STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: December 6, 2018]

In re: Matthew Komrowski : **Case No. P1-2011-3415ADV**

DECISION

MCGUIRL, J. At issue before this Court is whether the Defendant, Matthew Komrowski (Defendant), is now competent to stand trial on the charges against him. This Court exercises jurisdiction pursuant to G.L. 1956 § 40.1-5.3-3(g).

I

Travel

In December of 2011, the Defendant was charged in a three-count indictment, case number P1-2011-3415ADV, with Count (1) murder, domestic in nature; Count (2) possession of a stolen motor vehicle or parts; and Count (3) larceny under $1500. The first competency evaluation was ordered on July 1, 2013. The Court ordered this evaluation after being told by his two defense attorneys that they were unable to effectively communicate with the Defendant. In that report,[1] Dr. Barry Wall and Dr. Katherine Liebesny concluded that the Defendant was competent to stand trial. The Defendant contested the finding. A hearing was held on October 9 through October 11, 2013. The Defendant then retained his own expert, Dr. Wade C. Myers, to evaluate the Defendant. On November 4, 2013, Dr. Myers submitted a report on behalf of the Defendant. Dr. Myers found that the Defendant was incompetent to stand trial. A hearing was held on December 6 and 16, 2013. Based on these conflicting reports, and the complexities of the

[1] All reports in this case were submitted to the Court through Eleanor Slater Hospital.

findings, the Court, with the agreement of counsel, appointed a third doctor, Dr. Joseph V. Penn, to conduct a review. Dr. Penn submitted a report on March 30, 2014 and concluded that the Defendant was incompetent to stand trial. This Court found the Defendant incompetent to stand trial on July 3, 2014, based on the information and testimony contained in the various reports and findings.

After the Court declared the Defendant incompetent to stand trial, the Defendant was ordered to Eleanor Slater Hospital (ESH) pursuant to § 40.1-5.3-3, and periodic, six-month reviews were ordered in accordance with § 40.1-5.3-3(k). *See* Order at 1-2, Dec. 1, 2014. Following the Defendant's placement in a facility, Dr. Pedro Tactacan, the treating physician, prepared a report that was received by this Court on September 19, 2014. A hearing was held on September 23, 2014.

Soon after, Dr. Tactacan, Dr. Wall and ESH determined that there was a conflict in treating the Defendant, as they did not believe that he was incompetent. Therefore, the Defendant was not receiving any treatment. Both doctors recused themselves, and an outside expert, Dr. Howard V. Zonana, was retained in December of 2014.

After Dr. Zonana's appointment in 2014, a hearing was held in April of 2015[2] regarding the Defendant's treatment. *See* Hr'g Tr., Apr. 16, 2015. In that hearing, Dr. Zonana testified that the Defendant was, in his opinion, incompetent to stand trial to a reasonable degree of medical certainty. *Id.* In June of 2015, Dr. Tactacan filed a Petition for Instruction (PFI), regarding the Defendant's treatment and care. Later, in July of 2015, Dr. Zonana testified again before this Court regarding issues of informed consent and forced medication, stemming from the PFI. *See* Hr'g Tr., July 29, 2015. In his July 2015 report, Dr. Zonana found that the Defendant was able

[2] The early history of the case is taken from a summary of dates agreed upon by the Court and by both parties during the hearing on April 16, 2015. *See* Hr'g Tr., Apr. 16, 2015.

to communicate regarding treatment choices and able to understand the relevant information regarding risks and benefits of medication, but that he was not able to reason clearly about treatment options due to his distrust of medical staff. *See* Report at 5, July 22, 2015.

The Court ordered the most recent periodic review of Defendant's competency in January of 2017. In his report dated April 4, 2017, Dr. Zonana concluded that the Defendant is now competent to stand trial since he is now able to understand the character and consequences of the proceedings against him and is now able to properly assist his attorneys with a reasonable degree of rational understanding, if he so chooses.[3] *See* Report at 10, Apr. 4, 2017. A hearing regarding this most recent report was held on June 20, 2017. On July 12, 2017, the Defendant filed his memorandum of law contending that he remains incompetent to stand trial. The Court received the State's memorandum in support of finding the Defendant competent to stand trial on July 17, 2017. The Court must now decide whether, based on the evidence before it, the Defendant is competent to stand trial at this point in time.[4]

II

Competency Standard in Rhode Island

Rhode Island law begins with the presumption that the Defendant is competent to stand trial. *See* § 40.1-5.3-3(b). Section 40.1-5.3-3(a)(2) states that "[a] person is mentally competent to stand trial if he or she is able to understand the character and consequences of the proceedings against him or her and is able properly to assist in his or her defense." *See* § 40.1-5.3-3(a)(2). Section 40.1-5.3-3(a)(5), conversely, defines incompetency stating, "A person is mentally

[3] All doctors referenced within this Decision were accepted as experts, with no objections from the attorneys, based on qualifications.

[4] The Court pauses to note that the Providence County Superior Court file, though voluminous, was not complete. This Court is satisfied that the case file has been adequately recreated where necessary, and with the assistance of counsel, to afford the Defendant meaningful and effective review.

incompetent to stand trial if he or she is unable to understand the character and consequences of the proceedings against him or her or is unable properly to assist in his or her defense." *See* § 40.1-5.3-3(a)(5).

Rhode Island law provides for a hearing regarding competency where such an issue is in dispute:

> "Upon receipt of the report and appropriate notice to the parties, the court shall hold a hearing . . . At the hearing, the report shall be introduced, other evidence bearing on the defendant's competence may be introduced by the parties, and the defendant may testify, confront witnesses, and present evidence on the issue of his or her competency. On the basis of the evidence introduced at the hearing, the court shall decide if the defendant is competent." Sec. 40.1-5.3-3(g); *see also State v. Peabody*, 611 A.2d 826, 829 (R.I. 1992).

If the Court finds, after the hearing, that a defendant is competent, the Court shall proceed with the criminal case. *See* § 40.1-5.3-3(h). However, if the Court finds that the defendant is incompetent, the Court "shall commit him or her to the custody of the director for the purpose of determining whether or not the defendant is likely to imperil the peace and safety of the people of the state or the safety of himself or herself and whether the defendant will regain competency. . . ." Sec. 40.1-5.3-3(h)(2). The director must issue the written report no more than fifteen days from the date of the commitment. *See* 40.1-5.3-3(h)(3). Subsequent to the filing of that report, the Court must hold a hearing to review the evidence presented, and—if the Court finds that the defendant is likely to imperil the peace or safety of the people of the state or the peace and safety of himself—the Court may order the defendant to remain at the facility. *See* § 40.1-5.3-3(i)(3).

Once ordered to remain at the facility, the director "shall petition the court to review the state of competency of a defendant committed . . . not later than six (6) months from the date of the order of commitment and every six (6) months thereafter, or when the director believes the

defendant is no longer incompetent, whichever occurs first." *See* § 40.1-5.3-3(k). Finally, a committed defendant may, at any time, petition the court to review the state of his or her competency. *See* § 40.1-5.3-3(l).

In the instant case, Dr. Zonana's latest report, written on April 4, 2017, concluded that the Defendant was competent to stand trial. The Defendant did not retain his own expert to refute Dr. Zonana's determination of competency, and instead the Defendant cross-examined Dr. Zonana's findings on the record at the hearing.

III

Defendant's History

Born in 1976, the Defendant—according to a 2011 Investigative Report (Report)—was nine years old when he was hit by a tractor trailer on Manton Avenue and very badly injured. *See* Invest. As a result, the Defendant was in a body cast and he spent an extended period of time at Rhode Island Hospital. Although doctors could not find any physical brain injury, the Defendant's family reported that he began having behavioral problems at school after his accident. In fact, the Defendant had four admissions to Bradley Hospital between 1986 and 1992. *See* Report at 7, Nov. 4, 2013. In the summer of 1992, during one of the admissions to Bradley Hospital, "[the Defendant] became tangential, grandiose, and agitated after being given Prozac . . . [and] [h]e was diagnosed as having Bipolar Disorder . . . ." *Id.* The Defendant has since had multiple psychiatric diagnoses, including "oppositional disorder, conduct disorder, developmental disorder, dysthymic disorder, cyclothymic disorder, psychosis, major depression with psychotic features, posttraumatic stress disorder, schizophrenia, malingering, bipolar disorder, depression, different personality disorders (*e.g.*, Antisocial, Borderline), adjustment disorder, and substance abuse." *Id.* at 7-8.

According to Dr. Myers, "[the Defendant] ha[d] been tried on virtually all classes of psychotropic medications, such as antidepressants, antianxiety agents, mood stabilizers, and antipsychotics, with limited or inconsistent results." *Id.* at 8. Dr. Meyers also noted that "[the Defendant] ha[d] been a dreadful management problem for institutions." *Id.* According to Dr. Myers, "[t]here are multiple reports of past suicide attempts; self-mutilation (*e.g.*, cutting, biting self); inserting foreign objects into his body, urethra and rectum; swallowing of foreign objects; and threatening or engaging in hunger strikes." *Id.*

In March of 2009, during a period of time while the Defendant was admitted to ESH, Dr. Tactacan and Dr. Wall reviewed the Defendant's behavior and mental health through a joint report entitled "Forensic Treatment Interim Summary Report." *See* Report at 1-7, Mar. 6, 2009. In their opinion, the Defendant was diagnosed with Antisocial Personality Disorder, Borderline Personality Disorder (BPD), and Malingering. *See id.* at 6. Additionally, Drs. Tactacan and Wall found that the Defendant met the criteria for Post-Traumatic Stress Disorder (PTSD)—which was in remission—as well as Polysubstance Dependence (also in remission within a controlled environment). *See id.* Drs. Tactacan and Wall wrote that in their opinion, the Defendant's "continued impulsive behavior is willful" and that he "will demonstrate the ability to control his impulsive behavior, terminate self-damaging behaviors, and have alleviation of suicidal impulses/ideation . . . only when he believes that his needs are met by ACI or ESH staff[.]" *Id.*

IV

Review of Previous Competency Reports

A

Dr. Wall and Dr. Liebesny

In July of 2013, Dr. Wall and Dr. Katherine Liebesny (Dr. Liebesny) reviewed the Defendant's competency to stand trial. In that July 2013 report, the doctors diagnosed the Defendant with Borderline Personality Disorder, Antisocial Personality Disorder, Malingering, Polysubstance dependence in remission, Asthma, and GERD. *See* Report at 14, July 24, 2013. Dr. Wall and Dr. Liebesny included "Malingering" in the list of Defendant's diagnoses, stating in their report that the Defendant is "known to exaggerate his symptoms and at times overemphasized how his depressive symptoms interfered with his focus on his case." *Id.* at 15. Based on these observations, Drs. Wall and Liebesny concluded that the Defendant met both prongs under Rhode Island's competency test and was competent to stand trial in July of 2013. *See id.* at 14.[5]

B

Dr. Myers

In November of 2013, Dr. Myers conducted a psychiatric evaluation, at the request of the Defendant, in order to review the Defendant's competency to stand trial. *See* Report at 1, Nov. 4,

[5] After reviewing his various diagnoses, along with medical records and interviews with the Defendant, both doctors found that the Defendant demonstrated "sufficient understanding of his charges and the potential outcomes." *See* Report at 15, July 24, 2013. Additionally, they found that he was likely able to assist counsel in his defense, writing that "[d]espite his rigid thinking patterns and overall pessimism about the legal system, [the Defendant] understands the roles of courtroom officials and the steps of the judicial process." *Id.* They continued that the Defendant's "responses to the hypothetical cases indicate that he is able to make rational decisions regarding his case" and that his "passionate discussion of the facts in his favor, suggests that he does hope for the best outcome and is motivated to defend himself." *Id.*

2013. In his report, Dr. Myers stated that the Defendant's "diagnostic picture is complicated[,]" ultimately writing that the Defendant exhibits behavior consistent with Bipolar Disorder, Borderline and Antisocial Personality Disorders, and possibly a Neurocognitive Disorder Due to Traumatic Brain Injury. *See id.* at 10.

Dr. Myers concluded that—in his opinion and to a reasonable degree of medical certainty—the Defendant was incompetent to stand trial since he was unable to properly assist counsel in his defense. *Id.*[6] at 10-11. Overall, Dr. Myers concluded that Defendant was, in his opinion, incompetent to stand trial because he "has shown continued difficulty with his ability to properly assist counsel in preparing a defense." *Id.* at 11.

C

Dr. Penn

In March of 2014, Dr. Penn evaluated the Defendant, at the request of the Court, for competency purposes. *See* Report, Mar. 30, 2014. In his report, Dr. Penn recounted the Defendant's previous diagnoses of possible schizophrenia, major depressive disorder, Bipolar Disorder, PTSD, Polysubstance dependence (in remission), Antisocial and Borderline Personality Disorders, and malingering. *Id.* at 17.

Ultimately, Dr. Penn concluded that the Defendant was incompetent to stand trial since he was "unable to demonstrate an understanding of the character and consequences of the proceedings against him and he was also unable to demonstrate an ability to properly assist in his

[6] Dr. Myers wrote that the Defendant lacked the ability to assist his attorneys due to the combined effect of a "Mood Disorder, severe Personality Disorder, and Neurocognitive Disorder due to Traumatic Brain Injury." *See* Report at 15, Nov. 4, 2013. At the time of the evaluation in 2013, Dr. Myers noted the Defendant's circumstantial, vague thought process where he spoke rapidly and with anger, never answering the direct question posed. *See id.* at 2. However, Dr. Myers noted that the Defendant showed an appreciation of the charges he is facing, that he could name such charges, and that he had a capacity to manifest appropriate courtroom behavior. *See id.* at 4.

defense." *Id.* at 18. Dr. Penn based this conclusion on the fact that the Defendant exhibited some impairment in his thinking and behavior throughout the interviews, which caused the Defendant to be an "extremely poor and unreliable historian." *Id.* at 17.[7] However, he concluded by writing that "[i]t was very difficult for this evaluator to clarify if this belief system was delusional (a fixed false belief) and specifically psychotic in nature, an over-valued belief system, or more suggestive of malingering." *Id.* at 18.

