STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 27, 2019)

STATE OF RHODE ISLAND	:	
	:	
VS.	:	**P1/2015-3840AG**
	:	
ANDREW McLEAN	:	

DECISION

KRAUSE, J. Andrew McLean's current (now fourth) attorney and the chief forensic psychiatrist at Rhode Island Hospital say that McLean is not competent to stand trial. McLean's three prior defense attorneys and the director of forensic psychiatry at Eleanor Slater Hospital say that he is. So does this Court.

* * *

On November 24, 2015, a grand jury returned an indictment charging Andrew McLean and two others with first degree robbery of a pawnshop, assault with a dangerous weapon (shooting the pawnbroker in the head), conspiracy, and ancillary firearm offenses. On March 22, 2016, assisted by retained (and his first) attorney John M. Cicilline, McLean pled guilty to first degree robbery in exchange for a parolable life sentence and concurrent ten-year terms for other charges. He also received a mandatory consecutive, non-parable twenty-year term, which was suspended with probation, for discharging a firearm and injuring the shopkeeper during the robbery.[1]

[1] The entire episode was recorded by video cameras in the pawnshop, and it is not disputed that McLean shot the shopkeeper, who survived but sustained permanent brain injuries. The co-

Some months later, McLean learned from ACI inmates that Mr. Cicilline had mistakenly told him, prior to the guilty plea, that his initial parole eligibility date would be in ten years, instead of the twenty years which the Legislature had recently decreed for a life term on a first degree robbery charge. With the assistance an of an ACI inmate librarian, McLean filed a *pro se* postconviction relief (PCR) application based upon ineffective assistance of counsel and asked that his guilty plea be vacated. Since he could no longer afford counsel, the Court appointed Glenn Sparr, an experienced criminal defense attorney, to represent him in his pursuit of the PCR petition. At the March 24, 2017 PCR hearing, Mr. Cicilline readily acknowledged that he had erred, and the prosecutor also admitted that he, too, had been unaware that the ten-year parole eligibility had been extended to twenty years and that he had misinformed Mr. Cicilline of the ten-year period. PCR Hr'g. at 5, Mar. 24, 2017.

The Court, with Mr. Sparr's participation, thoroughly and carefully explained to McLean that if his PCR application were granted, all of the original counts in the indictment would be restored and that this Court would no longer engage in any binding plea negations. That colloquy included the following dialog, during which McLean was under oath:

> MR. SPARR: I have met with Andrew three times about this since I've been appointed, and I indicated to him that I was going to find merit in one of his contentions. I will also put on the record that in my opinion he is making this request of this Court knowing and voluntary [*sic*].
>
> I have discussed with him the ramifications of making this request to the Court, that he obviously doesn't have to do this. That if he wanted to, he could withdraw his request and his application and could leave well enough alone, so to speak, but I believe, based on my conversations with him, that this is what he does want to do. I know the Court will address him, but I do believe that he is making

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defendants' cases have been completed. On July 20, 2016, Leroy Dorsey pled guilty and was sentenced to serve thirty years of a fifty year sentence. Reginald Isom was convicted on all counts by a jury on June 12, 2018, and was ordered to serve a parolable life term, followed by ten additional non-parolable, consecutive years of incarceration.

this request, if this is what he still wants to do, knowing and voluntary [*sic*] and intelligently. ***

THE COURT: Mr. McLean, I want to be sure that I have your assent to the application that has been filed and the comments that Mr. Sparr has made, that you are in full agreement with his representations to the Court, that you are in full agreement with that which he seeks from the Court, namely, essentially to have your guilty pleas vacated, and that the matter would thus be back in the process as if you had never pled guilty to this case, the matter would simply be pending and it would be back to, if I can use the vernacular, square one.

Is that your desire, sir?

MR. MCLEAN: Yes.

Q. You understand that if this post-conviction petition for relief is granted, not only are you back to square one, but I would advise you that this Court will in no way in the future engage in any binding plea negotiations or discussions with counsel for you or counsel for the state, and only one of two things will happen, or possibly three things: The matter will go to trial on all counts, we understand that; or the state will dismiss the case. I don't know that that's very likely; or thirdly, you may later decide to change your mind and plead to some or all of the counts, but if the third option occurs, this Court will not bind itself in any way to any sentence that would be imposed under those circumstances.

Do you understand all three of those?

A. The last one –

Q. I can't hear you.

A. I said the last one I kind of don't understand. The third one.

Q. What part did you not understand, sir?

A. The third one.

Q. That is, if you went to trial or that if you plead guilty later on?

A. Yeah.

Q. If you plead guilty later on, I'm telling you after today, if I grant this petition, I'm not binding myself to any kind of sentence that will ever be imposed in this case. You're back to square one. I am not going to get involved and get involved in any binding plea agreements whatsoever.

A. Oh.

Q. Do you understand that?

A. Yes.

Q. Do you agree to that?

A. Yes.

Q. Okay. Very well. The state not voicing any objection to the particular circumstances present in this case, and the defendant—excuse me—the applicant being insistent on pursuing this application, knowing full well the consequences and ramifications, the petition is granted. Unless there's something else you want to add [addressing the prosecutor].

PROSECUTOR ROKLAN: *** I just want to make it clear, though, the dismissed counts in exchange for the plea come back.

THE COURT: Everything is back to square one. Every count in this indictment is right back in play.

Do you understand that?
MR. MCLEAN: Yes. PCR Hr'g. at 4; 8, Mar. 24, 2017.

Thereafter, the Court granted the PCR application and also installed Mr. Sparr as trial counsel. Within a few months, however, McLean began to disparage Mr. Sparr's efforts, filed a disciplinary complaint against him, and demanded to be separated from him. Because of the disciplinary complaint, Mr. Sparr also requested that he be allowed to withdraw. On September 6, 2017, Mr. Sparr was released from the case, and attorney Jay Canham, another veteran criminal defense attorney, was appointed to represent McLean, with this Court's admonition that no additional court-appointed attorneys would be furnished if McLean also failed to get along with Mr. Canham. McLean voiced his understanding and said he had no questions. Tr. 3-5, Sept. 6, 2017.

On January 8, 2018, Mr. Canham, at McLean's request, moved for a grant of bail and a bill of particulars. Both motions were denied. Mr. Canham, also at McLean's request, asked the Court to disqualify itself. The recusal motion was also denied. McLean again, notwithstanding this Court's prior admonitions, expressed dissatisfaction with Mr. Canham in a fashion similar to the criticism he had leveled at Mr. Sparr, and he asked that Mr. Canham also be relieved as counsel.

