defendant was improving.

After listening to jail calls during which the Defendant spoke with his mother and brother, Dr. Hall did not change his opinion. He found the Defendant's responses were consistent with symptoms of depression.

Dr. Precious N. Ogu

On June 21, 2024, the Defense called Dr. Precious N. Ogu, a clinical and forensic neuropsychologist.[8] She testified that neuropsychology is a subspecialty of clinical psychology; a neuropsychologist is a psychologist who specializes in evaluation and diagnosis of brain behavior conditions. She explained that a clinical psychologist is trained in conditions such as depression, bi-polar disorder, schizophrenia, and mood disorders and that a neuropsychologist has specialty training in addressing brain behavior conditions and its effects an individual's functioning and behavior. She stated that she performs neuropsychological testing as part of her work, which are functional evaluations; she puts the individuals through a test and based on how they perform she can draw conclusions on how different regions of the brain are functioning separately and in synchronicity. She noted that it was important to review historical records in addition to conducting face to face evaluations for contextualization and to create a narrative.

Dr. Ogu, testified that she was court appointed to evaluate the Defendant and met with him on April 25, 2024, and found him not competent, but restorable. She diagnosed him with major depressive disorder, severe, with psychotic features based on his delusional thinking and hallucinations, and cannabis abuse disorder in sustained remission in a controlled environment. Dr. Ogu found his capacity to appreciate the charges, his capacity to understand the range of possible penalties, and ability to manifest appropriate courtroom behavior acceptable, but she found his understanding of the adversarial nature of the proceedings, his ability to disclose important and relevant facts to counsel, and his ability to testify relevantly unacceptable.

The Defendant was able to tell her he was charged with murder but would not provide acute circumstances and told her he "did not like speaking on it because it is emotionally too much." He appreciated the seriousness of the charges. She found that his ability to understand the adversarial nature of the process was unacceptable because she had concerns that cognitive or intellectual deficits were affecting him. She stated that she could not render an opinion on whether the

[8] Dr. Ogu's full *curriculum vitae* was introduced as Defense Exhibit #8.

Defendant suffers from cognitive deficits without formal testing but based on her experience with him and review of the records she would recommend him for further assessment.

Dr. Ogu concluded that the Defendant's ability to disclose important and relevant facts to counsel was unacceptable based on his history of learning, cognitive, or intellectual disability interfering with his ability to learn and based on his severe depression. She explained that severe depression can be impairing, even in individuals who do not have cognitive deficits; some of the symptoms of severe depression are memory difficulties and concentration difficulties and acting together they can cause difficulty keeping up with information on a moment to moment basis, which she observed in the Defendant. She felt that death penalty defendants require more communication with their attorneys than defendants with other charges because they need to be able to talk about aggravating and mitigating circumstances. She found the Defendant's ability to testify relevantly unacceptable based on concerns about baseline cognitive and intellectual abilities and the effects of severe depression and suicidal thinking at this time. She could not render an opinion on cognitive deficiency because it would require testing.

Regarding her diagnosis, she explained that major depressive disorder with psychotic features is a mental illness where the major depression symptoms are the prominent presentation and there are elements of psychosis. Dr. Ogu stated that examples of psychotic features are perceptual disturbances like hallucinations, seeing or hearing things that others cannot see or hear, feeling things on your body that are not apparent to others, delusional thinking, paranoia, delusions of grandeur; they are fixed beliefs that are impermeable to any sort of reason or rationality to the contrary. As a mood component, the individual could be withdrawn, asocial, a motivated, a volitional, catatonic, or disengaged from reality, and that there is an overlap between some psychotic symptoms and those of major depression.

She noted that a severe emotional state of any kind can effect test performance as to effort. If not inspired to perform, it can affect how a person responds on a test, which can create a flawed estimate of ability, and if it interferes with the ability to put forth a best effort, the results of the test are not valid. She stated that disturbed emotional states can also have an effect, as people with psychosis also have the running commentary of audio or visual hallucinations; they are distracted by perceptual disturbances. She would mitigate by treating the depression or other issues.