1

Issue of Malingering

The issue of the Defendant's malingering was described by the experts in their various reports and testimony. Dr. Tactacan reported that the Defendant often exaggerates the symptoms of his illnesses and noted that individuals will often malinger or fake symptoms in order to "achieve certain goals, such as [a] transfer from one part of an institution to another to get out of a problem, or to access a hospital." *See* Report at 29, 30, Feb. 12, 2008.[8]

[7] Despite this conclusion, Dr. Penn noted that there are some "inconsistencies in [the Defendant's] presentation." *See* Report at 18, Mar. 30, 2014. Dr. Penn wrote that there had been no recent disciplinary cases, no recent self-injurious behavior, and no evidence of psychotic behavior or belief systems. *Id.* The doctor noted that the Defendant was not, at the time, prescribed or receiving any mood stabilizers or antipsychotic medications. *Id.*

[8] Doctor Tactacan listed four instances when he believed that the Defendant was malingering or exaggerating symptoms. *See* Report at 30, Feb. 12, 2008. First, the doctor summarized his erratic behavior on May 2, 2006 when the Defendant was acting "very confused, incoherent." *Id.* After a transfer to another unit of the facility, the Defendant calmly stated that he was "on recreation jogging, got hot" and he then provided a "logical and rational" reason for his earlier behavior. *Id.* Second, on September 25, 2007, after returning to the Adult Correctional Institutions (ACI) from Rhode Island Hospital, the Defendant stated that he was going to attempt to kill himself again in order to get back to the hospital stating, "I'll be going back there and I'll try it again as soon as I can . . . ." *Id.* Third, on September 26, 2007, the Defendant threatened to kill or injure himself again, making statements to correctional officers that "he will not return to max." *Id.* Finally, Dr. Tactacan reported that on October 5, 2007, the Defendant stated that he "lied to the doctor." *Id.*

Dr. Wall and Dr. Liebesny also raised the issue of malingering in their report when they stated that the Defendant is "known to exaggerate his symptoms and at times overemphasized how his depressive symptoms interfered with his focus on his case." *See* Report at 15, July 24, 2013. Moreover, Dr. Penn discussed the possibility of Defendant's malingering, noting that there are some inconsistencies in the Defendant's presentation. *See* Report at 18, Mar. 30, 2014.[9]

Dr. Myers testified at the previous hearing that the Defendant told lies, and that those lies were volitional in nature. Hr'g Tr. 75, Dec. 6, 2013. In addition, Dr. Myers testified that the Defendant had the ability to engage in normal conversations, but would then get emotional when the discussion focused on the charges against him, at which time the Defendant "would suddenly start becoming preoccupied with the system mistreating him and persecuting him and then he would be off and racing on that topic and hard to get him off of it." *Id.* at 77. When asked if the Defendant's "hunger strike" was manipulative, the doctor said that "[i]t may have some manipulative component to it, but I don't think it is just manipulation." *Id.* at 89. Dr. Myers also testified that Mr. DiLauro succeeded in getting the Defendant to focus on the case during a meeting between the two that the doctor observed. *Id.* at 91.

When asked about whether Dr. Wall's opinion that the Defendant was a malingerer had any effect on his opinion of the Defendant's malingering, Dr. Myers said: "[y]ou have to look at

[9] Dr. Penn wrote that it was very difficult to discern whether his belief system was actually delusional or whether such behavior was more suggestive of malingering. *See* Report at 18, Mar. 30, 2014. Dr. Penn described malingering as the "intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives . . . ." *Id.* Dr. Penn continued, stating that "[m]alingering is not considered a mental illness. In the [] DSM-5, malingering receives a V code as one of the other conditions that may be a focus of clinical attention." *Id.* The DSM-5 notes that clinicians are directed to suspect the presence of malingering when "two or more of four conditions are met: medico legal context of presentation, marked discrepancy between claimed stress or disability and objective findings, lack of cooperation in diagnostic process and in compliance with treatment regimen, [or] presence of antisocial personality disorder." *Id.*

what repeated episodes of malingering means in that context. He looks like a very seriously mentally ill man throughout those records. I'm not as convinced everything that happens with him on a day-to-day basis is malingering." Hr'g Tr. 20, Dec. 16, 2013.[10] Lastly, Dr. Myers appeared to say that it is possible for an individual to suffer from psychosis but also be a malingerer when he testified that "[someone] can be psychotic and malinger and still have psychosis while [they] are malingering." *Id.* at 4.

Dr. Zonana, in his April 2015 report, wrote that "[t]here certainly have been times, when [the Defendant] was incarcerated in the Department of Corrections, that he claimed to have fabricated symptoms in order to get out of difficult situations." Report at 9, Apr. 10, 2015. The doctor also said that "[the Defendant] seems to have the capacity to both exaggerate real

[10] This Court and Dr. Myers then engaged in a brief colloquy, regarding the Defendant's manipulative behavior:

> "[THE COURT]: Do you agree with Dr. Wall's assessment that the defendant has in fact attempted over the years to manipulate his conditions or his status or what he wanted and did that by various behaviors: Fights, self-injurious behavior, etcetera?
> "[DR. MYERS]: Yes, he has. Ever since he was even a boy, a young boy in the records there's a description of manipulation as well.
>
> "[THE COURT]: So you agree with Dr. Wall on that then, there's many examples of manipulative behavior?
> "[DR. MYERS]: Yes.
> "[THE COURT]: Is that then considered to be malingering; or is that a different issue?
> "[DR. MYERS]: It's a behavior pattern that he has; and I think there's different causes for that. Some of it is him trying to — there's probably a lot of causes. Some of it is lack of judgment, some of it is trying to get some kind of nurturance from the environment he's in, some of it is expressing inner pain, misery.
> "[THE COURT]: But it's willful behavior?
> "[DR. MYERS]: Some is and some is unconscious." Hr'g Tr. 26-27, Dec. 16, 2013.

symptoms as well as fabricate others. Unfortunately there is no bright line that allows us to specify when it is real, an exaggeration, or outright malingering." *Id.* at 10.

V

Court's Initial Decision on Competency

On July 3, 2014, this Court found the Defendant to be incompetent to stand trial. In its opinion, this Court noted that the issue in making the determination was not whether the Defendant understood the character and consequences of the proceedings against him. Instead, the significant issue for this Court had been whether the Defendant could properly assist his attorneys in his defense. In making its determination that the Defendant was incompetent to stand trial, this Court relied upon the various reports discussed above, particularly the portions discussing the concept of malingering[11], as well as multiple expert reports discussing the factors to be considered when determining if a defendant is competent to stand trial, specifically the reports of Drs. Wall and Liebesny, Dr. Myers and Dr. Penn.

Drs. Wall and Liebesny felt that the Defendant showed a good understanding of the charges against him and the potential consequences. *See* Report at 9, July 24, 2013.[12] The

[11] At the time this Court made its initial decision on the Defendant's competency, Dr. Zonana had not yet been introduced to the case. Therefore, his report, and its discussions on the Defendant's potential malingering, was not relied upon in making the initial decision. Dr. Zonana's discussion on the Defendant's malingering was presented in the previous section to illustrate the common theme among the doctors that malingering has always been an issue with the Defendant.

[12] According to Dr. Wall and Dr. Liebesny, when asked about the charges against him, the Defendant said that the police had accused him of '[m]urder, kidnapping, arson I guess . . . I'm not really too sure, they say I killed somebody. My fiancée . . . ." *See* Report at 1, July 24, 2013. The doctors asked the Defendant to clarify the kidnapping charge, to which the Defendant said

> ''I don't know. The whole thing is confusing to me, because I don't recall. They say things happen that I believe or know that didn't happen. Just a whole bunch of stuff. That I don't know . . . to my knowledge a lot of stuff isn't true, saying that I was at places or doing things. My sister and brother took lie detector tests and

doctors also discussed different types of pleas with the Defendant, including guilty, not guilty and *nolo contendere*. *See id.*[13] Drs. Wall and Liebesny also felt that the Defendant had an understanding of the trial process. *See id.* at 10. In response to what the role of the judge was, the Defendant stated:

> "Who controls the court room? I'll try to tell you, the victim, the family, the witnesses, the people spreading lies. None of your questions. The lawyer doesn't. It's the people on the news. You can sit there and lie to me. It's the people on the outside who are in control. The people want to complain. They want to lock you up not because you committed a crime but because the public wants you locked up." *Id.*[14]

> they passed 'em. My niece and nephew gave their statements. Other people say I was somewhere else at that time. As far as I know none of the stuff [that they are accusing me of] is true . . . For instance, at the time of the fire they say they have me on camera at one of my sister's houses, that they have the car [on camera]; but my sister has passed a lie detector test saying that I wasn't there at the time. I honestly don't get it.'' *Id.*

[13] When asked what pleading guilty means, the Defendant responded by saying that "'No one would say that, 'cause you're not supposed to.'" *See* Report at 9, July 24, 2013. In response to being asked about a *nolo contendere* plea, the Defendant said "I heard of it, it means not guilty—that's the standard basically not guilty plea. That's the one you use when you first go in. People also say it's the same as pleading guilty—it's guilty but it's not guilty, it doesn't make sense." *Id.* The doctors also asked what pleading not guilty means, to which the Defendant responded by saying "That's standard procedure—'cause that's what you do, you go in and your lawyer says not guilty.'" *Id.* The doctors then asked the Defendant about different possible outcomes of his case. *See id.* When asked about the best likely outcome of his case, the Defendant said "I have no clue." *Id.* According to the doctors, the Defendant was unwilling to respond to the worst possible outcome and estimated outcome of his case. *See id.*

[14] The doctors attempted to redirect the Defendant to explain the role of the judge. *See* Report at 10, July 24, 2013. This time, the Defendant said the judge's role was "to fry my ass." *See id.* The Defendant continued his response:

> "Who pays the judge? You pay the judge. He doesn't get his money from me. I don't pay the lawyer that is supposed to represent me . . . What does it say on my case—the what vs. what? Who do you work for? Who does the lawyer work for? You people think you can fool me. You want a [real] lawyer you pay for one." *Id.*

With respect to the role of a defense attorney—imagining that he had private counsel rather than a public defender—the Defendant said that the defense attorney's role is "[t]o take [his] money. Don't believe that anyone is here to help me. If people wanted to help me they would have helped me a long time ago." *Id.* In response to the doctors' question about why people would not want to help him, the Defendant said, "I don't know. I can't read people's minds. People only want to help when things get bad or after the fact." *Id.* When asked about the role of the prosecutor, the Defendant said a prosecutor's role is to "[tell] lies to satisfy the public." *Id.*

In response to the question about the role of the jury, the Defendant answered angrily:

> "I've never been to a trial . . . to help the prosecutor to prosecute your ass and give the people justice. You got to sit there and fight to change one of those people's minds. You've gotta win them over. The state is paying them. It's corrupt. You tell me, who's paying those people? It will be the same people talking on the news that he should go away for the rest of his life, they are going to put me away.'" *Id.*

The Defendant then said that the role of witnesses is "'[t]o do what the police tell them to do, same thing they do on the reports. Tell lies to say you were somewhere you weren't. TV mimics real life you know." *Id.* According to the doctors, the Defendant began mimicking a witness and said "Let's do this, guilty verdict, I'm tired of sitting here." *Id.*

With respect to purpose of a trial, Defendant responded:

> "Formality—it's what we are supposed to do so we are going to go through the motions but the result is going to be what the result is going to be. Unless they know that the case is shit, sorta like my case, if they mishandle the evidence. That could free you. If they want to fry your ass they take you to trial." *Id.* at 11.

Finally, Drs. Wall and Liebesny believed that the Defendant was able to participate in his defense. *See id.* According to the doctors, the Defendant "was able to answer questions and

respond to candid redirection for a 60 minute interview with Dr. Liebesny. However, he was frosty and terse with Dr. Wall, pretty much glumly sitting there waiting for the interviews with Dr. Wall to pass." *Id.* The doctors also stated that the Defendant "sat calmly and appeared to have good insight as to when he should censor himself." *Id.* With regards to the Defendant's motivation to defend himself, the doctors wrote that the Defendant "gave conflicting responses. At times he would indicate that he did not care about the outcome but the overall content of many of his angry tirades was to demonstrate numerous ways he could defend himself and errors of police and the legal system that would be in his favor." *Id.* Regarding the Defendant's hopes for the best outcome of his case, the doctors wrote that "[b]ased on [the Defendant's] insistence that he can only plead not guilty and his repetition of facts that would help his case, his demeanor was not consistent [with] someone resigned to a bad outcome or someone looking for punishment from others." *Id.*[15]

With respect to the "Appreciation of the Charges," Dr. Myers wrote that the Defendant "showed an appreciation of the charges he is facing and could name them (*e.g.*, murder, kidnapping)," which, according to Dr. Meyers, was "[a]cceptable." Evaluation at 4, Nov. 4, 2013. Regarding the "Defendant's Appreciation of the Range and Nature of Possible Penalties," Dr. Myers wrote that the Defendant

> "believed that the best outcome, if he proceeded to trial, would be a not guilty verdict. If found guilty, he estimated he would receive a prison sentence ranging from five to 30 years. He understood the plea bargaining process and that he did not have to accept one. He added that he was charged in the past with assault on an officer, a misdemeanor, and he refused a plea bargain of 30 days. Instead,

[15] The doctors then described the information that the Defendant considered to be helpful to his case, stating that the Defendant "[r]epeatedly mentioned conflicting information from witnesses, cameras, that multiple witnesses in his favor had passed lie detector tests, that police may have mishandled evidence and that the prosecution had 'a shitty case.'" *See* Report at 11, July 24, 2013.