For all of his imprecations, aimed first at Mr. Sparr and then at Mr. Canham—and in each instance with trial looming closer—McLean nonetheless continued to lament his inability to proceed without the help of a lawyer. Accordingly, this Court, after extensive dialog with McLean, relented and appointed yet another attorney, Robert Kando (current counsel), to represent him. McLean has since complained about Mr. Kando, too; and he has filed a disciplinary complaint against him, as well. Tr. *passim*, Jan. 8, 2018.

McLean, at least to date, has not requested separation from Mr. Kando, who, to his credit, has maintained his willingness to represent him. He has, however, expressed a concern that McLean is not competent to proceed to trial because, according to Mr. Kando, McLean refuses to confer with him, engages in protracted monologues complaining about the court system, and is allegedly unable to assist in his defense. On March 15, 2018, at Mr. Kando's request, this Court ordered a competency evaluation pursuant to G.L. 1956 § 40.1-5.3-3(c).

Within a few days, McLean was interviewed at the Adult Correctional Institutions (ACI) by Dr. Barry W. Wall, Director of Forensic Psychiatry at Eleanor Slater Hospital (ESH), and his colleague Dr. Michael J. Byrne, a psychiatrist and a Fellow at ESH. They also administered what Dr. Wall referred to as a Competence Assessment Screening Tool for Persons with Mental Retardation (CAST-MR), a standardized psychological test which assists in determining competency to stand trial.[2] Thereafter, Drs. Wall and Byrne prepared a Competency Report as well as a Risk Assessment Evaluation. Neither document was intended to be discursive nor conclusive of McLean's mental condition; rather, the March 28, 2018 "competency" report was prepared in order "to trigger hospitalization so that we could do a more in-depth analysis of his intellectual capabilities. . . . It was a *provisional* assessment at the time. We wanted more testing which needed to occur in the hospital, and observation." Comp. Tr. at 105, 106, 107 (emphasis added). As Dr. Wall explained:

> "[T]he first [March 28, 2018] examination is just a snapshot without really getting to know him, and the second examination is more in-depth, after the hospital has had the opportunity examine him 24 hours a day, seven days a week, to get an

[2] Also known as the Competence Assessment for Standing Trial for Defendants with Mental Retardation. When initially created, the CAST-MR included the words "mental retardation," a term then used in clinical psychiatry. It has since been replaced in texts and publications with "intellectual disability" or "Intellectual Disability Disorder," but the CAST-MR has retained that original term.

> idea of what his capacities are, what his limitations are. And we've had a chance by that point to really observe him, to see if he has any symptoms of mental illness that might account for things or symptoms of drug use that might account for problems of intellectual disability. So it's more in-depth analysis because our entire team has had a chance to observe him round the clock for a long time in the hospital." Comp. Tr. at 121-22.

The Risk Assessment Evaluation was created principally to determine whether McLean was likely to endanger the ESH populace or himself. McLean's risk was deemed "high," *not* because of any psychiatric reason, but because he had a "history of assaultive behavior (his current charges aside) and antisocial personality traits[.] . . . The relationship, if any, between *possible* Intellectual Disability Disorder and risk will be assessed during his inpatient psychiatric hospitalization." Risk Assessment Evaluation at 5 (emphasis added).

At ESH, a neuropsychologist administered a battery of tests to assess McLean's mental functioning and to determine his IQ (69). He was further evaluated by Dr. Wall and Dr. Byrne on May 3, 2018; and, after further reviewing his progress, they presented their June 4, 2018 Competency Report, concluding that McLean was competent to stand trial.[3]

Dr. Wade C. Myers, Director of Forensic Psychiatry at Rhode Island Hospital, who was engaged as an expert by the defendant, met with McLean on August 7, 2018. Subsequently, in his October 12, 2018 report, Dr. Myers opined that McLean was not competent to go to trial.

At a four-day competency hearing during the week of January 28, 2019 (the Competency Hearing), Dr. Wall and Dr. Myers testified, as did all four of McLean's attorneys. Also presented were transcripts of prior court proceedings before this Court in which McLean participated, as

[3] For ease of reference, as was done at the Competency Hearing, the June 4, 2018 Wall/Byrne Competency Report will simply be cited as the "Wall Rep.2."

well as some of McLean's recorded (and transcribed) ACI telephone calls, and some other written materials.

The Competency Standard

The United States Supreme Court has long made clear that "[a] criminal defendant may not be tried unless he is competent . . . This requirement 'has a modest aim: It seeks to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel.'" *United States v. Kenney*, 756 F.3d 36, 43 (1st Cir. 2014) (quoting *Godinez v. Moran*, 509 U.S. 389, 402 (1993); *see also Dusky v. United States*, 362 U.S. 402 (1960) (other internal cites omitted). "The 'understanding' required [of the defendant] is of the essentials—for example, the charges, basic procedure, possible defenses—but not of legal sophistication." *United States v. Brown*, 669 F.3d 10, 17 (1st Cir. 2012) (quoting *Robidoux v. O'Brien*, 643 F.3d 334, 339 (1st Cir. 2011)).

Under Rhode Island law, McLean is statutorily presumed competent, and he shoulders the burden to prove, by a fair preponderance of the evidence, that he is incompetent. Sec. 40.1-5.3-3(3)(b). He must thus demonstrate that he is "unable to understand the character and consequences of the proceedings against him" and that he is also "unable properly to assist" in his defense. *Id*. at 3(a)(5). As stated in *State v. Owen*, 693 A.2d 670, 671 (R.I. 1997) (quoting *State v. Cook*, 104 R.I. 442, 447, 244 A.2d 833, 835-36 (1968)):

> "For a court to permit an accused to be prosecuted criminally, 'three things must be found: first, that defendant understands the nature of the charges brought against him; second, that defendant appreciates the purpose and object of the trial proceedings based thereon; and third, that defendant has the mental capacity to assist reasonably and rationally his counsel in preparing and putting forth a defense to the criminal charges of which he stands accused.'"

Competency decisions, like insanity trials, are typically balanced on a fulcrum of expert testimony. "Ideally, psychiatrists—much like experts in other fields—should provide grist for

the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities." *State v. Gardner*, 616 A.2d 1124, 1127 (R.I. 1992) (citations omitted.)

In the end, however, it is a legal not a medical decision, and the trial justice is free to choose between expert opinions so long as he does so "not from mere whim or fleeting caprice, but with reasonable justification." *Cook*, 104 R.I. at 449, 244 A.2d at 836. "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." *In re Tavares*, 885 A.2d 139, 150 (R.I. 2005).