Regarding malingering, although she considered the SFETC doctor's diagnosis as historical information and as context that she wanted to account for, she had no concerns about

malingering. Dr. Ogu did not have any indication that the Defendant was exaggerating psychiatric symptoms or cognitive or intellectual deficits. She stated that the Defendant needs restoration training and psychotropic medication to be restorable. She opined that if malingering is suspected she would use standardized tools such as the M-FAST and MMPI. She assigned some weight to malingering based on the SFETC report but based on her own evaluation she did not suspect malingering. She believed if he got more rehabilitation and still was found to be malingering then she would be more suspicious.

Although she did not personally observe symptoms of psychosis and psychotic features, Dr. Ogu stated that the Defendant reported auditory and visual hallucinations and visual hallucinations that have been ongoing since his teenage years. When asked about the difference between intrusive thoughts versus delusions, she stated that delusions are fixed beliefs an individual has that are completely impermeable to evidence to the contrary and that intrusive thoughts are thought process; it is a thought that a person cannot let go of even if they try to let go of it. Dr. Ogu believed that the fact that the Defendant does not want to talk about the facts of the case was not an intrusive thought; she thought it was a symptom of depression. She did not think the Defendant is delusional but severely depressed and suicidal with hallucinations that have plagued him for a long time. She explained that the Defendant's psychosis is the hallucinations, which she described as a perceptual disturbance, seeing or hearing or feeling something that is not there.

Dr. Valerie R. McClain

On June 28, 2024, the Defense called Dr. Valerie R. McClain, a psychologist with training in neuropsychology.[9] Dr. McClain diagnosed the Defendant as suffering from major depressive disorder, severe with psychotic features, unspecified schizophrenia and other psychotic disorder, generalized anxiety, and cannabis use disorder. She found that the Defendant's capacity to appreciate the charges or allegations, capacity to appreciate the range and nature of possible penalties, ability to understand the adversarial nature of the proceedings, and his ability to manifest appropriate courtroom behavior were acceptable but that his ability to disclose important and relevant facts to counsel and ability to testify on his own behalf were unacceptable. She stated that the Defendant's ability to disclose important and relevant facts to counsel was impaired because he was unable or unwilling to communicate and only gave simple answers. She indicated

[9] Dr. McClain's full *curriculum vitae* was introduced as Defense Exhibit #10.

that his difficulties with his ability to testify on his own behalf are multi-layered. Aside from the major depressive disorder and psychotic issues, he may have intellectual issues that would require testing to determine.

Dr. McClain testified that in addition to information about a defendant in terms of the pending charges, it is important to obtain any medical, mental health, or academic records that would be relevant to understand their level of comprehension and overall intelligence. She also relies on jail records to know if the person has been compliant with medications and if medications have changed. Among the documents Dr. McClain reviewed were the Defendant's psychological interview dated March 25, 2011, when the Defendant was eight years old, which was introduced as Defense Exhibit 11. She noted that the Defendant was only absent five times and that he was behind in reading despite his mother having enrolled him at the Sylvan Learning Center; he was referred to special education and put in a drop out program earlier than most. She noted he was not a problem child but had a potential learning disability with regard to reading, spelling, etc. She also reviewed the Defendant's records from Boca Ciega High School and noted he was below average with poor grades; he received an A in basketball but did not finish algebra and dropped out after the tenth grade at age 19. Dr. McClain could not determine or was unaware of the reasons he could not or did not perform in school.

Dr. McClain testified that she was hired as a confidential expert and met with the Defendant four times. Her first meeting with him was for an hour on May 12, 2023 for intake and to inquire about his history, medications, and mental health. She did not perform any tests because he was not stable and exhibited psychotic symptoms. On June 23, 2023, she met with the Defendant for a half hour. He was on a new medication, Zyprexa, but he was still experiencing visual and auditory hallucinations so she did not perform any tests because he was still not stable. After these two meetings, she authored a report finding him not competent to proceed and he was sent to the hospital; he returned after approximately three weeks.