> his case was heard by a judge and he was sentenced to six months." *Id.*

Again, Dr. Myers found this appreciation to be "[a]cceptable" even though the Defendant's "understanding of the potential length of a prison sentence if found guilty is presumably unrealistic on the lower end ('five years')," because "[the Defendant] has the ability to be educated on this topic." *Id.*

With respect to the "Defendant's Understanding of the Adversarial Nature of the Legal Process," Dr. Myers wrote that the Defendant's "understanding of the adversarial nature of the legal process was mostly accurate and rational when it could be discussed with him when he was not in an agitated, paranoid, emotionally labile state." *Id.* Dr. Myers continued:

> "To wit, the public defender's role is to 'help him' and 'fight for him and get him the best outcome that he can.' In contrast, the attorney general is trying to convict him of the charges he is facing. The judge listens to the trial, 'runs the courtroom,' and is involved with sentencing. The role of the jury is to determine guilt. They are supposed to be 'neutral and open-minded.' The best choice for him in his view was to have a jury, 'if there is any chance.' However, he complained the Investigative reports were biased and not fair. 'The facts are way off.'" *Id.*

Dr. Myers further wrote that "[i]n contrast to the above, for example, on my February 7, 2013 evaluation of [the Defendant], he decompensated when we began discussing his case." *Id.* at 4. Dr. Meyers explained:

> "(This emotional lability and associated deterioration in his thought process occurred during each of my interviews with him, brought about or exacerbated either from discussing his case or from him bringing up and obsessing over the verbal abuse and other mistreatment by the ACI officers that he perceived was occurring). This abrupt change in his mental state was remarkable for a transition to paranoid ideation, agitation, and rapid, rambling and pressured speech. His verbalizations morphed into a rant about his attorneys not truly being on his team; rather, that they were surreptitiously working with the prosecution. He spoke hurriedly

> and with racing thoughts for about 15 minutes before he was at last interrupted. Other topics of his nonstop tirade, to name a few examples, included the evidence being 'circumstantial,' 'I could not have been there to light a fire,' conflicting witness descriptions of a car (one said red, another said gold), 'I was never with anyone else, a conspirator,' 'I know the cards are stacked against me,' 'Honestly, she was the only person I had in my life,' 'I never knew she cheated on me.' 'After a while I told them whatever they wanted to hear,' 'I was at my sister's house at 11:30 p.m.,' The fire alarm was 'pulled at 11:45 p.m.' 'They say I arrived at 11:10 p.m. . . ." *Id.* at 4-5.

Unlike the first two factors, Dr. Myers found the Defendant's understanding of the adversarial nature of the legal process to be "[m]arginal." *Id.* at 5. This is because "[the Defendant's] understanding of the role of his defense attorneys is compromised when he is in the above-described paranoid, agitated state that phenotypically looks like mania (an abnormally elevated or irritable mood with racing thoughts and confusion).]" *Id.*

Dr. Myers found the Defendant's capacity to disclose facts pertinent to the proceedings and properly assist in his defense to be "[i]mpaired." *Id.* Dr. Myers wrote that:

> "[the Defendant's] ability to communicate with his attorney and participate in his defense is impaired based on my interviews with him, and also from my observations of his interactions with Mr. DiLauro on June 11, 2013. On that date, he was suspicious of his attorney's motives and was hesitant to discuss events pertaining to his involvement in the crimes, despite repeated assurances from his attorney it was confidential and important to his defense. He made several brief forays into discussing the crime facts and his associated mental state and behaviors, yet each time he devolved into a paranoid, frantic preoccupation with the ACI staff listening in through the door and speakers in the ceiling and would proceed no further. After the last attempt that day to discuss the crime with him he began hysterically sobbing, could not continue, and then settled into a state of paranoid preoccupation. This cycle recurred in my earlier evaluations of him." *Id.*

With respect to the "Defendant's Capacity to Manifest Appropriate Courtroom Behavior," Dr. Myers wrote that "[the Defendant] has the ability to manifest appropriate

courtroom behavior. He has been in court in the past and reported he was able to conduct himself appropriately," and Dr. Myers found this to be "[a]cceptable." *Id.* Regarding the "Defendant's Capacity to Testify Relevantly in Court," Dr. Myers wrote that "[the Defendant's] capacity to testify relevantly in court would be vulnerable were he experiencing significant mood and personality disorder symptoms at the time of trial. He would be at risk of using poor judgment and testifying irrelevantly were he to transition into speech that was rapid, disorganized, and pressured during testimony." *Id.* Dr. Myers found the Defendant's capacity to testify relevantly in court to be "[m]arginal." *Id.* at 6.

Dr. Penn wrote that "[the Defendant] demonstrated impairments in his understanding of the current charges and legal proceedings against him." Report at 11, Mar. 30, 2014.[16] Regarding the Defendant's understanding of court personnel, Dr. Penn wrote that "[the Defendant] demonstrated impairments in his description of the role of his defense lawyer." *Id.*[17] With

[16] In addition, Dr. Penn wrote that "[the Defendant] demonstrated impairments in his understanding of court procedure." Report at 11, Mar. 30, 2014. Dr. Penn stated that "[the Defendant] was unable to spontaneously describe different possible pleas, plea bargaining, or what these pleas would entail." *Id.* Dr. Penn further wrote that "[e]ven when different pleas were explained to him (*e.g.*, guilty, not guilty, no contest, not guilty by reason of insanity), he was unable to demonstrate an ability to retain this new information, rationally weigh and manipulate potential risks and outcomes." *Id.* In addition, "[the Defendant] specifically demonstrated impairments in his ability to appreciate the range and nature of possible penalties," and "[the Defendant] was unable to give an appraisal of the anticipated or likely outcome." *Id.*

[17] Moreover, "[the Defendant] was unable to identify and describe the role or function of the judge, or the objective and impartial role/nature of the judge." Report at 11, Mar. 30, 2014. Furthermore, "[the Defendant] was unable to identify and describe the role of the prosecutor/attorney general." *Id.* Dr. Penn also wrote that "at no time [during his evaluation of the Defendant] did [the Defendant] spontaneously describe the adversarial nature of the current proceedings and/or the role of the prosecutor during a criminal proceeding or specifically his pending legal case." *Id.* at 12.

regards to the Defendant's ability to assist with his defense, Dr. Penn wrote that "[the Defendant] demonstrated either unwillingness or an inability to participate in his legal defense." *Id.* at 12.[18]

Based on the statements of the various doctors—regarding the Defendant's malingering—and the discussions on the factors to be considered when determining a defendant's competence to stand trial, the question of whether the Defendant could properly assist his attorneys remained unclear to the Court. Even though this Court felt that the Defendant understood the character and consequences of the proceedings, it could not rule that he was competent to stand trial because it was not able to determine whether he was able to properly assist his attorneys in his defense. Specifically, this Court could not determine if he was truly unable to assist his attorneys—as a result of his illnesses—or if his inability to assist his attorneys was a result of his own volition and his potential malingering. In other words, this Court could not determine if the Defendant was making a conscious decision to not assist his attorneys.

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[18] According to Dr. Penn, "[the Defendant] said that he has significant concerns and mistrust regarding his public defender . . . ." Report at 13, Mar. 30, 2014. Dr. Penn wrote that the Defendant is of the belief that his attorney and others involved lie to him. *See id.* In addition, Dr. Penn wrote that "[the Defendant] reported that he has a past history of problematic behavior at court." *Id.* Dr. Penn further wrote that

> "[d]espite using several scenarios and examples of how [the Defendant] could alternatively advocate for his legal defense by whispering to his legal team during a hearing or trial, communicating via handwriting, asking for a break, or asking to speak to his team inside or outside the courtroom before, during (perhaps during a pause or break) or after a hearing, [the Defendant] was unable to identify any other strategies except to talk out loud, because 'everyone lies.'" *Id.*

Furthermore, Dr. Penn wrote that "[the Defendant] demonstrated significant impairments in the quality of his ability to disclose available pertinent facts surrounding the offense including the defendant's movements, timing, mental state, actions at the time of the offense as this relates to his attorney/legal team," as well as "impairments in his capacity to realistically challenge prosecution witnesses and in his capacity to testify relevantly." *Id.* at 14.

A

Subsequent Competency Evaluation

In late 2014, this Court again asked for assistance from an outside expert to review the Defendant's competency. This Court eventually retained Dr. Zonana, who prepared a report of the Defendant's competency in April of 2015. *See* Report at 1, Apr. 10, 2015. In preparation for that report, Dr. Zonana reviewed documents and met with the Defendant on February 5, 2015, for approximately three and one-half hours at ESH. *See id.* at 3.[19]

Ultimately, Dr. Zonana concluded that the Defendant was aware of some of the factual nature of the proceedings against him. *See id.* at 11. However, the doctor found that there was not "enough in the record to conclude that [the Defendant] has a rational as well as factual understanding of the proceedings and [that the Defendant] has the capacity to work with his attorneys with a reasonable degree of rational understanding." *Id.* Dr. Zonana also noted that the Defendant "seems to have the capacity to both exaggerate real symptoms as well as fabricate others" and that "[u]nfortunately there is no bright line that allows us to specify when it is real, an exaggeration, or outright malingering." *Id.* at 10.

[19] Dr. Zonana wrote that originally, the Defendant objected to the meeting when he noticed the videotaping equipment, and he was unwilling to speak with him in the presence of ESH staff. *See* Report at 3-4, Apr. 10, 2015. Dr. Zonana reported that the Defendant walked out of the room and returned fifteen minutes later after notifying staff that he had spoken with his attorney and that he was willing to continue, on video, without staff present. *See id.* Dr. Zonana then spoke with Defendant regarding his childhood, mental health, experiences at ESH, and his knowledge of the charges against him. *See id.* at 4-7.

VI

Petition for Instruction Hearings

A

Dr. Tactacan

On June 1, 2015, the Defendant's treating physician at ESH, Dr. Tactacan, submitted a PFI to the Court.[20] As a result of the standstill between the Defendant and the staff at ESH, Dr. Tactacan submitted a PFI to the Court and the Court reviewed the Defendant's situation and behavior at ESH.[21]

In the PFI, Dr. Tactacan stated that the Defendant was diagnosed with Borderline Personality Disorder. He further stated that medication would help to manage the Defendant's symptoms, that the Defendant was unable to provide informed consent, and that the Defendant refused the necessary medications. The doctor asked the Court for permission to medicate and treat the Defendant, since there were no available substitute decision-makers to agree to the administration of medication on the Defendant's behalf.

In a first hearing held on June 4, 2015, Dr. Tactacan appeared before the Court for testimony regarding the PFI. During that hearing, Dr. Tactacan testified that, in his opinion, the proposed medications may be useful in treating the symptoms of Borderline Personality Disorder. However, the doctor acknowledged that there are no medications approved by the

[20] At that time, the Defendant was housed at ESH, but he was refusing treatment and medications proposed by his treating doctors. The parties, and the Court, had considered the possibility of moving the Defendant to another facility, since the Defendant was not receiving treatment at ESH due to his refusal to cooperate and his distrust of staff. Moving the Defendant to another facility was not a viable option, however. State regulations and laws prevented the Defendant from being transferred to another facility.

[21] At this point in the proceedings, Megan Clingham, Esq., a Mental Health Advocate who had been attending court proceedings to assist the Court and counsel, entered her appearance on behalf of the Defendant regarding the PFI.

FDA to treat Borderline Personality Disorder itself, and that medication is not an appropriate solution or remedy to the Defendant's malingering.

Upon questioning by the Court, Dr. Tactacan testified that the Defendant was not currently receiving any formal treatment while at ESH due to his refusal to work with staff and doctors; the only treatment ESH could provide, at the time, was one-on-one supervision to prevent instances of self-injurious behavior. The doctor explained that from his conversations with the Defendant, it appeared as though the Defendant did not have an insight into his own mental illness or into the charges that brought him before the Court.

Dr. Tactacan clarified that no guardian was appointed in this case to make medical decisions for the Defendant because the Defendant was not "globally incompetent." Hr'g Tr. 46, June 4, 2015. The doctor stated that the Defendant can make decisions and take action regarding his grievances, purchases, bank accounts, etc., and that he only refuses to work with staff when it comes to treatment and his medical decisions. *Id.* Dr. Tactacan testified that the Defendant is capable of advocating for himself and making decisions when it comes to matters that he feels strongly about. *Id.* Despite a refusal to participate in treatment or to discuss medical decisions, the doctor provided examples of times when the Defendant had asserted himself, stating that "he's very rights driven and rights oriented. He certainly can advocate for himself, you know, when he chooses to." *Id.* at 49-50.

Finally, Dr. Tactacan concluded by stating that the PFI was presented to the Court because, without court-ordered medication, the only treatment that ESH can provide the Defendant is one-on-one supervision. Dr. Tactacan stated that in his opinion, and to a reasonable degree of medical certainty, the benefits of the proposed medications outweigh the risks. *Id.* at 7. After a short recess and a conference among the parties, the State requested a short continuance

in order to present a second expert, Dr. Zonana, for a future hearing on the matter of informed consent and forced medication. Thus, the Court did not issue an order for forced medication after Dr. Tactacan's testimony on June 4, 2015.

B

Dr. Zonana

On July 22, 2015, Dr. Zonana prepared a report after he was requested to address the continued issue of forced medication and informed consent. *See* Report at 1, July 22, 2015. Specifically, the Court asked Dr. Zonana to inquire whether the Defendant was able to make a "fully informed decision or [to] provide informed consent" regarding proposed medications. *Id.* In preparation for his July 2015 report, Dr. Zonana met with the Defendant on July 18, 2015 from approximately 9:45 am to noon. *Id.* Dr. Zonana had previously met with the Defendant on February 5, 2015, and he reviewed progress notes dating from March 30, 2015 to July 17, 2015. *Id.*

In a videotaped meeting on July 18, 2015, Dr. Zonana informed the Defendant that their discussion would not be confidential, since it would be included in a report prepared for the Court. *See* Report at 1, July 22, 2015. The Defendant noted that he had spoken with one of his attorneys and that he was willing to proceed. *Id.* Dr. Zonana writes that in their July 18, 2015 meeting, the Defendant spoke "more clearly and in a normal rate and volume than he did in [the] first interview. There was no loosening of associations, neologisms, and he generally was coherent." *Id.* at 3. The doctor reported that the Defendant "recalled [his] previous visit and was able to bring up some of the details of what [they] had talked about quite accurately. [The Defendant] was oriented to person place and time." *Id.*

Finally, Dr. Zonana concluded that the Defendant was able to communicate regarding treatment choices, able to acknowledge the symptoms of his psychiatric condition, and that he did appreciate the need for some kind of treatment. *Id.* at 5. However, Dr. Zonana concluded that the Defendant is unable to reason about treatment options because of his mistrust for staff and treating physicians. *Id.* Therefore, Dr. Zonana found that the Defendant likely cannot reason rationally and meaningfully about proposed treatment plans, and thus, the Defendant cannot provide informed consent. *Id.*

Dr. Zonana testified to the above findings before the Court on July 29, 2015. *See* Hr'g Tr., July 29, 2015. Near the conclusion of that hearing, Dr. Zonana was given the list of proposed medications as specified in Dr. Tactacan's earlier PFI. *Id.* at 33; *see also* PFI at 1. Dr. Zonana discussed Dr. Tactacan's many proposed medications—and the possible side-effects accompanying each medication—finally concluding that, in his opinion, the benefits of such medications outweigh the risks. *See* Hr'g Tr. 36, July 29, 2015. In his opinion, the Defendant was not able to provide informed consent since he was not able to reason regarding treatment options and he was unwilling to work with staff. *Id.* at 30.