* * *

The focus of the Competency Hearing was narrow, as both Dr. Myers and Dr. Wall agree that McLean understands the charges, the trial process, and the roles of the various parties (*i.e.*, the judge, the prosecutor, defense counsel, and the jury). Comp. Tr. at 10-11, 59-61, 123, 292. In addition, both Dr. Myers and Dr. Wall agree that McLean has a Mild Intellectual Disability Disorder and a full scale IQ of 69.[4] Thus, the only issue to be decided by the Court is whether McLean has the mental capacity to assist counsel.[5]

[4] Dr. Wall further explained that McLean's full scale IQ is "low in terms of standard deviations from the main," and that it is "about 69" but not necessarily fixed at that number. It could fluctuate by a few points lower or higher if he were tested at different times. Comp. Tr. at 116-19.

[5] The parties have waived oral argument and have submitted the matter to this Court for a decision based upon the record, the pleadings, and the exhibits.

Dr. Myers believes that McLean's low intellectual capacity, when coupled with what he perceives as McLean's Oppositional Defiant Disorder (ODD), renders McLean without the mental capacity to assist Mr. Kando. He believes, however, that McLean's present "inability to properly assist in his defense could be treated through a combination of brief, focused psychotherapy (geared at a basic, problem-solving level) in tandem with psychotropic medication to target his underlying ODD symptoms (*e.g.*, anger, oppositionality, resentfulness, suspicioness [*sic*])." Myers Rep. at 11.

Dr. Wall disagrees. He has concluded that McLean does not suffer from ODD and that irrespective of his Mild Intellectual Disability Disorder, McLean is nonetheless able to rationally confer with his lawyer. Wall Rep.2 at 9; Comp. Tr. at 261-62. All three of McLean's prior attorneys testified that they conferred with McLean about the case without his resistance and that he never exhibited any sign that he was incompetent to stand trial. Mr. Kando offered a different scenario, testifying that McLean has resisted his efforts to discuss the case, has engaged in protracted rebukes of the criminal judicial system and has sought advice from prison inmates rather than from him.

Dr. Wall

As noted above, there is no disagreement between Dr. Wall and Dr. Myers that McLean demonstrates Mild Intellectual Disability Disorder, a debility which, as explained by Dr. Wall, is a neurodevelopmental condition reflecting low cognitive/intellectual function. However, a person who has a *mild* intellectual disability (typically with an IQ which hovers in the 60's to about 70) can usually function in society. Notwithstanding a substantially low IQ, he or she is capable of learning, albeit at a slower rate. Comp. Tr. at 117-120. Dr. Myers similarly testified,

"Having an intellectual disability doesn't equate with a person being competent to stand trial or incompetent to stand trial." Comp. Tr. at 93.

In May and June of 2013, Dr. Wall and Dr. Byrne again met with McLean and reviewed all of the test results and his progress at ESH. They also reviewed other pertinent materials such as court transcripts, McLean's written materials, and previously recorded ACI telephone calls. By that time McLean had also decided to engage in weekly one-on-one competency restoration classes with a psychologist and had voluntarily enrolled in GED, social studies, and life skill classes. Additionally, according to ESH staff observations, he had displayed a daily ability to conduct himself independently without any symptoms of mental illness, and, importantly, without behavioral outbursts and with no need for medication. Wall Rep.2 at 3; Comp. Tr. at 110-111, 113.

Dr. Myers also testified that after eight to twelve classes, he expected that McLean's competency would likely have improved. Comp. Tr. at 81. He also noted that by the spring of 2018, McLean had "improved with one-on-one counseling. For example, his original CAST-MR score was 32.5 and his most recent was 38.5. So he now tests pretty much within the range of people recommended to courts as competent even though they have an intellectual disability." Comp. Tr. at 317; Wall Rep.2 at 9 ("While he still has a Mild Intellectual Disability Disorder . . . competency education has mitigated his previous deficits.").

Notably, Dr. Myers has acknowledged that McLean himself told him during his August 7, 2018 interview that "the competency classes have been helpful." Myers Rep. at 6. Mr. Kando, too, has accepted that "McLean has learned to adapt to his handicap." McLean Supp. Mem. at 9.

Moreover, Dr. Wall testified that those who, like McLean, have a mental disability but have experienced prior criminal prosecution, may actually better comprehend court proceedings

and the importance of conferring with counsel than those who, although they suffer no such disability, have never had to deal with criminal court matters:

> "It is important to assess a person's ability to stand trial based on what they know about what could happen in court. A person with a lot of experience in the criminal justice system who has a lower IQ may actually be competent or capable in some ways that a person with a higher IQ with no experience in the court might not have. So that's why the examination of competence to stand trial is separate from the examination of diagnosing an intellectual disorder. And that's why we look at both the CAST-MR, as well as the face-to-face interview to help us assess a person's ability to stand trial." Comp. Tr. at 120.

Dr. Myers

When Dr. Myers met with McLean at ESH on August 7, 2018, he had reviewed various source materials similar to those considered by Dr. Wall, as well as Dr. Wall's June 4, 2018 report. He also was cognizant of McLean's test results, including his IQ of 69 and low academic skills. Like Dr. Wall, he knew that McLean had not progressed beyond the ninth grade, had quit school with failing grades and had amassed a history of suspensions and abused drugs, and had demonstrated antisocial tendencies. He had also considered Mr. Kando's reported difficulties communicating with McLean, as well as Mr. Kando's concern that McLean was relying on "jailhouse notions" of other ACI inmates, particularly his incarcerated grandfather.[6]

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[6] All of the collateral materials considered by Dr. Myers and Dr. Wall are listed in their respective reports. Prior to preparing his evaluation, Dr. Myers had not been provided with several court transcripts spanning the past two years in which the Court engaged in dialog with McLean. He indicated at the Competency Hearing, however, that he later reviewed those transcripts and that they do not alter his opinion. Comp. Tr. at 83.

Significantly, however, Dr. Myers has conceded that he never reviewed McLean's ACI telephone calls, which are important and relevant to this Court's Decision. Comp. Tr. at 80. *See, e.g.*, n.9 at 26 *infra*.

As noted earlier, Dr. Myers, like Dr. Wall, also acknowledged at the competency hearing that McLean's mental disability, particularly his low IQ, does not, by itself, render McLean incompetent. His opinion that McLean is nonetheless incompetent is based on McLean's intellectual disability coupled with his belief that McLean also suffers from ODD. Myers Rep. at 11; Comp. Tr. at 93-94.