Five weeks after his return from the hospital, she met with the Defendant on March 1, 2024 for an hour. She performed no testing. She thought that IQ and malingering testing was needed but the Defendant still was not stable. Her expectation upon his return from the hospital was that he would be more stable and show improvement but she had not seen this yet, although she felt it may still be possible with more treatment. She met him again on May 24, 2024 and there was no

improvement; he was still seeing blood, which was interfering with communication. She had no change in her diagnosis and found he was not competent.

Dr. McClain testified that she witnessed the Defendant's psychotic symptoms; he was distracted and experiencing visual hallucinations while talking with her. She stated that she saw him right after he had a shower and he reported he saw blood while in the shower. He did not appear to be exaggerating; he was consistent and not dramatic claiming that he sees blood and hears voices telling him to kill himself. He appeared to be responding to internal stimuli, was still experiencing slowness in processing, and still exhibiting passive suicidal ideation. The Defendant was responsive and cooperative. Her opinion was he is not competent to proceed because his mental health is not stabilized.

Regarding malingering, Dr. McClain explained that malingering is exaggerating symptoms for gain and that tests, which include the ILK and the TOMM, can determine malingering when considered in conjunction with comparisons with other behavior and collateral information. She stated that if a person has hallucinations but there was no evidence of mental health issues before the legal matters occurred it could be indicative of malingering. She found that the records reflected that the Defendant had a history of mental illness including prior suicide attempts and Baker acts. She noted that malingering has a negative connotation or label. She testified that a person can both exaggerate symptoms and have mental health issues, and that both depression and psychosis can be misdiagnosed as or mistaken for malingering. She noted that the Defendant exhibited slow verbal and motor responses consistent with depression but noted that if a person is on medications and it still experiencing hallucinations, they could be exaggerating or malingering.

Dr. McClain testified that the ILK tests under-reporting of knowledge of the legal system, general legal concepts, and feigning. She does not use this test; she uses other tests of psychological malingering like the M-FAST and TOMM. She stated that there are limitations to all tests and that organically impaired and intellectually disabled individuals are not good candidates because the test requires a fifth grade reading level. Dr. McClain reviewed the ILK administered to the Defendant at the state hospital. The Defendant had a low score of 26 but there was no verbal commentary, which could potentially be indicative of malingering but could also be an issue of comprehension or psychotic symptoms. There were no notes from Dr. Jones for Dr. McClain to review so she could not tell if Dr. Jones had evaluated his comprehension level.

She testified that the SIMS is normed on females asked to perform poorly. She noted that if a test subject is organically impaired or has comprehension issues, the test overstates lack of legal knowledge and that severe pathologies can impact the outcome. She would not give the SIMS to the Defendant based on his academic intellect, comprehension level, and psychotic symptoms. She observed that the SIMS given at the state hospital was scored correctly. The scoring cutoff is 14 and the Defendant scored 39, which suggests exaggeration; he was higher on all subscales. But she noted that this is also consistent with comprehension issues. Dr. McClain testified that taking the tests into consideration, she did not think the Defendant was malingering or feigning but she did not have enough information to make a determination and did not perform any testing for malingering. She stated that there was no baseline on the Defendant's comprehension and that IQ testing is required for an intellectual disability diagnosis but the Defendant was not stabilized for mental health for accurate IQ testing.

Dr. McClain testified that most defendants usually spend three months at the state hospital and that the Defendant in this case only spent three weeks. She believed the Defendant can be stabilized on medications. She stated that to determine whether the Defendant was suffering from delusions or intrusive thoughts would require determination as to whether his major depression is causing him not to communicate or if he is just choosing not to communicate. She noted that people with intellectual disabilities may exhibit surface level competency but interacting in the moment is too complex for them. The cognitive problems she observed in the Defendant were slowed responses.

Other Relevant Evidence

Jail Calls

The State introduced a disk containing telephone calls between the Defendant and his family recorded while the Defendant was housed at the Pinellas County Jail after his return from SFETC.[10] Two of the calls were played in court during Dr. Hall's testimony. The Court reviewed the entirety of jail calls submitted. On the jail calls, the Defendant sounds depressed but still interested in life. During the calls, he was conversational with his mother and his family. He was able to report to them dates that he was in court, what occurred while he was in court, and the dates of future hearings. He was aware that the public defenders were his attorneys. The Defendant

[10] The disk of jail calls was introduced as State's Exhibit #1 and the call file list was introduced as State's Exhibit #2.

discussed his medications and knew that he had been found competent. He did not report to his family that he was experiencing hallucinations. Nothing in the jail calls suggested that he was delusional or suggested psychosis.