After hearing the objections from defense counsel and the mental health advocate, Ms. Clingham, regarding the PFI, and considering its own concern of the list of all possible medications that might be used, this Court reserved its decision on the matter.

VII

Additional Review of Competency

A

Dr. Zonana's April 2017 Report

Most recently, on January 31, 2017, this Court ordered Dr. Zonana to conduct another semi-annual report for competency in accordance with § 40.1-5.3-3(k), which requires a review of competency every six months after a defendant is committed. At this time, the Court specifically asked the doctor to look at the Defendant's daily living arrangements and other relevant factors in order to give this Court a clearer picture of the Defendant's behavior and actions outside of the judicial process. Pursuant to the Court's request, Dr. Zonana reviewed a variety of records.[22]

In his report, Dr. Zonana stated that "[a]s part of [his] ongoing evaluation, [he] attempted to interview [the Defendant] on March 6, 2017." *Id.* at 1. According to Dr. Zonana, "[d]uring the prior 2-3 months [before March 6, 2017], [the Defendant] had been informed of [his] plan to see [the Defendant] and had told staff repeatedly that he was not interested in seeing [the doctor] again and that [the doctor] could get anything [the doctor] needed from the hospital records." *Id.* In his report, Dr. Zonana stated that "when [he] came to the hospital [on March 6, 2017], [the Defendant] was again asked if he was willing to be interviewed and said no." *Id.* Dr. Zonana did, however, "observe [the Defendant] playing basketball for 10 to 15 minutes with other patients

[22] These records include: (1) the Defendant's medical records from ESH from approximately 3/15/15 to the present; (2) an Investigatory Report, which is dated 2/12/16 and signed by Elinore McCance Katz MD, Ph.D; (3) a summary by Dr. Ruby Lee, which is dated 3/5/17; (4) Dr. Zonana's first report, which is dated 4/10/15; (5) his second report dated 7/22/15; and (6) § 40.1-5.3-3. *See* Report at 1-2, Apr. 4, 2017. Dr. Zonana also noted that he had collateral sources of information, including conversations with the Defendant's attorneys and members of the treatment team. *Id.* at 2.

from the unit," despite the Defendant's refusal to meet with him. *Id.* Dr. Zonana stated, however, that "[he] met with Dr. Tactacan, Rosa Gough LCSW, and Dr. Ruby Lee for approximately 3 hours," instead of the Defendant, on March 6, 2017. *Id.*

Dr. Zonana noted that, although he did not meet with the Defendant on March 6, 2017, "[he] had seen [the Defendant] previously on February 5, 2015 for approximately 3 1/4 hours . . . [and] on July 18, 2015 for 2 1/4 hours." *Id.* According to Dr. Zonana,

> "Given the fact that [the Defendant] has been under constant, 24/7, observation for the past several years with multiple staff writing daily progress notes, [he] believe[d] it [was] possible to comment on [the Defendant's] capacities in spite of his usual refusal to talk with them about his current legal charges or his knowledge of legal proceedings." *Id.*

Dr. Zonana buttressed this opinion on June 20, 2017, during his testimony regarding the report, when the State asked if it was possible to conduct an evaluation of a person without an actual meeting. In response, Dr. Zonana testified that:

> "Well, there are certain circumstances where you have no choice, like a will case where someone has died and you have to rely on the records. Our ethical guidelines are made clear that the evaluation is limited by the fact that having an evaluation at the time, but it is possible to proceed then to write the report." *See* Hr'g Tr. 16, June 20, 2017.

In his report, Dr. Zonana wrote that "[i]n the absence of a recent interview with [the Defendant], [he] reviewed [the Defendant's] medical records to gain an understanding of [the Defendant's] ability to grasp procedural rules and administrative procedures as well as to develop working relationships with staff." Report at 2, Apr. 4, 2017. According to Dr. Zonana, the medical records "have examples of 20 formal complaints and grievances that [the Defendant] has filed." *Id.* In his report, Dr. Zonana referenced three of these complaints. *Id.* at 2-4. Dr.

Zonana reviewed these complaints and explained why he believed they were important in forming his opinion.

In the first quoted grievance, labeled Complaint A, the Defendant wrote to complain that a staff member was sleeping during a 1 on 1 assignment with the Defendant. *Id.* at 2.[23] In Complaint B, the Defendant wrote a grievance regarding his food preferences and the meals provided by ESH. *Id.* at 3.[24] In the third complaint, Defendant stated that "[a staff member] ha[d] been having an inappropriate relationship with him for a very long time . . . ." *Id.*[25]

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[23] The Defendant wrote that "to prove that [the staff member] was sleeping and wasn't awake [he] was doing things in [his] room for about 15 to 20 minute[s]." Report at 2, Apr. 4, 2017. The Defendant further wrote that "[someone] c[ould] look at the camera in [his] room to confirm that [he] got up in an attempt to get [the staff member's] attention." *Id.* In addition, the Defendant wrote that "[he] ha[d] informed [the staff member] numerous times that [the staff member] was putting [him] at risk of harm preventing [him] from sleeping peacefully due to [the staff member's] behavior," and that "[he] would file complaints," if necessary. *Id.* According to the Defendant, filing a complaint "[was] [his] only alternative and [he] hope[d] th[e] information [was] accurate enough to properly address th[e] ongoing issue." *Id.*

[24] The Defendant wrote that "[he] told [a staff member that he] did not want BLTs nor are they on [his] likes to alternate list." Report at 3, Apr. 4, 2017. In addition, the Defendant wrote that "[t]he kitchen shouldn't be able to dictate what [he] eat[s] because they don't want to work too hard . . . A reasonable effort should be made to ensure that [he is] treated fairly—as every other patient." *Id.* The Defendant went on to write that "[j]ust because there was a [p]icnic which [he] didn't ask for (OPTION) doesn't give the kitchen the right to force it upon [him]." *Id.* He concluded the complaint by writing that "[t]here is a constant issue with my tray and it's tiring. Please address this issue. If they'd like to talk to me that's fine. Thank you." *Id.*

[25] The Defendant directed the complaint at the staff member whom the Defendant alleged was having this inappropriate relationship with him. The complaint reads, in pertinent part:

> "This is my olive branch, my peace offering. However, I still will not tolerate some of the behaviors like gossiping, using staff or patients to target me, threats nor any kind of character assassinations as you've been doing. First, you need to get your emotions in check and realize I'm not your enemy but I don't want to have to write any report to defend my reputation as a man and an honest one at that. I've put this in writing because I have no fear and nothing to hide. In fact I'm doing it in the hopes of getting through to you before this gets any worse than it is for real. Smarten up being it's you who is going to determine if we continue to be at odds or at peace. Take care, use your head and make smarter decisions." Report at 3, Apr. 4, 2017.

According to Dr. Zonana, these complaints were helpful in his review because "[t]hey "illustrate that [the Defendant] understands the need to provide evidence for his allegations/complaints." *Id.* at 2. Dr. Zonana continued by writing that:

> "[The Defendant] appreciates the professional obligations of staff, and the consequences that can be brought to bear on behaviors that cross professional boundaries. He can also pay attention to, and apply the knowledge of hospital procedures to his advantage. He can develop a plan of action and follow through the formal complaint procedures." *Id.*

Dr. Zonana buttressed this opinion on June 20, 2017, when he testified that such grievances demonstrate that the Defendant "had some understanding of what evidence was, what kinds of things were needed to make his complaint -- [a] solid complaint that addresses the issue at hand and how it would be perceived and adjudicated." Hr'g Tr. 21, June 20, 2017.

After reviewing the Defendant's complaints and grievances, Dr. Zonana reviewed the Defendant's medical records and progress notes from staff. *See* Report at 4, Apr. 4, 2017. According to Dr. Zonana, "[t]he notes by the staff document that [the Defendant] has consulted with an attorney when he feels it to be in his interest." *Id.*[26]

[26] For example, in a Progress Note dated 1/27/16, ESH staff wrote that after refusing to meet with a psychiatrist, the Defendant informed staff that he "spoke with his attorney and was advised not to speak with the psychiatrist." *See* Report at 4, Apr. 4, 2017.
Despite refusing to attend any competency education classes—*see* Prog. Notes December 5, 2016 and January 20, 2017—Dr. Zonana wrote that the Defendant had expressed interest in being on a committee to discuss solitary confinement. *Id.* at 5-7. In a Progress Note dated January 19, 2017, ESH staff reported that the Defendant had demonstrated an ability to check and track his bank account balance after a disagreement arose regarding money that was deducted from Defendant's account. *Id.* at 6. According to Dr. Zonana, such behavior "illustrates good memory, tracking details, knowing hospital rules and checking to be sure that the rules were followed." *Id.* at 4.

Dr. Zonana, in preparing his report, also spoke with the Defendant's attorneys.[27] *Id.* at 8. According to Attorney DiLauro, "he and [Attorney] Geiselman had seen [the Defendant] approximately once over the past 1-2 months." *Id.* DiLauro claimed that he and Geiselman "felt that [the Defendant] appear[ed] worse to them, in the sense that he does not stay on topics for very long." *Id.* According to Attorney Geiselman, "he had seen [the Defendant] a month or six weeks before with [A]ttorney DiLauro and that [the Defendant] initially noted for the first time in their experience that things were going well." *Id.* Continuing, however, Attorney Geiselman stated that "[w]ithin about ten minutes [the Defendant] was no longer able to maintain a coherent conversation and started crying." *Id.*

In addition to phone interviews with the Defendant's attorneys, Dr. Zonana, in preparing his report, interviewed Dr. Tactacan on March 6, 2017. *Id.* According to Dr. Tactacan, "[the Defendant] continue[d] to refuse any medication . . . ." *Id.* Dr. Tactacan also noted that "there had been no change in [the Defendant's] diagnoses." *Id.*

In his conclusion, Dr. Zonana wrote:

> "[The Defendant] generally refuses to meet with psychologists and refuses to attend any educational programs designed to improve his competency knowledge and capacities. He usually refuses to have more than a few words with the attending psychiatrist. His writing is coherent and organized especially in his grievances. There is no description of loose associations or of a formal thought disorder. He continues to refuse psychotropic medications. He almost always refuses to discuss his charges or elements of competence to stand trial." *Id.* at 9.

According to Dr. Zonana,

> "In this context, as noted above, it is not possible to directly assess [the Defendant's] competency to stand trial as he has continuously refused to discuss any aspect of his case with me, his treatment

[27] Dr. Zonana spoke with Attorney DiLauro on March 24, 2017. He spoke with Attorney Geiselman on March 27, 2017.

> staff, psychologist, or lately even with his attorneys. His competency, however, can be assessed based on his other behaviors and communications on the ward where he remains under constant observation and monitoring." *Id.* [28]

Dr. Zonana concluded his report with:

> "In my opinion, to reasonable medical certainty, I would conclude that [the Defendant] has the capacity to understand the character and consequences of the proceedings against him and to properly work with his attorneys with a reasonable degree of rational understanding if he so chooses." *Id.* at 10.

On June 20, 2017, the State also called Ms. Myrtle Bernard, a mental health worker with twenty-four years of experience working for the Department of Health and seventeen years

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[28] Dr. Zonana then went on to emphasize the facts that led him to his conclusion, writing that:

> "During some of my prior evaluations and in some comments to staff [the Defendant] has acknowledged that he is facing a homicide charge that could have a penalty of 25 years. As can be seen from the records, he is capable of filing articulate and coherent grievances about staff behavior and shortcomings. He tracks his bank account to see if deductions have been made. He notes when procedures have not been followed to the letter, such as his not having formally signed an authorization for certain payments. He is capable of picking up on these discrepancies and obtaining a reimbursement. Although suspicious of staff, he can still make alliances with certain staff members and get many of his needs fulfilled." Report at 9-10, Apr. 4, 2017.

With regard to the Defendant's relationship with his attorneys, Dr. Zonana wrote:

> "[The Defendant] has no chronic fixed delusions and has the intelligence to comprehend his charges and the ability to work with his attorneys if he chooses to. He makes contact with his attorneys when he has legal questions and appears to be able to resolve those issues and then develop a plan of how to proceed." *Id.* at 10.

Regarding the Defendant's behavior, Dr. Zonana wrote:

> "[The Defendant's] behavior is chronic and antedated his current charges. His demeanor is noted to change when relating to staff or going to court and returning from court as well as when interviewed by senior staff. Although I still feel that medication could be of benefit to him in terms of overall mood stabilization, I think his records reveal that he has adequate behavioral control when he feels it is in his interests." *Id.*

working in the Pennell Building, to testify. Her testimony supported the opinion and findings of Dr. Zonana. Ms. Bernard highlighted the Defendant's behavior and how his willingness to meet and speak with his attorneys varied from day to day. According to Ms. Bernard, the Defendant chose to meet and speak with his attorneys on some days, while refusing to meet and speak with them on others. He would decide how cooperative and communicative he would be on any given day, given his plans for the day.