In making that ODD diagnosis, Dr. Myers relied upon the *Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association (5th ed. 2013) (the DSM-5), the principal authority for diagnosing mental disorders. Dr. Myers opined in his report and at the competency hearing:

> "[McLean] also meets the criteria for Oppositional Defiant Disorder, which is a pattern of an angry/irritable mood, argumentative/defiant behavior, and/or vindictiveness lasting at least six months, and that occurs during interactions with at least one other person who is not a sibling. Mr. McLean has the necessary four symptoms needed for this diagnosis, and they include being touchy or easily annoyed, being angry and resentful, arguing with authority figures, and refusing to comply with authority figures." Myers Rep. at 11, Comp. Tr. at 73-76.

The DSM-5 criteria underpinning a finding of ODD consist of the following factors and accompanying notes:

Oppositional Defiant Disorder

Diagnostic Criteria 313.81 (F91.3)

A. A pattern of angry/irritable mood, argumentative/defiant behavior, or vindictiveness lasting at least 6 months as evidenced by at least four symptoms from any of the following categories, and exhibited during interaction with at least one individual who is not a sibling.

Angry/Irritable Mood

1. *Often* loses temper.
2. Is *often* touchy or easily annoyed.
3. Is *often* angry or resentful.

Argumentative/Defiant Behavior

4. *Often* argues with authority figures or, for children and adolescents, with adults.

5. *Often* actively defies or refuses to comply with requests from authority figures or with rules.

6. *Often* deliberately annoys others.

7. *Often* blames others for his or her mistakes or misbehavior. (Emphasis added throughout to the word "often.")

Vindictiveness

8. Has been spiteful or vindictive at least twice within the past 6 months.

Note: The persistence and frequency of these behaviors should be used to distinguish a behavior that is within normal limits from a behavior that is symptomatic. For children younger than 5 years, the behavior should occur on most days for a period of at least 6 months unless otherwise noted (Criterion A8). For individuals 5 years or older, the behavior should occur at least once per week for at least 6 months, unless otherwise noted (Criterion A8). While these frequency criteria provide guidance on a minimal level of frequency to define symptoms, other factors should also be considered, such as whether the frequency and intensity of the behaviors are outside a range that is normative for the individual's developmental level, gender, and culture.

B. The disturbance in behavior is associated with distress in the individual or others in his or her immediate social context (*e.g.*, family, peer group, work colleagues), or it impacts negatively on social, educational, occupational, or other important areas of functioning.

C. The behaviors do not occur exclusively during the course of a psychotic, substance use, depressive, or bipolar disorder. Also, the criteria are not met for disruptive mood dysregulation disorder.

Significantly, the DSM-5 note following those first seven criteria also provides, among other things, that in a person of McLean's age "the behavior should occur at least once per week for at least 6 months" and that the behavioral disturbance "is associated with distress in the individual . . . or other important areas of functioning." DSM-5 at 462. In addition to the requisite presence of at least four of the eight predicate conditions, the DSM-5 also obliges the clinician to specify whether the ODD is "Mild" (symptoms confined to only one setting (*e.g.*,

home, school, work, with peers)); "Moderate" (some symptoms present in at least two settings); or "Severe" (some symptoms present on three or more settings). Nowhere in his report or in his testimony does Dr. Myers identify the level of ODD which he ascribes to McLean.

With respect to specifying one of those three levels, however, the DSM-5 states that "the *pervasiveness* of the symptoms is an indicator of the severity of the disorder." DSM-5 at 462-63. Among the "Diagnostic Features" identified in the DSM-5 for ODD, the manual emphatically states: "The *essential* feature of oppositional defiant disorder is a *frequent and persistent pattern* of angry/irritable mood, argumentative/defiant behavior, or vindictiveness. . . . Given that the pervasiveness of symptoms is an indicator of the severity of the disorder, it is *critical* that the individual's behavior be assessed across *multiple settings and relationships* [and] they must be observed during interactions with persons other than siblings." *Id*. at 463. First among the "key considerations" is that "the diagnostic threshold of four or more symptoms within the *preceding 6 months must be met*." *Id*. (emphasis added throughout as noted).

The record before this Court does not, in this Court's view, reflect sufficient credible evidence which, as prescribed by the DSM-5 ODD criteria 1 through 7, demonstrates that McLean *often* engages in such behavior across multiple settings and relationships. Indeed, nowhere in the record is there any report of a disciplinary infraction or a suggestion of misconduct or disruptive behavior by McLean either at the ACI or ESH, and through the January 2019 Competency Hearing, a total of three years and three months. Indeed, Dr. Wall writes:

> "Mr. McLean has appeared comfortable and has posed no management problem [at ESH]. He has no symptoms of mental illness. He requires no treatment with medications. He has not displayed any behavioral outbursts or required restraints. He follows directions. He is sociable. He performs his activities of daily living independently with minimal prompting." Wall Rep.2 at 3.

When confronted with those observations, which this Court frankly finds probative and supportive of McLean's competency, Dr. Myers skeptically discounts them. While acknowledging, as he must, that McLean's behavior has been appropriate, he nonetheless depreciates it, suggesting that although McLean didn't have any outbursts or require restraints, "that's a pretty high bar contained in the meaning of that sentence." Comp. Tr. at 79. That assertion is more than puzzling.

No such "high bar" is chronicled by Dr. Wall. He merely reports that McLean's conduct at ESH reflected not a single outburst, much less one which would necessitate restraints. That account, on its face, presents neither a psychiatric nor a medical finding. It is basically an unvarnished and unembellished observation of McLean's behavior. Considered in the context of that quoted paragraph, Dr. Wall simply relates that while at ESH, McLean's deportment has been commendable, without any misbehavior and, indeed, with no sign of mental illness and without any need for medication. Accordingly, this Court declines to accept Dr. Myers' proffer that this passage somehow sets a "high bar" of comportment. It does not.