DETERMINATION OF COMPETENCY

LEGAL CONSIDERATIONS

"It is well-settled that a criminal prosecution may not move forward at any material stage of a criminal proceeding against a defendant who is incompetent to proceed." McCray v. State, 71 So. 3d 848, 862 (Fla. 2011) (quoting Caraballo v. State, 39 So. 3d 1234, 1252 (Fla. 2010)); see Fla. R.Crim. P. 3.210(a). In determining whether a defendant is competent to proceed, the trial court must decide whether the 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 a factual understanding of the proceedings against him." Hardy v. State, 716 So. 2d 761, 763-64 (Fla. 1998) (quoting Dusky v. United States, 362 U.S. 402 (1960)). Whether a defendant has the necessary rational understanding turns on whether his "mental condition precludes him from perceiving accurately, interpreting, and/ or responding appropriately to the world around him." Edwards v. State, 88 So. 3d 368, 371 (Fla. 5th DCA 2012) (noting that "a defendant may be deemed incompetent, despite an intellectual understanding of the charges against him, if his impaired sense of reality undermines his judgment and prevents him from making rational decisions regarding his defense.") (quoting Lafferty v. Cook, 949 F. 2d 1546, 1551 (10th Cir. 1991)).

Section 916.12, Florida Statutes, and Florida Rule of Criminal Procedure 3.211 each set forth the Dusky criteria as a list of factors to be considered by the court. These factors include the defendant's capacity to appreciate the charges or allegations, his capacity to appreciate the range and nature of possible penalties, his ability to understand the adversarial nature of the proceedings, his ability to disclose important and relevant facts to counsel, his ability to manifest appropriate courtroom behavior, and his ability to testify relevantly on his own behalf. See Fla. Stat. § 916.12(3)(a)-(f); see also Fla. R. Crim. P. 3.211(a)(2)(A)(i)-(vi).

The trial court must consider "all relevant evidence" presented in deciding whether the defendant is competent to proceed. See Castro v. State, 744 So. 2d 986 (Fla. 1998). In making its decision, the court may rely on expert testimony, lay testimony, and the court's own observations. The reports and related testimony of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995) (quoting

Muhammad v. State, 494 So. 2d 969, 973 (Fla. 1986)). "It is incumbent upon the court to consider all evidence relative to competence and to render a decision on that basis." Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989). "After the competency hearing, the trial court must make its own 'independent legal determination regarding whether the defendant is competent, after considering the expert testimony or reports and other relevant factors.'" Losada v. State, 260 So. 3d 1156, 1162 (Fla. 3d DCA 2018) (quoting Shakes v. State, 185 So. 3d 679, 682 (Fla. 2d DCA 2016).

ANALYSIS

After conducting competency hearings, which spanned over twelve hours, and considering all relevant testimony and evidence as summarized above, this Court finds the Defendant remains not competent to stand trial at this time.

In making its decision, the Court considered the reports and testimony of all four doctors and all the exhibits admitted at the hearings. The Court included the testimony and report of Dr. Jones from SFETC because historical reports are relevant in competency proceedings.[11] Likewise, the Court considered the jail calls, which enabled the Court to further observe the Defendant. All of the doctors indicated that they had reviewed numerous historical records, previous mental health reports, and extrinsic evidence, like school records, in determining the Defendant's diagnosis and his capacity to proceed, as well as to evaluate the possibility of malingering. Dr. Hall testified that review of past records is important in evaluating capacity; Dr. Ogu stated that looking at evidence outside a legal setting is important. And Dr. McClain noted that historical information is always important when malingering or exaggerating is an issue.