B

Defendant's In-Court Behavior

This Court had the opportunity to observe the Defendant on June 20, 2017, when he appeared in Court for the testimony of Dr. Zonana. This Court notes that the Defendant sat quietly and alert for the proceedings, and listened attentively to Dr. Zonana's testimony from 9:30 a.m. to 3:30 p.m., excluding an afternoon recess around noon. The Defendant appeared to be following Dr. Zonana's testimony, occasionally shook his head in agreement or disagreement with Dr. Zonana's testimony, and—at least on one occasion—conferred quietly with his attorney seated next to him. At the conclusion of the hearing, the Defendant raised his hand and asked to be heard. He expressed a desire to speak directly to the Court. Despite his counsel's recommendation that he not do so, the Defendant addressed the Court. The Court listened.

In his statement, the Defendant discussed the content of Dr. Zonana's testimony. He asserted that his complaints regarding ESH staff were accurate, and that he does not trust the staff at ESH. *See* Hr'g Tr. 125-26, June 20, 2017. He spoke about the grievances that he has filed against ESH staff stating, "I start filing reports because I don't want to get people in trouble. I'm tired of getting people in trouble. I don't want to hurt nobody. I try very, very hard. I do want to go forward with my case." Hr'g Tr. 113-14, June 20, 2017.

The Defendant talked about his interactions with staff, doctors, and defense counsel, noting that he had called his attorney when dissatisfied with treatment or staff interactions at ESH. The Defendant stated, "I said, 'Meg this is going on. Can you please help me.' She said, 'Matt, I'll make a phone call.'" *Id.* at 115. On the other hand, the Defendant also spoke about his distrust of other counsel, stating, "I don't care what Mike says. He's not here to represent me. I don't care. He's not on my side." *Id.* at 118.

The Defendant acknowledged some symptoms of his mental illness, stating, "When I come up with something that makes sense, sometimes my thoughts aren't organized, but I still try. I have my days. I have my good days and I have my bad days." *Id.* at 116. He further explained that solitary confinement at the DOC does not help his mental illness. He stated that despite his complaints regarding ESH staff, he would rather be at ESH than the DOC. *See id.* at 117. Specifically, the Defendant stated, "[T]he only thing I wanted to do is just to be able to deal with the things I needed to deal with and get away from some of the horrors that was at the ACI." *Id.* at 123. In the course of his statements, the Defendant recognized the nature of the proceedings, acknowledging that he was in Court for the purpose of a competency hearing. He stated: "That facility is dysfunction and you got me in this courtroom talking about whether or not I'm competent." *Id.* at 124. The Defendant concluded his statement saying that "for 31 years I've had illnesses" and that "whether I'm at the ACI or in the hospital, I just want a safe environment. That's all I want." *Id.* at 125, 127. The Defendant spoke for a total of thirty-three minutes.

The Defendant appeared before the Court again on July 18, 2017 for oral arguments by the State, defense counsel, and BHDDH regarding Defendant's competency to stand trial. During the course of that hearing, the Defendant again sat quietly and attentively, listening to

legal arguments by all parties and either shaking his head in agreement or disagreement with what was being stated. At one point, the Defendant gestured to his counsel, requesting a pen or pencil with which to take notes. Defense counsel provided the Defendant with a pen, and he thereafter wrote briefly on a notepad before speaking with counsel. The Court observed the Defendant confer quietly with defense counsel regarding the note he had taken. The Court provided the Defendant and defense counsel with an opportunity to be heard, if necessary, but both declined the opportunity.

The Court observed that the Defendant's most recent two appearances before the Court are a marked improvement in courtroom behavior compared to the Defendant's previous appearances in 2015 and earlier. At previous court appearances, the Defendant sat with his head in his hands, was either silent or exhibiting mood swings, and he was more prone to audible outbursts; on one occasion, the Defendant flipped over the table at where he and counsel had been seated. On both June 20, 2017 and July 18, 2017, however, the Defendant appeared observant and interested, remaining respectful of the Court and those around him. When the Defendant spoke before the Court on June 20, 2017, the Court noted that his statement was rushed and emotional, yet incredibly sincere, articulate, and relevant to the proceedings before the Court.

C

Self-Injurious Behavior

The Defendant has similarly shown an improvement with his tendency to participate in self-injurious behavior (SIB). In March of 2014, Dr. Penn noted that the Defendant had an "extensive history of severe self-injurious behavior and disciplinary infractions in the Rhode Island DOC." Report at 17, Mar. 30, 2014. Dr. Zonana reviewed this behavior in his report from

April of 2017, stating that "[i]n terms of attempts to hurt himself by swallowing paperclips, batteries, or other self-injurious behaviors (*e.g.*, broken metacarpal bone, inserting metal objects under skin), [the Defendant] has been admitted to a general hospital on 11 occasions from Eleanor Slater Hospital." Report at 8, Apr. 4, 2017. Such hospitalizations occurred once in 2014, five times in 2015, and five times in 2016.

On June 20, 2017, Dr. Zonana testified that it is not rare for individuals with Borderline Personality Disorder to engage in SIB. *See* Hr'g Tr. 52, June 20, 2017. When asked why an individual with Borderline Personality Disorder might engage in SIB, the doctor stated that "[patients] say that they find that harming themselves often will bring them back to reality, that feeling the pain actually decreases some anxiety that they have." *Id.* at 53.

Recently, however, Doctors at ESH have reported that the Defendant has drastically reduced the amount of SIB as of the latest competency review in April of 2017. Dr. Zonana stated in his report that "[o]ver the past six months his condition has been relatively stable with fewer episodes of self-injury or episodes requiring physical restraint or hospitalization." Report at 9, Apr. 4, 2017; Hr'g Tr. 57, June 20, 2017. Notably, the Defendant's last hospitalization for SIB was in May of 2016.

D

Most Recent Review of the Defendant's Status

While this Court was preparing its Decision in this matter, six months passed since Dr. Zonana's April 2017 Report. As a result, in early December 2017, this Court requested that materials be submitted in order to provide this Court with an update on the Defendant's condition. Later that month, Dr. Tactacan provided a clinical status update of the Defendant. In addition, Allison Giuliano, MA, CAGS, LMHC, a clinical psychologist on the Forensic Unit's

Treatment Team at ESH, sent this Court a letter providing additional updates on the Defendant. Along with the updates from Dr. Tactacan and Ms. Giuliano, this Court received copies of "Monthly Psychologist Note[s]," which were prepared by Ms. Giuliano, and various complaints filed by the Defendant[29]. This section will address these materials.

1

Dr. Tactacan

According to Dr. Tactacan, "[Defendant has] remain[ed] clinically stable with no evidence of signs and symptoms of an active mental illness . . . ." Dr. Tactacan Clinical Status Update at 1, Dec. 29, 2017. As a result, Dr. Tactacan wrote that the Defendant "does not warrant any treatment with medications at this time." *Id.* Dr. Tactacan further stated that "[t]here has been no change in [Defendant's] overall mental status and behavior since his admission to the forensic unit 3 ½ years ago." *Id.* Dr. Tactacan claimed that the Defendant continues to display certain behaviors, including: (1) manipulativeness; (2) irresponsibility; (3) callousness/antagonism; (4) impulsivity and hostility; and (5) deceitfulness. *Id.* Dr. Tactacan elaborated on each of these behaviors.[30]

[29] All parties agreed to this method of updating the Court on the Defendant's status.

[30] Regarding the Defendant's manipulativeness, Dr. Tactacan wrote that the Defendant "uses[] seduction, charm and glibness befriending staff and obtain[ing] their personal information only to use th[at] information later to control them . . . ." Dr. Tactacan Clinical Status Update at 1, Dec. 29, 2017. Regarding the Defendant's irresponsibility, Dr. Tactacan wrote that the Defendant "purposefully smashed and ruined a radio headset of another patient in response to a prior altercation; he initially indicated and agreed to pay and replace it but when the money was taken out of his account he complained [and] demanded his money back." *Id.* Regarding the Defendant's callousness/antagonism, Dr. Tactacan wrote that the Defendant has a "lack of concern for others or remorse about the negative or harmful effects on others . . . ." Dr. Tactacan continued by writing that the Defendant "picks and chooses who should be assigned as his 1:1 staff and if that staff is somebody he doesn't like, he purposefully walks them up and down the hallway to fatigue them while . . . verbally berating and threatening them—he even tells them 'I'll walk you like a dog.'" *Id.* Regarding the Defendant's impulsivity and hostility, Dr. Tactacan wrote that the Defendant "frequently expresses his anger by making threats to become assaultive daring staff to put him in restraints—especially if he does not like the staff assigned to him." *Id.*

Dr. Tactacan concluded his update by writing that:

> "[the Defendant] continues to demonstrate ability to advocate for himself, make his needs known and able to follow through with his verbal and written complaints. He has called the Mental Health Advocate several times and filed numerous complaints that were investigated by the Department of Health. He enjoys living on the forensic unit because it provides him with a sanctuary and he is able to manipulate our staff to get what he wants." *Id.* at 2.

2

Allison Giuliano, MA, CAGS, LMHC

According to Ms. Giuliano, she "ha[s] provided [the Defendant] with the opportunity for individual counseling on a weekly basis since his admission to the Forensic Unit." Giuliano Letter, Dec. 28, 2017. Despite her weekly attempts to offer the Defendant counseling, the Defendant "completely declined to meet with [her]," until May 2016. *Id.* Starting in May 2016, "[the Defendant] intermittently agreed to meet with [her], but with limited engagement, still often declining to meet altogether." *Id.* It was not until January 2017 that the Defendant began regularly participating "on an almost weekly basis." *Id.* According to Ms. Giuliano, "[d]uring the initial few months of counseling sessions, as a therapist, [her] focus was to build therapeutic rapport to begin to engage [the Defendant] in the counseling process." *Id.*[31]

Finally, regarding the Defendant's deceitfulness, Dr. Tactacan wrote that the Defendant "misrepresents himself and makes embellishment[s] or fabrication[s] when relating to specific events . . . ." *Id.* In addition, Dr. Tactacan wrote that the Defendant "was able to access a cellular phone which he used to take 'selfies' . . . in the shower and bathroom and had those pictured posted on Facebook and most recently he was found with $205 cash (two $100 bills and a $5 bill) under his tongue during a search." *Id.* at 1-2. It is Dr. Tactacan's belief that the Defendant "is selling tee shirts to raise cash for a television should he ever be returned to the ACI, because he designed several tee shirts and they disappeared by the time the cash was discovered hidden in his mouth." *Id.* at 2.

[31] Ms. Giuliano continued by writing that "[the Defendant's] engagement remained limited, typically focused on external factors such as complaints about staff and his perceived dysfunction of the hospital and unit." Letter, Dec. 28, 2017. Ms. Giuliano wrote that, as the meetings became more regular, "[she] ha[d], on a limited basis, been able to include therapeutic

Her sessions with the Defendant have "focused mostly on concepts such as interpersonal issues, communication skills, and coping skills," and, according to Ms. Giuliano, "[the Defendant] has been somewhat receptive to these interventions." *Id.* Ms. Giuliano did note, however, that the Defendant "has continued to be guarded around many personal issues, and has admittedly strategically avoided discussing topics (to include anything legal), as he has stated numerous times that he believes the treatment team members to be manipulative, 'magicians' who 'twist' his words for their agenda in court." *Id.* She concluded her letter by writing that "[w]hile [the Defendant] has participated more regularly in counseling over time, his engagement remains largely on a superficial level, and his behavior and overall presentation on the unit have remained unchanged." *Id.*

Ms. Giuliano also provided this Court with five "Monthly Psychologists Note[s],[32]" which cover July 2017-November 2017. In the notes, Ms. Giuliano summarized the Defendant's month based on her interactions with him, as well as reports from other staff members.[33]

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interventions such as Cognitive Behavioral Therapy . . . and Dialectical Behavior Therapy . . . ." *Id.*

Cognitive Behavioral Therapy is "a type of counseling with a goal of helping patients change their unhelpful thinking and behavior to improve their mood and functioning." Dialectical Behavior Therapy is "a type of counseling with a goal of helping patients with emotional regulation issues to identify and accept emotions and to better cope with stress using mindfulness, interpersonal, emotion regulation and distress tolerance skills." Ms. Giuliano wrote that both types of therapy "are evidence-based interventions that can be beneficial for folks with [the Defendant's] diagnoses and presenting issues."

[32] Each note submitted by Ms. Giuliano is practically identical in content. As a result, this Court will not discuss the notes individually.