Mr. Kando, too, attempts to minimize McLean's commendable deportment and the absence of ODD symptoms at ESH because that facility is "conducive to one being comfortable and not being put into positions of having to go into a defiant or oppositional type of response to the people you're being supervised by and to the people in authority or . . . provoke[d into] any confrontations with the residents." Comp. Tr. at 351; McLean Supp. Mem. at 6. This disbranched argument fails to take into account that while at the ACI for two and a half years, three times longer than his ten-month stay at ESH, McLean displayed no behavioral problems in a truculent environment generally consisting of innumerable angry and argumentative prisoners, supervised by stressed correctional officers who recurrently become enmeshed in verbal as well as physical

confrontations. Yet McLean, who had few ACI confidants (principally his grandfather, a "cousin," and a couple of prison librarians), and without the generous ESH friendly flow of visitors, apparently still maintains a desire to return to the ACI, and, indeed, to one of the most undesirable sections of the prison, telling Dr. Wall: "Things are 'OK' here, but [I] would prefer to be at [ACI] Maximum Security." Wall Rep.2 at 3.

According to Mr. Kando, McLean becomes highly animated about the legal system, particularly the prospects of a lengthy prison sentence and the lack of a favorable plea bargain. However, apart from McLean's isolated "tirade" about an allegedly unfair legal system, Dr. Myers recounts a relaxed session with McLean. His report is replete with pleasant modifiers which include McLean's satisfactory attention and concentration during the interview, his cooperative and respectful attitude, a full range of appropriate facial expressions, and even flashes of humor. Dr. Myers also reported that McLean was soft-spoken and that his answers to questions were logical and relevant, albeit simplistically expressed and without any delusional thinking. Myers Rep. at 8-10. McLean displayed similar decorum with Dr. Wall: "He remained seated calmly throughout the entire interview. He appeared forthcoming and engaged as well." Wall Rep.2 at 7.

Dr. Myers assigns "vindictive" behavior to the two disciplinary complaints which McLean filed against Mr. Sparr and Mr. Kando. The Court is not entirely inclined to accept that conclusion. If McLean were truly "vindictive," one would think he would have filed complaints against all of his lawyers, as his criticism of each of them is similar. Even if there were some dependable evidence that McLean's conduct somehow reflects vindictiveness, any such evocation falls well short of the DSM-5's yardstick, which requires "frequent and persistent pattern[s]" of other criteria to certify ODD. More applicable, in this Court's view, is the

Diagnostic Features section of the DSM-5 which provides: "The symptoms of oppositional defiant disorder can occur to some degree in individuals *without* this disorder." *Id*. at 463 (emphasis added).

In any event, the more persuasive evidence is that those two written complaints are but a small part of McLean's general suspicion of what he perceives as an unfair criminal justice system, consisting of misguided defense attorneys, judges, and prosecutors, all of which spawn his objurgations and extended remonstrations with Mr. Kando. Put plainly, those subjects simply set him off. They are, as Dr. Myers testified, the "emotional fuel" which ignites him. Comp. Tr. at 88-91.

Whatever may be the precipitating factor(s) of McLean's behavior, Dr. Wall is convinced that it is not ODD and that it is not born of a psychiatric or mental health reason. Instead, in his opinion, it relates to McLean's "general personality structure," *i.e*., his "antisocial traits." Comp. Tr. at 123-24, 262, 288, 294, 300-301, 310; Risk Assessment Evaluation at 5. It also reflects prevarication by McLean, which Dr. Wall discerned in prior court proceedings. Comp. Tr. at 297-98.

When asked to describe the basis of his disagreement with Dr. Myers' ODD diagnosis, Dr. Wall explained:

> "Again, we are looking at an ongoing pattern of argumentative or defiant, angry or vindictive behavior. Usually you would see this develop in a person who's at about age six, seven, eight years old, and then you would see it with some regularity over the course of one's lifetime. We didn't really get any of that in terms of taking [McLean's] history. We didn't have any reports of him being oppositional or defiant or disruptive when he was at the Adult Correctional Institutions. We've not had the experience of him being that way both with our [ESH] staff, with his peers in our hospital, or with any of his visitors." Comp. Tr. at 261.

Having considered all of the evidence, this Court finds, unhesitatingly, that there is insufficient basis in the record to support the conclusion that McLean suffers from ODD. The Court finds, instead, that there is persuasive and compelling evidence to the contrary, and it accepts Dr. Wall's determination that McLean does not suffer from that debility.

McLean's Ability to Assist Counsel - His Attorneys (Real and Mythical)

Having found that McLean is not afflicted with ODD, the Court remains cognizant that McLean does function at a lower than normal intelligence level which reflects Mild Intellectual Disability Disorder. Both experts agree, however, that McLean's low intelligence level, by itself, does not equate with incompetency to stand trial, and courts have also addressed and accepted that notion. *E.g.*, *Commonwealth v. Chatman*, 473 Mass. 840, 851, 46 N.E.3d 1010, 1021 (Mass. 2016) ("One can both have a mental disease or deficiency and still be competent to stand trial; the two are not mutually exclusive. The same is true about a defendant with a low intelligence quotient.") (citation omitted); *Kenney*, 756 F.3d at 44 ("A defendant may have a serious mental illness while still being able to understand the proceedings and rationally assist his counsel."); *United States v. Bernard*, 708 F.3d 583, 593 (4th Cir. 2013) (quoting *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000) (observing that '"neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial'") (citations omitted)); *United States v. Turner*, 644 F.3d 713, 725 (8th Cir. 2011) (same); *Dolchok v. State*, 639 P.2d 277, 293 n.34 (Alaska 1982) (quoting *Schade v. State*, 512 P.2d 907, 914 (Alaska 1973) ('"Numerous persons are subjected to criminal prosecution, and properly so, even though they are of relatively low intelligence or are suffering from some significant emotional or physical impairment.'") (citations omitted)).

Even if McLean needs to have some things explained to him in simpler terms, he is, as Dr. Wall observes, "street smart," and, as earlier noted, because of his prior criminal history and exposure to the court process, McLean may even better understand his circumstances than those who, without a mental disability, have never dealt with such criminal court issues. *Supra* at 10-11; Wall Rep.2 at 7. Further, explaining matters to McLean in simple language does not have a tendency to make it more probable that he is incompetent to stand trial. Simple explanations may actually make it *more probable* that McLean is competent, because it demonstrates that he will better comprehend what his attorney tells him. *See State v. Hamlin*, 156 Idaho 307, 312, 324 P.3d 1006, 1011 (Idaho 2014) (finding defendant with IQ of 62 competent, notwithstanding legitimate concerns that the defendant's disability might make certain portions of the trial process more difficult).

Given the foregoing authorities, and in view of Dr. Wall and Dr. Myers' agreement that Mild Intellectual Disorder does not by itself preclude competency to stand trial, one might well propose that further examination of the competency issue is unnecessary. Although that suggestion may be superficially appealing, Mr. Kando's concerns that McLean cannot properly assist him should be more fully addressed.