The doctors agreed that malingering could be a possibility when criminal charges are pending. And Dr. Jones' report of malingering, and her reported scores of the Defendant on the ILK and SIMS are concerning. However, other than Dr. Jones, none of the doctors who testified found clear evidence that the Defendant was malingering. Dr. Jones's report was issued after the Defendant was at SFETC for approximately three to four weeks and he was provided little time to complete his competency objectives before leaving the hospital. Dr. Jones herself spent relatively little time with the Defendant compared to Doctors Hall and McClain, who each saw the Defendant for multiple hours over the course of a year. They both opined that performing tests on a person suffering from severe depression and/or from intellectual disability could result in an inaccurate determination of malingering. They found that the Defendant's severe depression would interfere

[11] All of the doctors opined that historical reports are important in assessing a person's present competency.

with the validity of testing, and that successful treatment of the Defendant's severe depression could assist in a determination of whether the Defendant is unable or just unwilling to discuss facts pertinent to the case.

Dr. Ogu testified that a severe emotional state of any kind can affect the validity of test performance, and that although she considered malingering based on Dr. Jones's report, she did not have any indication the Defendant was exaggerating psychiatric symptoms or cognitive or intellectual deficits. She found that further treatment of the Defendant's severe depression would give a better determination of the Defendant's competency. However, in her report at page 3 indicates she noted that "[s]hould he fail to regain competency after another round of treatment at the State Hospital, then malingering of intellectual and/or cognitive deficits will be a more likely concern that should be addressed by future neuropsychological testing." Dr. McClain also found there was a potential for malingering but opined that the Defendant's mental illness needed to be stabilized in order to perform the required testing to accurately determine the Defendant's intellect. She stated that she did not have enough information to determine if he was malingering. Dr. McClain testified that "perhaps, not a long enough treatment period or the right medication combo, but I haven't been able to do testing that I think is important, nor have I been able to communicate on a level that assures me on at least two areas of competency that he's able to go forward."

Since there was conflicting expert testimony regarding the Dusky criteria, this Court is required to make a factual determination based upon all relevant evidence. See Hardy, 716 So. 2d at 764. The Court makes the following findings with regard to the Dusky criteria:

Capacity to Appreciate the Charges

This Court finds that the Defendant has the capacity to appreciate the charges or allegations. There was sufficient evidence presented that the Defendant is aware of the charges against him. Although he did not want to discuss the details of the offenses, he expressed to the various doctors that he understood the charges.

Capacity to Appreciate the Range and Nature of Possible Penalties

This Court finds that the Defendant has the capacity to appreciate the range and nature of possible penalties. The evidence indicates that the Defendant understands the maximum penalty that can be imposed in this case, which is the death penalty.

Ability to Understand the Adversarial Nature of the Proceedings and Roles of the Parties

The Court finds that the Defendant has the ability to understand the adversarial nature of the proceedings and the roles of the parties. The Defendant scored poorly on the ILK, indicating he may be feigning his lack of legal knowledge or that severe depression or an intellectual disability may be the cause of the poor score. Dr. Ogu had concerns about whether cognitive or intellectual deficits were affecting the Defendant's ability in this area. Dr. Hall found the Defendant was confused about how the government paid both the State and the Public Defenders. However, on the jail calls, he appears to generally understand the roles of the attorneys and the adversarial nature of the proceedings. Dr. McClain found that, during the period after his return from SFETC and without intervening competency training, the Defendant understood the respective roles of his attorneys, the State, and the Judge. She also reported that he understood the concept of plea-bargaining in a jury trial.

Ability to Disclose Important and Relevant Facts to Counsel

The Court finds at this time that the Defendant's ability to disclose important and relevant facts to counsel is impaired, whether that is based on symptoms of his severe depression that may not be properly treated, or an unwillingness to communicate due to intrusive thoughts is unclear. However, the State has not provided sufficient evidence that it is malingering and not the symptomology of a major depression that is interfering with the Defendant's ability to communicate.

Ability to Manifest Appropriate Courtroom Behavior

The Court finds that the Defendant has the capacity to manifest appropriate courtroom behavior. The Defendant has been quiet and compliant in court.