[33] In the notes, Ms. Giuliano wrote that "[b]ased upon [the Defendant's] overall functioning on the unit and his prior experiences in court, he likely has a very good understanding of the court process, despite his lack of participation in Competency Education. He was reevaluated for competency . . . and was reportedly recommended as restored to competency." Giuliano Notes, July 2017-Nov. 2017. Ms. Giuliano also wrote, in the notes, that "[the Defendant] did not engage in self-injurious or physically assaultive behaviors," but that "he ha[d], however, become verbally abusive toward other patients and toward staff on several occasions." *Id.*

3

Defendant's Most Recent Complaints

On June 28, 2017, the Defendant filed a complaint about his "special 1:1," who fell asleep during her shift with him.[34] The Defendant filed a second complaint on June 28, 2017. In this complaint, the Defendant wrote that "[the] complaint [was] in regards to the invalidation that [he] experience[s] due to [his] complaint writing." Compl. 2, June 28, 2017.[35]

In addition, Ms. Giuliano wrote that "[t]here ha[d] been no significant change in [the Defendant's] clinical presentation . . . ." *Id.* According to Ms. Giuliano's notes, "[the Defendant's] thought process is organized and linear, and he has shown that he is oriented, highly aware of his surroundings, and articulate when motivated." *Id.* Moreover, Ms. Giuliano wrote that "[the Defendant] has continued to express the belief that staff treats him differently than other patients and are out to get him, which also appears to be a product of his personality style rather than symptoms of psychosis/paranoia." *Id.* Furthermore, Ms. Giuliano wrote that "[the Defendant] has often refused to engage with the Psychiatrist or other members of the treatment team unless he has a specific request or concern . . . and has made many complaints about staff members (which have been addressed by the appropriate hospital staff members)." *Id.* Finally, Ms. Giuliano wrote that "[the Defendant] has continued to show poor insight into his behaviors and actions, and instead often has become argumentative, stating [that] staff and other patients are responsible for his behaviors." *Id.*

[34] According to the Defendant, he awoke at approximately 2:30 a.m. to get a drink of water. After getting the drink of water, the Defendant "realized that [his] special 1:1 . . . was not with [him]." Compl., June 28, 2017. Defendant claimed that he looked at the camera monitor and "s[aw] that [his special 1:1] . . . was sleeping." *Id.* He attempted to get a nurse's attention but the tint on the window of the nurse's office "prevented [them] from clearly seeing one another." *Id.* The Defendant decided to "wait for the nurse to appear or for [his special 1:1] to realize that [he] was gone." *Id.* According to the Defendant, "20 minutes passed before [his special 1:1] stood and stretched; however she appeared to sit down and continue to sleep for another thirty minutes." *Id.* The Defendant concluded this complaint by writing that "this is common with [this particular special 1:1] every night." *Id.*

[35] According to the Defendant, "every time [he] write[s] a staff up [he is] criticized by Dr. Tactacan and [a] social worker." Compl. 2, June 28, 2017. The Defendant claimed that he is told that he is "a liar, a fabricator, a manipulator and that [he is] picking on staff." *Id.* The Defendant went on to write that he is "tired of be[ing] retaliated against for [his] complaints, in the form of being called a liar and manipulator and picking on people, because [he] want[s] a safer unit. Rosa tells Dr. Tactacan what to do and is constantly brainwashing and misleading him to also protect certain people." *Id.* The Defendant concluded this complaint by writing that the "[b]ottom line is if [his] complaints are valid, they need to be addressed regardless of why [the staff] believe [he is] making them." *Id.*

On October 17, 2017, the Defendant filed another complaint. This complaint focused on a "denial of prompt, efficient medical treatment." Compl., Oct. 17, 2017.[36] Defendant filed another complaint on October 20, 2017. The complaint focused on the use of shackles when the Defendant was transferred from one building to another.[37] The Defendant filed yet another

[36] The Defendant wrote that, on October 16, 2017, "[he] had informed the nurse . . . that [he] was experiencing excruciating pain on [his] right side in which [he] personally attributed this to the metal that [he had] previously (years ago) inserted into [his] abdomen." Compl., Oct. 17, 2017. According to the Defendant, "[he] . . . pleaded with the nurse . . . and Dr. Tactacan to stay upstairs and [he] was denied the safety of staying on the unit in the event that the metal 'MAY' have been disturbed while traveling up and down the stairs." *Id.* At 4:30 p.m. the PA arrived and "examined [the Defendant] [with] the understanding being that she'd order an X-Ray and after if necessary Bloodwork/Sonogram to determine the cause of the [his] pain." *Id.* The Defendant underwent an X-Ray on October 17, 2017, at 9:30 a.m., and, at 10:30 a.m., he saw the PA from the day before and asked her about the results of the X-Ray. The Defendant claimed that the nurse "determined [that] the metal had 'not' moved, therefore [they would] proceed to the blood test and further testing." *Id.* According to the Defendant, "there was nothing done." *Id.*

The Defendant went on to write that "the deliberate indifference on the part of [the PA] regarding her procrastination throughout [his] ordeal is totally unacceptable. No patient should be allowed to suffer because a doctor refuses to act in a timely manner." *Id.* In addition, the Defendant wrote that "even if a diagnosis could not have been made it is medically inexcusable for any doctor to dismiss their in-actions by stating 'Oh, I wouldn't have known even if I did examine you or order [a] test faster!'" *Id.* The Defendant concluded the complaint by writing that "[t]he bottom line is [he] feel[s] this is all done because [he is] not liked and made to suffer unfairly by having [his] needs prolonged and put aside. No patient should be discriminated against." *Id.*

[37] According to the Defendant, "[u]pon being admitted to Regan [he] was informed that [he] would be 'shackled' to the Bed for the duration of [his] stay." Compl., Oct. 20, 2017. The Defendant "verbalized [his] indifference to the Medical Doctor who brought [his] concerns to her administrators." *Id.* As a result, "as long as [the Defendant] had no issues, remained in the room and was not abusive, [he would] be permitted to remain un-shackled." *Id.* The Defendant claimed that it was brought to his attention that "Dr. T[actacan] had given a direct order to shackle [him] to the bed . . ." *Id.*

The Defendant then presented his "argument" as follows:

> "#1) Not every patient that comes to Regan . . . is shackled to a bed while being admitted to Regan. To clarify 'Transporting' a patient to Regan for an exam or visit to the clinic is different from 'Transferred' to Regan for treatment in my case. 'ISOLATION'!
> #2) Regan is 'technically' still ESH and cannot be confused with policies, practice and procedures regarding the transportation of a patient in general or to a private off grounds hospital clinic or examination.

complaint on October 28, 2017. This complaint focused on an incident between another patient and staff member.[38]

The Defendant filed his final complaint, which this Court has reviewed, on December 12, 2017. This complaint focused on a search conducted by the Rhode Island Department of Corrections, which led to $205 being confiscated from the Defendant. *See* Compl., Dec. 12,

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> #3) There is absolutely, unequivocally no 'policy' that affords Dr. Tactacan the authority to direct staff members to cuff or shackle any patient on state grounds for a prolonged period of time, especially while still on the grounds. In fact it's clear that a patient whom is at risk to himself the normal precaution is 1:1, 24 hour observation. As a secondary more imminent risk patient there are what is referred to as a four point restraint 'metal' is not a part of these restraints. And recently the restraint chair. (Nothing includes cuffs/shackles). So while I'm in Regan (non-abusive) my added precaution is 2 to 1, 24 hour observation! Seeing that these restraints are soft and used only temporary in increments of 2 to 4 hours, and the law clearly defines the use of cuffs and shackles on patients under such circumstances as barbaric and cruel and unusual punishment, under the worst case scenario a patient cannot be kept in such a manner . . . ." *Id.*

After presenting this argument, the Defendant questioned whether it was possible "for Doctor Tactacan to give his staff and nurses an 'ORDER' to shackle [him] to a bed on the grounds without incident, for days not hours . . . ." *Id.* According to the Defendant, "Dr. Tactacan commonly refers to [the Defendant's] 'Past' for every unprecedented order he makes to make [the Defendant's] life miserable." *Id.* The Defendant continued by writing that "this is all punitive measures devised and applied in a sadistic manner by Dr. Tactacan, acquiesenced [sic] by the other administrative figures of ESH whom has heard my complaints and have failed to effectively intervene and uphold the right[s] of patients like myself." *Id.* The Defendant concluded this complaint by writing that "[a]n immediate implementation of securing patients on grounds for treatment policy is definitely in dire need to clarify what's acceptable or not. Thank you for your time and attention. I patiently await your response." *Id.*

[38] According to the Defendant, the staff member, after having a brief altercation with a colleague, "literally grabbed [the patient] by the throat leaving scratch marks." Compl., Oct. 28, 2017. The Defendant explained the history between this patient and this staff member, which included other instances of verbal and physical abuse. *See id.* The Defendant concluded the complaint by writing that "[he was] personally getting involved . . . because [the patient] did absolutely nothing wrong. [The staff member] takes [the patient] every night because she can easily control him until finally he exploded tonight which was inevitable prompting this complaint and your immediate attention . . . ." *Id.*

2017. The Defendant claimed that he explained where the money came from to a social worker, one who he has had issues with in the past. *See id.* According to the Defendant, "she refused to accept [his] explanation and continues to pursue her own investigation based on her own imaginative conjecture" because "she has [a] personal vendetta against [him] . . . ." *Id.* The Defendant further wrote that this social worker "has illegally taken $60.00 out of [his] account to purchase a radio for another patient," and "she continues to gain Dr. Tactacan's full approval to violate rules, regulations and policies they themselves have implemented." *Id.* In addition, the Defendant wrote that "(2) other patients were found to be in possession of [money] . . . Without procrastination, no investigation, this money was immediately placed into the patients' accounts and nothing further on the issue." *Id.* The Defendant concluded this complaint by writing that "[the social worker] needs to stop acting like an investigator and if she feels an illegality exist [he would] encourage her to hand it over to the proper authorities for misconduct or treat [him] like she does other patients . . . ." *Id.*

This Court finds this information helpful because, as Dr. Zonana pointed out, they show that the Defendant "had some understanding of what evidence was, what kinds of things were needed to make his complaint -- [a] solid complaint that addresses the issue at hand and how it would be perceived and adjudicated." Hr'g Tr. 21, June 20, 2017. The out-of-court behavior of the Defendant demonstrates his intelligence, ability to pursue legal rights and willingness to follow-up and offer testimony.

VIII

Arguments of Counsel

The Defendant contends that—since this Court previously declared the Defendant incompetent to stand trial on July 3, 2014—the State must demonstrate that the Defendant is now

competent to stand trial based on clear and convincing evidence. *See* Def.'s Mem. 4 at n.6. This argument, however, is unsupported by case law. In addition, the Defendant argues that "[t]he caliber, quality, and contrast between the information utilized and relied upon by Dr. Zonana in performing [] three separate and distinct forensic psychiatric evaluations of [Defendant] are not only striking but in each case impact the reliability and accuracy of the final product." *Id.* at 5. Specifically, the Defendant argues that "in Dr. Zonana's 1st and 2nd Reports and the testimony given before this court at the 1st and 2nd Hearings regarding them, it is clear that [Dr. Zonana] relied upon the best, most extensive, and reliable information available in forming his opinions."[39] *Id.* Conversely, however, the Defendant argues that "in the forensic psychiatric evaluation memorialized in [Dr. Zonana's] 3rd Report and testimony at the 3rd Hearing, Dr. Zonana relied almost exclusively upon information contained in and compiled and provided by BHDDH records and personnel." *Id.* at 6. (Emphasis in original.) According to the Defendant, "[c]onsidering the reliability of these sources, most troubling is how Dr. Zonana himself categorized and described them and the information they afforded him on several prior occasions."[40] *Id.* at 6-7.

[39] The Defendant notes that Dr. Zonana, in his 1st Report, "alludes to forty one (41) separate pieces of information, not including interviews he conducted with [Defendant's] counsel and family members, as well as several members of BHDDH staff." Def.'s Mem. 5-6. The Defendant also notes that Dr. Zonana, in his 2nd Report, "relied upon Progress Notes containing information about daily contacts with a variety of staff members in addition to yet another extensive videotaped interview." *Id.* at 6.

[40] The Defendant lists four instances of Dr. Zonana's descriptions of BHDDH and its staff:

> "[1] BHDDH has an 'institutional conflict' when it comes to Mr. Komrowski, due to the length of his stay and the small number of beds available for competency restoration[;] [2] In contravention of 'best practices' in the area BHDDH keeps incomplete progress notes and records regarding Mr. Komrowski due to these 'institutional conflicts'[;] [3] BHDDH staff are 'frustrated' by Mr. Komrowski's non-cooperation which reinforces his feelings that

Moreover, Defendant argues that "in order to find [him] competent to stand trial" there are facts that this Court would have to find as true. *Id.* at 10. Those facts, according to the Defendant, are:

> "[1] Before, during, and after this court's determination that [the Defendant] is incompetent to stand trial, [he] was successful for several years in 'pulling the wool over the eyes' of at least three (3) experts, including Dr. Zonana[,] his lawyers[,] and this court, convincing all that he was incompetent to stand trial when he really was[;] and [2] Miraculously, [the Defendant] has been 'restored' to competency, this despite the fact that he has not received the treatment at the hands of BHDDH that at least three (3) experts, including Dr. Zonana, recommend as necessary and provide the best chance for [the Defendant] to truly be restored to competency." *Id.*

Finally, the Defendant argues that "conclu[ding] that [the Defendant] has suddenly and without explanation been 'restored' to competency . . . strains credulity [and] flies in the face of the prior forensic psychiatric evaluations of at least three (3) experts and the opinion of this court that were based upon the most complete and reliable information available."[41] *Id.* at 10-11.

The State, as expected, disagrees with Defendant's contentions. First, the State argues that, "[a]lthough [it does] not agree[] with defense counsel's contention that a higher standard of proof is required," it has satisfied even the higher standard of proof in proving that the Defendant is competent to stand trial. State's Mem. 8 at n.19. Second, the State argues that Dr. Zonana's "three years of observation of the [D]efendant . . . ha[ve] allowed Dr. Zonana to render a clearer, more accurate opinion of [the Defendant]." *Id.* at 5. Specifically, the State argues that the three years of observing the Defendant have presented Dr. Zonana with the ability to

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> the staff doesn't like him[;] [and 4] Again in contravention of 'best practices' and ethical guidelines in this area BHDDH maintains 'inadequate separation' between its forensic and treatment functions." Def.'s Mem. 7.

[41] The Defendant refers to forensic psychiatric evaluations performed by Dr. Myers, Dr. Penn, and Dr. Zonana (as memorialized in Dr. Zonana's 1st and 2nd Reports).

> "contrast [the Defendant's] manipulative behavior when in Court, or when confronted with any actions designed to move the case forward (such as taking his medications or meeting with personnel tasked with marking any improvement in his mental state) with [the Defendant's] controlling and rational behavior in the hospital (such as making personal decisions, taking photos secretly for posting on social media, or filing complaint after complaint for transgressions against him) . . . ." *Id.*

According to the State, having this ability "allows Dr. Zonana—and more importantly, this Court—to reasonably conclude that the [D]efendant is in fact capable of assisting his counsel in his defense *if he so chooses*." *Id.* at 5-6. (Emphasis in original.)

Third, the State argues that "[a]side from behavior that is attributable to the [D]efendant's mental illness, the sole basis for the contention that the [D]efendant was unable to assist his counsel in his defense was his behavior towards defense counsel." *Id.* at 6. According to the State, "the [D]efendant consciously engaged in the behavior voluntarily in order to postpone, or even completely avoid, the legal consequences of what he is accused." *Id.* The State further contends that "[t]here is no question that the defendant has the intelligence, the knowledge of the legal system and the personality to undertake such a deceptive course of action." *Id.*

Finally, the State argues that "if the Court is concerned about the Defendant's ability to rationally assess his situation, it need look no farther than the [D]efendant's statement to the Court on June 20, 2017." *Id.* The State avers that "[the] speech was certainly not an incoherent dissertation of abstract ideas that Dr. Myer's apparently relied upon in reaching his conclusion that the Defendant was incompetent to stand trial." *Id.* at 6-7. The State points out further that the Defendant's speech, which was made while Dr. Zonana was still on the stand, "only served to reinforce the Doctor's opinion" that the Defendant is competent to stand trial. *Id.* at 7.