It has been said that a defendant's attorney may be in a unique position to address the competency of his client, *Brown*, 669 F.3d at 17. Counsel's opinion, however, "certainly is not determinative." *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991). The Rhode Island Supreme Court has adopted that latter notion and stated in *State v. Buxton*, 643 A.2d 172, 176 (R.I. 1994:

> "Although we understand defense counsel's concerns and uneasiness with the situation, defense counsel's claims of a client's competence are not determinative '[A] defendant's bizarre actions or statements, or counsel's statement that the defendant is incapable of cooperating in his [or her] own defense, or even psychiatric testimony *need not alone* raise sufficient doubt [of his or her

> competence].' Consequently we cannot rest our decision on the assertions of trial counsel alone." (Emphasis in original) (citing *Hernandez*, 930 F.2d at 718).

Our Supreme Court and other courts have emphasized that, in determining competency, a defendant's relationship with his lawyer must be tested by the client's *ability* to assist his lawyer, not his *willingness* to do so:

> '"Lack of cooperation and the failure to heed counsel's advice and/or the failure to agree with counsel's strategy 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 . . .* [*T]here is a factual and a legal distinction between inability to assist and being unwilling to assist*.'" *Buxton*, 643 A.2d at 176-77 (quoting *Commonwealth v. Banks*, 513 Pa. 318, 343, 521 A.2d 1, 13, *cert. denied*, 484 U.S. 873 (1987) (emphasis in the original).

"A defendant who has it 'within his voluntary control to . . . cooperat[e],' is not incompetent merely because he refuses to cooperate." *United States v. Simpson*, 645 F.3d 300, 306 (5th Cir. 2011) (citation omitted); *Ferry v. State*, 453 N.E.2d 207, 212 (Ind. 1983):

> "[Defendant's] attorney stated to the trial judge . . . that he had difficulty in communicating with [defendant] and that this made it difficult to prepare for trial. The test of competency to stand trial, however, is whether the defendant has the *ability* to assist in the preparation of his defense (and also to understand the nature of the proceedings) . . . This is quite different than whether the defendant is *willing* to assist in the preparation of his defense." *Id.* (citations omitted; emphasis added).

McLean has had four attorneys, and he still seeks one who will do his bidding. Except for Mr. Kando, McLean's other three lawyers all testified that McLean was appropriately responsive in their conversations; that he was typically calm, save for his complaints, especially at length to Mr. Kando, about a lack of an acceptable plea bargain and his concern over a lengthy jail sentence (commonplace apprehensions in every criminal defendant's circumstances).[7] All of his

[7] Lawyers who represent a defendant may permissibly testify as to their observations of a client's competency without violating the attorney-client privilege. *See Clanton v. United States*, 488

past attorneys were aware that McLean had significant limited reading and writing capability, but they testified that he was able to focus his thoughts and conversation on the case, and he even offered a theory of self-defense to Mr. Canham, which he also repeated to Mr. Kando and to Dr. Myers and Dr. Wall.

Although his exchanges and diatribes with Mr. Kando were often been flavored by news reports and by ACI inmates from whom he sought advice, McLean, consistently and with appropriate focus, conferred with all of his past attorneys about the case. All of them are seasoned criminal defense attorneys who testified that they are always alert for any signs of incompetency in their clients. They said that despite McLean's limited academic abilities, he displayed absolutely no trace of incompetency and, had they observed such a signal, they would have unhesitatingly brought it to the Court's attention and sought a competency evaluation. Below are some of the relevant comments offered by those attorneys (all page references are to the Competency Hearing transcript):

John M. Cicilline, Esq.

> Q. Did you ask Mr. McLean any questions?
> A. We talked about his case. We talked about the potential defenses. Talked about the problems with the video. What it showed. He was charged with robbery. We discussed all that. Tr. 183
> Q. Was Mr. McLean responsive to all of the questions you asked him?
> A. Yeah. My memory is yes. Tr. 183
> Q. You mentioned that you discussed any possible defenses with the case. Did it seem to you like Mr. McLean understood what you were telling him?
> A. Yes. Tr. 184.
> Q. Was he logical in his reasoning and in his conversation with you?
> A. He knew he didn't like the numbers that were being given to him. You know, based on the evidence we had, I thought he was being very logical, that the disposition was appropriate and even though he didn't like it, I didn't see that we had much choice. Tr. 184.

F.2d 1069 (5th Cir. 1974); *People v. Kinder*, 126 A.D.2d 60, 512 N.Y.S.2d 597 (N.Y. App. Div. 1987).

Q. Would you have let Mr. McLean plead guilty if you thought he was not competent?
A. I could not do that, no. I did not do that. Tr. 187.
Q. BY THE COURT: And at any time during your representation of Andrew McLean from January 2016 to March of 2016, did you have any belief that he was not competent to stand trial?
A. No. Tr. 190.

Glenn Sparr, Esq.

Q. Did he answer all of your questions?
A. Yes. Tr. 214.
Q. Did Mr. McLean cooperate with your inquiry during the pendency of that post-conviction relief application?
A. Yes. Very much so.
Q. Did you discuss with Mr. McLean what would happen if he vacated his plea?
A. I did.
Q. And based on your conversations with him, did you believe that he understood what his options were?
A. I did. Tr. 214.
Q. Did he review the evidence and the discovery with you?
A. Yes.
Q. Was he responsive to your questions?
A. Yes.
Q. Did he supply you with the facts of the case as he saw them?
A. Yes, he did. Tr. 222.
Q. Did you discuss with him any defenses to the case?
A. Yes.
Q. Did you discuss with him any motions you could file?
A. Yes.
Q. Do you believe that he understood everything you were saying to him?
A. I believed so, yes.
Q. Did he assist you in discussing any possible defenses?
A. He did.
Q. Was he logical in his reasoning and his conversation?
A. Appeared to be to me. ***
Q. At any time during your representation from January 2017 to September 2017, did you have any belief that Mr. McLean was not competent to stand trial?
A. I did not, no. Tr. 222-223.
Q. BY THE COURT: The fact that Mr. McLean was unable to read or write very well, if at all, did that in any way inhibit your ability to converse with him and make yourself understood to him and his ability to make himself understood to you?
A. Not at all. ***
Q. If you had received any response, any indication whatsoever from Mr. McLean that he did not understand what you were telling him, would you have taken great

pains to make sure that, as best you could, he understood and would not leave the subject until you were satisfied that he did?
A. Absolutely. There was never a time during my conversations with him that gave me cause to walk away from the conversation that what I was discussing with him was not understood. Tr. 228-29.