Ability to Testify

The Court finds at this time that the Defendant's ability to testify may be impaired. He presented in court with a flat affect and spent much of the hearings with his head in his lap or on the table. It is unclear if his limited ability to discuss his case may be due to symptoms of his severe depression that may not be properly treated, or an unwillingness to discuss the facts of his case. The State has not provided sufficient evidence that it is malingering.

CONCLUSIONS OF LAW

The Court finds that although the State put forth evidence of malingering and competency, that evidence does not overcome the clear and convincing evidence that the Defendant has a mental illness and remains incompetent at this time. Dr. Hall specifically indicated the Defendant demonstrated significant improvement between his first set of evaluations in 2023 and his 2024 evaluations. However, the evidence presented during four days of competency hearings and the relevant testimony as summarized above indicates that the Defendant remains incompetent to proceed in accordance with the Dusky criteria and 916.12, Florida Statutes, and Florida Rule of Criminal Procedure 3.211. The Court finds that temporary hospitalization and observation is necessary for a complete determination of competency. The Court recommends that the Defendant be recommitted to the Department of Children and Families, and preferably placed at the Florida State Hospital in Chattahoochee, Florida, for evaluation, treatment, observation and appropriate testing, not limited to the issues of depression, intellectual disability, and malingering.

Based on the **FINDINGS OF FACTS** and **CONCLUSIONS OF LAW**, it is **ORDERED AND ADJUDGED** that:

1. The Defendant is continues to be incompetent to proceed due to his mental illness as defined in section 916.106(11), Florida Statutes, and all further proceedings are hereby stayed.
2. The Defendant is hereby committed to the Department of Children and Families.
3. The Defendant meets the criteria for commitment to a treatment facility of the Department of Children and Families as provided in section 916.13, Florida Statutes, and is hereby committed to the Department of Children and Families to be placed in a mental health treatment facility pursuant to section 916.13, Florida Statutes.
4. The Court recommends that the Defendant be placed at the Florida State Hospital, 100 North Main Street, Chattahoochee, Florida 32324, for appropriate testing, not limited to the issues of depression, intellectual disability, and malingering.
5. The Clerk of the Court is directed to forthwith forward a certified copy of this Order, along with copies of any written reports submitted to this Court by experts appointed by the Court relating to the issues of competency and need for treatment; copies of any other psychiatric, psychological or social work reports submitted to the court relative

to the mental state of the Defendant; and a copy of the charging instrument and all supporting affidavits or other documents used in the determination of probable cause to the following email address:

DCF.Adult.Forensic.Admissions@myflfamilies.com

or alternatively to

Forensic Admissions Coordinator
Department of Children and Families
State Mental Health Treatment Facilities Policy and Programs
2415 North Monroe Street
Suite 400
Tallahassee, FL 32303-4190

6. Upon notification of an admission date by the Department of Children and Families, the Sheriff of Pinellas County shall, upon the date specified, forthwith transport and deliver the Defendant to a treatment facility designated by the Department, together with a certified copy of this Order and the other documentation outlined in paragraph 4 above.
7. The Department, through the Administrator of the facility to which the Defendant is admitted, shall report directly to this Court, with copies to the Attorney for the State and Attorney for the Defendant on the issues of competency to proceed and the need for continued commitment as provided in section 916.13, Florida Statutes, and in Florida Rule of Criminal Procedure 3.212(5).
8. In the event the Defendant's presence is required at any hearings in this cause, this Court shall issue an Order to Transport, directing the Sheriff of Pinellas County, or his designee to resume custody and transport the Defendant back to the jurisdiction of this Court.
9. In the case of those defendants found incompetent to proceed with the trial of the case, the requirements of Rule 3.191 are hereby temporarily suspended.
10. This Court retains jurisdiction in this cause, pursuant to section 916.16, and the Defendant shall not be discharged or released from commitment within the Department of Children and Families without further Order of this Court.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 31 day of July, 2024. A true and correct copy of this order has been furnished to the parties listed below.

Susan St. John, Circuit Judge

cc: Office of the State Attorney
Attn: Courtney Sullivan, Esq.

Office of the Public Defender
Attn: Jessica Manuel, Esq.