IX

Burden of Proof

The Defendant contends that—since this Court previously declared the Defendant incompetent to stand trial on July 3, 2014—the State must demonstrate that the Defendant is now competent to stand trial by clear and convincing evidence. The Defendant's contention, however, is unsupported by statute or case law. Alternatively, the State contends that the Defendant is competent to stand trial and that a preponderance of the evidence standard, rather than a higher burden of proof, should be applied to the State's evidence.

Section 40.1-5.3-3(b) discusses the issue of burden of proof in competency cases, stating that:

> "A defendant is presumed competent. The burden of proving that the defendant is not competent shall be by a preponderance of the evidence, and the burden of going forward with the evidence shall be on the party raising the issue. The burden of going forward shall be on the state if the court raises the issue." Sec. 40.1-5.3-3(b) (emphasis added).

In accordance with a plain reading of that statute, the "preponderance of the evidence" burden of proof is applied when a party is attempting to rebut the presumption of competency to prove that a defendant is not competent to stand trial. *See id.* In cases where the Court raises the issue as part of a periodic review, the State has the burden of going forward and directing witnesses, but there is no explicit burden of proof stated under § 40.1-5.3-3(b).

Accordingly, this Court will determine whether the State has shown by a preponderance of the evidence whether the Defendant is competent to stand trial.[42] *See State v. Woods*, 348 P.3d 583 (Ka. 2015) (placing a preponderance of the evidence burden on the State when the court raises the issue of competency). Such a burden of proof will be applied since the

[42] Proof by a preponderance of the evidence means that a fact-finder must believe the facts asserted by the proponent are more probably true than false. *See Parker v. Parker*, 103 R.I. 435, 442, 238 A.2d 57, 61 (1968).

Defendant has previously been found incompetent, and the Court ordered the review as part of a required, periodic assessment. *See Smallwood v. Gibson*, 191 F.3d 1257 (10th Cir. 1999) (finding that a prior adjudication of incompetency gives rise to a rebuttable presumption of continued incompetency). However, the State will not be held to a higher burden of proof simply because this Court previously found the Defendant incompetent to stand trial in July of 2014. No such heightened burden of proof is required under § 40.1-5.3-3(b). *See Cooper v. Oklahoma*, 517 U.S. 348, 349 (1996).

X

Analysis

Determinations of a hearing justice regarding the competency of expert witnesses have traditionally been afforded great latitude. The Rhode Island Supreme Court stated that "[t]he test of qualification as an expert witness lies in the sound discretion of the trial justice, and his or her determinations in this regard will not be disturbed in the absence of clear error or abuse." *See Ferland Corp. v. Bouchard*, 626 A.2d 210, 215 (R.I. 1993) (citations omitted); *see also State v. Ortiz*, 448 A.2d 1241, 1243 (R.I. 1982).

Additionally, when a hearing justice sits as the fact-finder and evaluates the testimony of properly qualified experts, "[the] [hearing] justice retains the authority to determine the credibility of each expert's evidence . . . ." *See Conti v. R.I. Econ. Dev. Corp.*, 900 A.2d 1221, 1238 (R.I. 2006) (citations omitted). Just as a hearing justice may pick and choose among evidence presented by laypersons, he or she may do the same when reviewing evidence presented by experts. *See Harvard Pilgrim Health Care of New Eng., Inc., v. Gelati*, 865 A.2d 1028 (R.I. 2004). On review of a trial justice's determination that a defendant was competent to stand trial, the Supreme Court stated that "the trial justice was free to choose between expert

opinions so long as he [or she] did so not from mere whim or fleeting caprice but with reasonable justification." *See State v. Cook*, 104 R.I. 442, 449, 244 A.2d 833, 836 (1968).

A

Petition for Instruction: Competency to Make Medical Decisions

Under Rhode Island law, a competent adult has a constitutionally protected liberty interest in making decisions regarding his or her own medical treatment. *See* G.L. 1956 § 23-19-19.1(4); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (finding that the Fourteenth Amendment gives competent adults the right to refuse unwanted medical treatment); *Laurie v. Senecal*, 666 A.2d 806, 808 (R.I. 1995) (holding a competent adult may refuse medical treatment). The test for mental capacity to consent or to refuse medical treatment is whether the defendant has "sufficient mind to reasonably understand the condition, the nature and effect of the proposed treatment, [and the] attendant risks in pursuing the treatment, and not pursuing the treatment [.]" *Miller v. R.I. Hosp.*, 625 A.2d 778, 785-86 (R.I. 1993) (citations omitted).

In the present matter, Dr. Zonana met and spoke with the Defendant on February 5, 2015, in preparation for his written report in April of 2015. *See* Report at 3, Apr. 10, 2015. In the course of Dr. Zonana's interview with the Defendant, the Defendant was able to discuss his mental health and proposed medications with the doctor. *See id.* at 4. The Defendant stated that he was currently not taking any medications and that he had previously taken Seroquel, which resulted in side-effects of paranoia, depression, and an increased heart rate. *Id.* After that February 2015 meeting, Dr. Zonana concluded that psychotropic medications have, at times, been useful in the Defendant's treatment and management, but that it was difficult to assess the medication's effectiveness since the Defendant did not appear to take the medications regularly or to use them for a sufficient period of time. *Id.* at 10.

Additionally, Dr. Zonana spoke with Defendant on July 18, 2015 for over two hours to determine if the Defendant was able to make a "fully informed decision or provide informed consent" regarding proposed medication. *See* Report at 1, July 22, 2015. After reviewing progress notes dating from March 30, 2015 to July 17, 2015, and meeting with Defendant on July 18, 2015, Dr. Zonana stated that in his expert opinion, Defendant remains a danger to himself and others. *See id.* at 4. However, regarding his capacity to give informed consent, Dr. Zonana concluded that Defendant is able to communicate regarding treatment choices. *Id.* at 5.

Dr. Zonana wrote in his report that Defendant had the intelligence and mental capacity to understand relevant medical information regarding his treatment—specifically, comprehension of the risks, benefits, and side effects of the proposed medications. *See id.* Furthermore, Dr. Zonana concluded that Defendant was capable of acknowledging the symptoms of his psychiatric condition—including suspiciousness, mood liability, and self-destructive impulses. *Id.* This indicated to Dr. Zonana that the Defendant was able to appreciate his present situation, to discuss his mental illness, and to communicate regarding medications and side-effects. *Id.* at 5.

In a September 19, 2006 progress note, a nurse recounted her interactions with the Defendant that day. The nurse reported that when speaking with the Defendant regarding a proposed dose of Allegra for allergy symptoms, the Defendant responded with his general thoughts on prescribed medications stating, "If I don't feel like it, I won't take them . . . I know what's best for me." *Id.* The nurse went on to discuss the Defendant's sporadic refusals of allergy medication noting that, during the conversation, the Defendant was "disinterested in any education" on medications. *Id.*

At the competency hearing on June 20, 2017, the Defendant spoke regarding his decision not to take medication, stating, "I'm not going to sit here and talk to this guy who one minute he wants to help me and the next minute he wants to medicate me. I'm not stupid enough. How are they going to medicate me? How? They don't have a right to do that." Hr'g Tr. 118, June 20, 2017. Additionally, Defendant was able to articulate his choice to refuse medications, noting his concern for possible side-effects. *Id.* at 122-23. The Defendant stated at the hearing, "They use the medication to shut people up . . . One kid that's there right now, a young kid, 21 years old, because he was walking around saying 'turkey' all the time . . . and somebody else took it personal . . . They was putting him on restriction for it. Now they medicated the kid. He's drooling on himself." *Id.* at 123.

Finally, in his most recent report dated April 4, 2017, Dr. Zonana discussed the Defendant's continued refusal to take suggested medications. Dr. Zonana quoted a December 5, 2016 progress note in which Dr. Giuliano addressed the Defendant's intermittent refusal of medications, which he has now completely discontinued. *See* Report at 5, Apr. 4, 2017. Dr. Zonana ultimately concluded that he feels medication could be of benefit to the Defendant in terms of overall mood stabilization, but that the Defendant's records reveal he likely has "adequate behavioral control when he feels it is in his interests[,]" despite a refusal to medicate. *Id.* at 10. The April 4, 2017 report notes that Defendant is able to form and maintain relationships, track his own bank account, understand the character and consequences of the proceedings against him, and to work with his attorneys if he so chooses. *See* Report at 9-10, Apr. 4, 2017.

Based on the ample evidence before the Court, this Court finds by clear and convincing evidence that the Defendant is aware of the treatment options before him and that he is capable

of making his own decision regarding medications.[43] Furthermore, this Court finds that the Defendant has sufficient mind to reasonably understand his condition, the nature and effect of the suggested treatment plans, and the attendant risks or side-effects of proposed medications. *See Miller*, 625 A.2d at 785-86. Thus, this Court concludes, based on clear and convincing evidence, that the Defendant is competent to make his own medical decisions and that he has the mental capacity to provide informed consent to either accept or refuse medical treatment as he so chooses. *Id.*; *Cruzan*, 497 U.S. at 278.

B

Competency

As discussed supra, an individual is considered competent to stand trial under Rhode Island law if "he or she is able to understand the character and consequences of the proceedings against him or her and is able properly to assist in his or her defense." *See* § 40.1-5.3-3(a)(2) (emphasis added). Additionally, the Rhode Island Supreme Court discussed § 40.1-5.3-3(a)(2)'s definition of competency and promulgated a similar three-part test: 1) that the defendant understands the nature of the charges against him; 2) that the defendant appreciates the purpose and object of the trial proceedings; and 3) that defendant has the mental capacity to reasonably and rationally assist his counsel in preparing and presenting a defense.[44]

[43] No explicit burden of proof is specified under either Rhode Island statute or case law with respect to finding a defendant competent to make his or her own medical decisions. However, courts frequently apply either a preponderance of the evidence or a clear and convincing burden of proof to matters of mental health. *See* § 40.1-5.3-3(b) (requiring a preponderance of the evidence standard to party contesting competency to stand trial); § 40.1-5.3-4(h) (requiring clear and convincing evidence to commit those acquitted on ground of insanity); § 40.1-5-8(j) (requiring clear and convincing evidence for civil certification). Therefore, this Court will employ the higher of the two standards, requiring clear and convincing evidence of one's competency to make his or her own medical determinations.

[44] Although the three-part and two-part tests are facially different, the Supreme Court applies both tests harmoniously. *See Buxton*, 643 A.2d at 175.

The Rhode Island Supreme Court has recognized that, "[u]nfortunately, there is no hard-and-fast rule for determining whether a defendant possesses the necessary mental capacity to ensure an adequate protection of his or her basic constitutional rights." *See State v. Buxton*, 643 A.2d 172, 175 (R.I. 1994). The Supreme Court also acknowledged that "there are differing degrees and variations of mental illness, not all of which preclude criminal prosecution." *See id.* (citing *Cook*, 104 R.I. at 445, 244 A.2d at 835); *see also In re Tavares*, 885 A.2d 139, 150 (2005) (finding that whenever the issue of competency arises, it is the judge who makes a final determination about the defendant's condition).

1

Character and Consequences of Proceedings

With respect to the first prong under § 40.1-5.3-3(a)(2)—regarding the Defendant's ability to understand the character and the consequences of the proceedings against him—this Court finds Dr. Zonana's most recent report and testimony particularly reliable and persuasive. *See State v. Johnson*, 119 R.I. 749, 763, 383 A.2d 1012, 1020 (1978) (finding that court-appointed psychiatrist's qualification as expert is within sound discretion of the court and will not be disturbed upon review unless shown to be "palpably and grossly wrong"). In his April 4, 2017 report, Dr. Zonana concluded that—despite Defendant's diagnoses of Antisocial Personality Disorder and Borderline Personality Disorder—the Defendant is capable of understanding the character and consequences of the proceedings against him.[45] *See* Report at 10, Apr. 4, 2017.

[45] To clarify, Dr. Zonana's most recent report does not suggest that the Defendant has been restored to competency, but that the doctor now has sufficient evidence in which to base his opinion regarding the Defendant's ability to understand the character and consequences of the proceedings against him, in addition to his ability to assist counsel in his own defense.

This Court concurs with Dr. Zonana's finding that progress notes from ESH staff—in addition to the Defendant's own conversations with doctors and evaluators—demonstrate his understanding of the legal system and the various roles that parties play within that system. *See* Report at 4-5, Apr. 10, 2015. Such progress notes reveal that the Defendant understands the role of attorneys, the Court, and the various stages of proceedings. *Id.* This Court finds Dr. Zonana's conclusions in his April 10, 2015 report credible and persuasive. In said report, the doctor noted that at times, the Defendant can clearly acknowledge that he is being charged with murder, while at other times he refuses to answer or cooperate with staff. *See* Report at 11, Apr. 10, 2015.

Moreover, despite often refusing to meet with doctors or evaluators, the Defendant has, on occasion, discussed his understanding of the character and consequences of the proceedings against him. In previous interactions with Dr. Zonana, the Defendant has recognized that he is facing a homicide charge that could carry a penalty of twenty-five years. *See* Report at 9, Apr. 4, 2017. Although the Defendant has often discussed the character and consequences of the proceedings against him in a pessimistic and distrusting manner, such a discussion nonetheless demonstrates that the Defendant has a general understanding of these topics. *See* Report at 15, July 24, 2013; *see also U.S. v. Mitchell*, 706 F. Supp. 2d 1148 (D. Utah 2010) (finding defendant diagnosed with antisocial personality disorder competent to stand trial, despite his refusal to participate in judicial system that he perceived as corrupt).