Jay Canham, Esq.

Q. And did it seem like Mr. McLean understood what you were telling him about the case?
A. Absolutely. By the time he had looked at the video with me, I had been representing him for over a couple of months. We had discussed the facts many times and I believe [] he said he had already seen the video, but I wanted to make sure that he and I could discuss it, analyze it, and look at it. So it was a very [] smooth process.
Q. And after watching the video, was he able to discuss the facts of this case?
A. Absolutely. Tr. 236.
Q. Although he wasn't the most educated client you had, were you concerned that he was not competent to stand trial?
A. No. No. I never reached the opinion that he was not competent to stand trial.
Q. And did Mr. McLean answer all the questions you had of him?
A. Yes. As a matter of fact, not only did he answer my questions, he would raise topics, issues and so, yes, he answered my questions and he would ask me a lot of questions. Tr. 237.
Q. And you mentioned back and forth and discussing of defenses or possible defenses. Did Mr. McLean understand the possible defenses he could raise?
A. Yes. He [] had a family member that was at the prison. He also had a number of friends that were helping him go to the law library. So when you bring up the issue of defenses, yes, I would talk about defenses, but he would also initiate the various defenses to include the differences between robbery and larceny, the abandonment, self-defense. These were items not only I talked about, but he also raised. And so it was a back and forth between the two of us. Tr. 238-39.
Q. And during your 12 meetings with Mr. McLean and your interactions here at the courthouse, at any time did you have a belief that Mr. McLean was not competent to stand trial? ***
A. During my representation, I felt that Mr. McLean was always competent. Tr. 245-46.

Mr. Kando dismisses, as inconsequential, the opinions of McLean's three prior attorneys because, he says, (1) they did not have sufficient interaction with McLean, and (2) they do not account for what he professes is McLean's current inability to confer with him. The Court disagrees. McLean's intellectual disorder did not suddenly manifest itself in 2018, after laying

dormant in 2016 and 2017. As Dr. Wall testified, that disability is life-long and manifested itself years ago. Dr. Meyers also rejected the notion that McLean's mental restrictions were of recent vintage. Comp. Tr. at 92-93.

Further, a review of the testimony of prior counsel discloses that they spent ample time discussing the case with McLean. Notably, Mr. Canham, McLean's third attorney, testified that he met with McLean as many as a dozen times and that McLean himself raised various theories of defense, including the distinction between robbery and larceny, a defense of abandonment, and self-defense. Comp. Tr. at 238-39. While two of their discussions became heated over potential sentencing, those instances were short lived. Their conferences thereafter continued cordially, and by December "we were preparing for trial and they were collegiate meetings." Comp. Tr. at 250. Indeed, Mr. Canham was taken aback when, with the trial only a few weeks away, McLean demanded his dismissal: "Through all December and up until the 8th [of January], he and I had been working together preparing for trial and at that point I thought our relationship was very good. So I was somewhat surprised when he said he wanted to fire me." Comp. Tr. at 240.

It is this Court's unreserved view that McLean's strained relationship with Mr. Kando and what led him to report to Dr. Myers that he suspected McLean was relying on ACI inmates and "jailhouse notions" instead of his advisements, does not at all result from McLean's *inability* to assist counsel in the defense of the case; rather, it stems from McLean's volitional *unwillingness* to confer with him. *See*, *Buxton, Simpson,* and *Ferry; supra* at 19-20; s*ee Brown*, 669 F.3d at 18 (noting that defendant's overall distrust of the legal system and suspicion of the judiciary, as well as his relationship with his attorney which was not "genial," did not render him incompetent).

McLean, as Dr. Myers acknowledges, simply prefers to seek advice elsewhere, namely from other prisoners, "as opposed to lawyers who tell him things he doesn't like to hear," and "he was giving more credence to some of the jailhouse attorneys, that is, inmates and family members who were in prison, than his own attorneys." Comp. Tr. at 13; 372. Dr. Myers concluded that McLean "value[s] legal guidance from inmates over his own attorney," and Dr. Wall testified that "[h]e asks for help [in the ACI library] and he seems to avail himself of it." Myers Rep. at 11; Comp. Tr. at 280-81.[8]

McLean's distrust of the legal system, his disdain for counsel (both past and current), and his reliance on prison confidants have not, however, deterred him from making considered comparisons about his case, or from articulating theories of defense to the charges. Comp. Tr. at 90-92. As Dr. Wall wrote at page 9 of his report: "Although Mr. McLean has a history of disagreeing with his lawyers, he demonstrates an ability to give information that could help his defense." Showcasing that ability, he explained to Dr. Myers: "I will do my time for shooting the man in the head but he shot me first and I should not have to do [a] life sentence." . . . I was trying to sell him a weapon, not rob the place. . . . I had my hands up when he shot me." Myers Rep. at 5-6; Comp. Tr. at 61. In further explication of that self-defense theory, Dr. Myers testified:

> THE COURT: And as I recall from your report, and I can't find the page precisely at the moment, McLean said that he had gone in there, at least what he told you, to sell a firearm and that he had been accosted, is that correct?
> DR. MYERS: Yes. In so many words, yes.
> Q. And I take it that what he was trying to explain to you was that he had gone in there with a rather benign and innocent purpose and ended up defending himself.

[8] Not only has McLean spurned the advice of counsel in exchange for that of "jailhouse lawyers," he is currently seeking, despite his reading disability, law books at ESH because "[h]e wants to work on his case, relative to the issue of sentencing and plea bargaining." Comp. Tr. at 280.

A. Yes.
Q. So his claim to you was self-defense, in so many words.
A. He accepted responsibility for shooting the man, but he said, He shot me first. So he's not denying that he did shoot him.
Q. And I take it that he was saying that to you in an effort to explain the reaction that he felt was justified.
A. In a sense, yes. Comp. Tr. at 94-95.[9]

Similarly, Dr. Wall writes: "Mr. McLean wants to have a jury trial so that they can hear that 'I was not there to rob anybody…went to sell a weapon . . . I surrendered . . . gave up . . . I dropped my weapon because I wasn't there to hurt anybody.'" Wall Rep.2 at 8. Indeed, Dr. Myers himself has concluded that McLean "has the capacity to testify relevantly and is willing to do it . . . Mr. McLean is open to the idea of testifying and he wants his side of the story to be communicated clearly. He acknowledged that it may or may not help if he testified but he wants the opportunity to air his side." Myers Rep. at 6.