In his own words, the Defendant discussed the nature of the proceedings held on June 20, 2017, acknowledging that the Court was engaged in the review of competency and a discussion of Defendant's mental health. *See* Hr'g Tr. 124, June 20, 2017. The Defendant stated, "You got me in this courtroom talking about whether or not I'm competent." *Id.* In a previous note from Ms. Giuliano, the Defendant is described as having been cooperative in group meetings, leading

staff to believe that he had been "feigning his lack of knowledge of the court system." Report at 6, Apr. 10, 2015. Ms. Giuliano wrote that the Defendant "has given clearly incorrect answers to even the most basic court concepts, and it is the assessment of the writer as the group leader as well as the treatment team this is likely to be purposeful." *Id.* Such behavior is consistent with previous doctors' reports regarding the Defendant's tendency to malinger or exaggerate his symptoms and unfamiliarity with the legal system.

Therefore, based on a preponderance of the evidence, this Court finds that the Defendant is able to understand the character and consequences of the proceedings against him. *See* § 40.1-5.3-3(a)(2); *see also State v. Owen*, 693 A.2d 670, 671-72 (R.I. 1997) (upholding trial justice's finding of competency under the first prong of § 40.1-5.3-3(a)(2) since the evidence supported defendant's understanding of the court proceedings). Based on the experts' reports and testimony presented, this Court concludes that the Defendant is able to appreciate the situation and its consequences, able to understand the various roles and stages of the proceedings, and able to understand the character of the proceedings against him with a reasonable degree of rational understanding. *See Peabody*, 611 A.2d at 831 n.2 (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)). Such an understanding evidences competency under Rhode Island law in accordance with the first prong of § 40.1-5.3-3(a)(2).

2

Properly Assist in Defense

This Court recognizes that the Defendant's well-documented Antisocial and Borderline Personality Disorders constitute very real and significant mental illnesses. As such, this Court is primarily focused on whether such conditions compromise the Defendant's ability to properly assist his attorneys in his own defense. Under the second prong of § 40.1-5.3-3(a)(2), this Court

must find that the Defendant is able to assist in his own defense in order to declare him competent to stand trial; such an ability to assist must be with a reasonable degree of rational understanding. *See Peabody*, 611 A.2d at 833.

In a phone interview with defense counsel on March 24, 2017, Dr. Zonana spoke with Attorney DiLauro who reported that he and Attorney Geiselman had seen the Defendant approximately once over the past one to two months. *See* Report at 8, Apr. 4, 2017. Defense counsel stated that the Defendant "appears worse to them, in the sense that he does not stay on topics for very long." *Id.* On March 27, 2017, in a phone conversation with Attorney Geiselman, counsel informed Dr. Zonana that he had seen the Defendant a month or six weeks before with Attorney DeLauro and they noted that for the first time, in their experience, things were going well; however, within about ten minutes, the Defendant was no longer able to maintain a coherent conversation. *Id.*

Notably, in his April 4, 2017 report, Dr. Zonana provided his medical opinion regarding the Defendant's ability to work with legal counsel. *See* Report at 10, Apr. 4, 2017. The doctor stated that:

> "Although suspicious of staff, he can still make alliances with certain staff members and get many of his needs fulfilled. He has no chronic fixed delusions and has the intelligence to comprehend his charges and the ability to work with his attorneys if he chooses to. He makes contact with his attorneys when he has legal questions and appears to be able to resolve those issues and then develop a plan of how to proceed." *Id.*

The doctor continued that the Defendant "has adequate behavioral control when he feels it is in his interests." *Id.*

Progress notes from ESH staff reveal that some of the Defendant's refusals to participate in Court proceedings are indeed voluntary and somewhat rational. A progress note dated May 8,

2017 discusses the Defendant's most recent refusal to attend Court. *See* Prog. Note, May 8, 2017. The note recounted that the Defendant, when told that he was called to Court that day, indicated that he was not mentally prepared. *Id.* The Defendant stated, "No one told me about this, I figured it would be on a Tuesday. I didn't have time to shower or shave, I'm not going." Tr. at 103, June 20, 2017. In this instance, the Defendant's refusal was both conscious and rational, considering that he was not given sufficient time to prepare, and the date was, in hindsight, a scheduling error and not typical of the Defendant's previous Court dates.

Dr. Zonana, in his review of medical records and progress notes, highlighted a few instances when the Defendant was able to work effectively with defense counsel. *Id.* at 4. A progress note, written by nurses and dated January 27, 2016, recounts the Defendant's allegations of abuse by hospital staff and his later refusal to speak with a psychiatrist regarding the allegations. *Id.* The Defendant informed staff that he had spoken with his attorney and he was advised not to speak with the psychiatrist about his grievance. *Id.* In an earlier report dated July 22, 2015, Dr. Zonana noted that, prior to commencing a videotaped evaluation, the Defendant stated that he had spoken with one of his attorneys and that he was willing to proceed. *See* Report at 1, July 22, 2015.

Additionally, Dr. Zonana testified on June 20, 2017 that, for most people, it is not a diagnosis of borderline personality disorder that makes them incompetent to stand trial. *See* Hr'g Tr. 36, June 20, 2017. Dr. Zonana testified that the Defendant's BPD is "ongoing in the background, but it doesn't mean he can't understand the proceeding or, if he chooses, has the

ability to work with the attorney[.] [C]ertainly on the grievances, on the other kinds of things where he's interested, he shows the ability to do those kinds of things."[46] *Id.* at 36.

At the June 20, 2017 hearing, Dr. Zonana testified that it can sometimes be difficult for medical professionals to parse out the difference between BPD symptoms or real paranoia from a patient's willing choice to not cooperate. *See* Hr'g Tr. 35-36, June 20, 2017. In a previous report, the doctor wrote that there is no bright line that allows medical professionals to specify when symptoms are real, or when it is "outright malingering." Report at 10, Apr. 10, 2015. Despite this difficulty, Dr. Zonana believed that the Defendant's tendencies to malinger and his past cooperation with counsel or staff suggested that the Defendant has "the ability to work with his attorneys if he chooses to." Report at 10, Apr. 4, 2017.

While this Court recognizes that Defendant's Antisocial Personality Disorder and Borderline Personality Disorder make it generally difficult for him to interact with others, this Court finds that the Defendant is capable of providing assistance to his attorneys, if he so chooses. As the Supreme Court in *Buxton* noted—although this Court understands defense counsels' concerns regarding their ability to work with the Defendant—defense counsels' prior report of a client's uncooperativeness is not determinative in and of itself. *See Buxton*, 643 A.2d at 176 (citing *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991)) (finding that court will not

[46] These instances referenced by Dr. Zonana—where the Defendant spoke with his attorneys before taking a specific course of action—illustrate the reasons why the multiple doctors who interacted with the Defendant all considered malingering as a diagnosis. Drs. Tactacan and Wall believed early on that the Defendant exhibited signs of malingering. Dr. Myers acknowledged that the Defendant had a tendency to lie and did mention that the Defendant could be malingering. Dr. Penn clearly stated that the Defendant met the criteria for malingering, and that more time observing the Defendant would provide a doctor with the ability to make a more accurate determination. Dr. Zonana had this additional time that Dr. Penn referred to. This additional time provided Dr. Zonana with the ability to compare the Defendant's in-court behavior with his out-of-court behavior, which led Dr. Zonana to his ultimate conclusion that the Defendant has the ability to assist his attorneys if he so chooses.

rest its decision on the assertions of trial counsel alone, but that the court shall analyze the experts' testimony and resulting reports in its determination)).

Dr. Zonana's most recent report found that the Defendant is able to properly assist in his defense, if he so chooses, and this Court agrees with that finding. *See Cook*, 104 R.I. at 447, 244 A.2d at 835-36. The various complaints submitted by the Defendant show that the Defendant "ha[s] some understanding of what evidence [is], what kinds of things [are] needed to make his complaint -- [a] solid complaint that addresses the issue at hand and how it would be perceived and adjudicated." Hr'g Tr. 21, June 20, 2017. As previously noted, the out-of-court behavior of the Defendant demonstrates his intelligence, ability to pursue legal rights, and willingness to follow-up and offer testimony. This out-of-court behavior illustrates that Defendant has the ability to properly assist his attorneys in his defense.

In the present matter, although the Defendant has thus far not assisted defense counsel in any meaningful way, he is competent and able to do so if he chooses. As the Supreme Court has stated: '"Lack of cooperation and the failure to heed counsel's advice . . . are certainly not to be equated with and do not establish legal incompetency. *The issue is the [d]efendant's ability to cooperate and not whether he [or she] is actually cooperating*."' *Buxton*, 643 A.2d at 176 (emphasis in original) (quoting *Commonwealth v. Banks*, 513 Pa. 318, 343, 521 A.2d 1, 13, *cert. denied*, 484 U.S. 873 (1987)). Therefore, this Court finds that the Defendant is able to properly assist in his own defense with a reasonable degree of rational understanding, if he chooses. *See Peabody*, 611 A.2d at 831 n.2. With regard to the overall issue of competency, this Court finds that the State has demonstrated by a preponderance of the evidence that the Defendant is competent to stand trial under Rhode Island law and in accordance with § 40.1-5.3-3(a)(2).

The State charged the Defendant with the most serious crime of murder, six and a half years ago. The State has the right and obligation to prosecute its case. The Defendant has the right to require the State to meet its burden and prove its case beyond a reasonable doubt. The Defendant clearly suffers from a significant mental illness. In this Court's opinion, the Defendant was always competent, but for his lack of cooperation with his attorneys. The question has always been whether the Defendant failed to cooperate with his attorneys because he chose not to or because his mental illness prevented him from cooperating.

Since 2014, when this Court originally found the Defendant to be incompetent, the Defendant's living situation at the hospital seems to have improved. With the additional information utilized by Dr. Zonana, which includes hospital records, doctors' records, and progress notes, it is clear to this Court that the Defendant is able to, and does communicate. He is able to discuss his grievances, follow-up on his complaints, talk to staff and counselors at the hospital and make decisions.

Based on his present status and this Court's finding that he is competent to stand trial, the case should go forward. The Court does recognize that the Defendant will remain a demanding and difficult client, even for the experienced and diligent public defenders now representing him.

C

Commitment to ESH

The Defendant is currently committed to the forensic unit at ESH, where he receives medical evaluation and treatment, in addition to one-on-one supervision. Despite the Court's finding of competency, discussed *supra*, this Court will now exercise its discretion and order that the Defendant remain at the forensic unit at ESH. *See In re Tavares*, 885 A.2d at 150 (vesting

trial justices with discretion to consider whether a defendant's commitment should continue despite a finding of competency).

In *In re Tavares*, the Rhode Island Supreme Court found that the trial court had discretion to order the defendant's continued commitment to a mental health facility—after a finding of competency—due to a valid concern that defendant would decompensate before or during trial if he was returned to the DOC. *Id.* at 149. That Court reviewed the issue, despite the fact that the issue had been rendered moot by a finding of insanity at the defendant's murder trial. *See id.* at 146-47. The Supreme Court emphasized that competency is a legal condition, and not a medical condition, and therefore, it is within the province of the Court's discretion. *Id.* at 150. Ultimately, that Court stated that:

> "While judges may rely heavily upon the advice of mental health professionals in assessing a defendant's competency, it is the judge, not the mental health professionals, who must make the final call and who bears the weight of the final decision on his or her shoulders. It is therefore reasonable for judges, charged with the responsibility of ensuring a defendant's competency, to make legal assessments about whether a defendant's competency is likely to continue during his or her trial." *Tavares*, 885 A.2d at 150 (emphasis in original).

In the case at hand, a return to the ACI would likely cause the Defendant to decompensate prior to, or during, trial. *See Tavares*, 885 A.2d at 149. As the Rhode Island Supreme Court has stated, "Competency, as defined by the forensic statute, requires something more than just a momentary condition . . . The requirement that a person be able . . . to assist in one's defense requires a mental condition that continues through all stages of a trial." *Id.* at 149-50. The Supreme Court has long-recognized a "judicial responsibility" to ensure that a defendant is competent throughout the trial, as evidenced by § 40.1-5.3-3(c), which vests the Court with

authority to raise issues of competency on its own motion "at any time during a criminal proceeding." *Id.* at 150.

In the present instance, numerous medical experts have reported that the Defendant's engagement in SIB has drastically decreased under the one-on-one supervision provided at ESH. *See* Hr'g Tr. 57, June 20, 2017. Many witnesses have commented that due to the Defendant's serious diagnoses of Antisocial Personality Disorder and Borderline Personality disorder, he is an unusually difficult patient to work with and to treat. This Court acknowledges, based on Dr. Zonana's discussions with staff at ESH, that the Defendant can be difficult to manage and that such a task can sometimes wear out the staff. However, the medical professionals at ESH are the most able to provide the Defendant with the care he needs, and the forensic unit at ESH is the only facility in the state which is capable of doing so. Therefore, this Court orders that the Defendant remain in the custody and care of the forensic unit at ESH, despite the Court's finding of competency to stand trial, until further order of the Court. *See Tavares*, 885 A.2d at 150.

Due to the extended travel of the case and its complexity and volatility, in the interests of judicial economy, the Court, at this time, intends to retain jurisdiction, subject to the Presiding Justice's assignments. Counsel may object and will be heard.

XI

Conclusion

Findings

After a review of all transcripts, exhibits, and various experts' reports—including Dr. Zonana's most recent report dated April 4, 2017 and his in-court testimony on June 20, 2017—this Court finds the following, based on a preponderance of the evidence:

1. Defendant is able to understand the character and consequences of the proceedings against him.

2. Defendant is able to properly assist in his defense.
3. Defendant is competent to stand trial on the charges against him.
4. At this time, the Court will retain jurisdiction.

This Court also finds by clear and convincing evidence:

1. Defendant is able to provide informed consent and is capable of making his own decisions regarding possible treatment options and proposed medications.

Accordingly, the Defendant is ordered to remain at ESH to ensure that he does not decompensate prior to, or during trial. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	In re: Matthew Komrowski
CASE NO:	P1-2011-3415ADV
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 6, 2018
JUSTICE/MAGISTRATE:	McGuirl, J.

ATTORNEYS:

For Plaintiff:	John Clayton Krollman, Esq.
For Defendant:	Collin M. Geiselman, Esq.