And, reprising the "I-was-only-a-customer" theme, McLean explained to Dr. Wall that "his attorneys should focus on using the videotape to demonstrate that he entered the pawnshop as a customer intending to sell a weapon" and that his defense attorney "should argue that he was locked in the store (by codefendants) even though he was merely a customer. He thinks this approach could help with plea negotiations." Wall Rep.2 at 8.

These are coherent, cognitive musings, and they fit precisely within Dr. Wall's conclusion that "[a]lthough Mr. McLean has a history of disagreeing with his lawyers, he

[9] McLean's ability to consider legal issues extends well beyond his criminal case. For example, during an ACI telephone call, McLean explained to his girlfriend, with obvious awareness of the statute of limitations, that she could not timely sue for injuries in a traffic accident after three years had elapsed: "[Y]ou only got three years to sue, though. Any . . . civil action, you got up to three years. So this October's the, the deadline." ACI telephone call, Mar. 21, 2018; Tr. at 3. *See United States v. Shenghur*, 734 F. Supp. 2d 552, 555 (S.D.N.Y. 2010) (noting that defendant's taped phone calls reflected a rational understanding of his circumstances and rejecting a claim of incompetency).

demonstrates an *ability to give information that could help in his defense*." Wall Rep.2 at 9 (emphasis added). He has simply, albeit ill-advisedly and imprudently, chosen not to. That may make McLean a difficult client, but not an incompetent one. *See Buxton*, 643 A.2d at 176; *Ferry*, 453 N.E.2d at 212 ("The defendant who declines to help his attorney in the preparation of his defense is perhaps unwise, or even foolish, but he is not necessarily on that basis incompetent to stand trial."); *State v. Amaya-Ruiz*, 166 Ariz. 152, 162, 800 P.2d 1260, 1270 (Ariz. 1990) (*en banc*) (noting a psychiatrist's opinion that "defendant's uncooperative attitude" and his refusal to speak to counsel "might be the result of advice from other inmates, rather than psychological problems"). Manifestly, McLean has demonstrated the ability to confer rationally with his three previous attorneys, and it is this Court's firm belief that he clearly has the same and present ability to do so with Mr. Kando.[10]

Moreover, irrespective of McLean's distrust or disappointment with his prior and present attorneys, it certainly has not chilled his desire for a lawyer's support in this case. It is manifestly clear that McLean very much wants an attorney. As Dr. Myers said:

> Q. THE COURT: You're not suggesting that he wanted to represent himself in these matters, are you, without counsel? When I say "counsel," I mean a member of the bar.
> A. DR. MYERS: No, I'm not saying that.
> Q. He wanted a lawyer, didn't he?
> A. Yes. Comp. Tr. at 375.

Hence, McLean's keen and abiding interest in an "ongoing search for a great attorney," one whom Dr. Myers has denominated the "mythical" fifth attorney who "will ultimately fix his legal troubles" and one who "is smart enough or competent enough to make sense and set the

[10] Dr. Wall also testified that McLean "indicated that if he were in court and a witness for the other side is telling lies about him, he would tell his lawyer." Comp. Tr. at 314.

system back into order." Myers Rep. at 9-10; Comp. Tr. at 13. As Dr. Myers related at the hearing:

> Q. THE COURT: Did you get the impression from Mr. McLean that the legal advice that he was relying upon, if I may phrase it and construe it as legal advice, was from his grandfather, other inmates and, indeed, television, rather than his lawyers?
> A. Yes.
> Q. And he kept searching for a lawyer, I take it, from your report, that would concur with his own understanding, beliefs and hopes of how the legal system treated him, am I correct?
> A. How the legal system would what?
> Q. Would treat him.
> A. Yeah. Could treat him. Should treat him.
> Q. He was searching, was he not, effectively, if I could call it so, the Holy Grail? He wanted a lawyer that would concur with his conclusions that he had reached either on his own or by consultation with his grandfather, other inmates and television reports that he had seen?
> A. Yes. That he believes that there is a solution, and he hasn't had the proper attorney to get to that solution. Comp. Tr. at 90. [11]

The Court's Observations

In determining that McLean can properly assist counsel and is competent to stand trial, this Court has not restricted its examination to the experts' opinions and the accounts and opinions of the defense attorneys. The within Decision is also based upon this Court's own considerations, from the vantage point of a front row observer who has had several opportunities to closely assess McLean during court proceedings in which he was fully engaged.

[11] Attorneys Sparr and Canham recounted past experiences with clients who fired them as trial was approaching in order to delay the trial or the progress of the case because those clients disliked the plea offer. In response to Mr. Kando's objection to those accounts, this Court allowed that testimony but agreed, at least at that time, to limit it to their other clients and not necessarily attribute it to McLean's motivations when he jettisoned counsel shortly before trial. Comp. Tr. at 217, 244. That limitation, however, may no longer obtain, because even Mr. Kando now acknowledges that McLean's dismissive attitude toward counsel and firing them may, after all, be based on his intention "to delay the trial process." McLean Supp. Mem. at 9.

"A district court can consider several factors in evaluating competency, including, but not limited to, its own observations of the defendant's demeanor and behavior; medical testimony; and the observations of other individuals that have interacted with the defendant." *Simpson*, 645 F.3d at 306 (citation omitted). *See Owen*, 693 A.2d at 672 (noting that the trial justice permissibly relied upon audible conversations the defendant had with his attorney and the judge which reflected his intelligent and appropriate comments); *Amaya-Ruiz*, 166 Ariz. at 163, 800 P.2d at 1271 (trial judge's decision finding defendant competent "was aided by its observation of defendant's courtroom behavior"); *Edwards v. State*, 200 S.W.3d 500, 520 (Mo. 2006) (observing that when the trial judge "personally addressed [defendant], he did not appear confused, unresponsive, or disconnected"); *People v. Brown*, 4 A.D.3d 886, 887, 772 N.Y.S.2d 143 (N.Y. App. Div. 2004) (noting "court's own opportunity to observe defendant during the judicial proceedings"); *Clanton*, 488 F.2d at 1071 (noting that the judge in the federal postconviction proceedings had also presided over previous proceedings with the defendant, including his guilty plea).

In every instance—from his initial guilty pleas on March 22, 2016, during his subsequent PCR hearing, and throughout other court proceedings, McLean has displayed unfailing attention, answered questions responsively, and sought further explanation from the Court to ensure that he understood matters. Indeed, even during the Competency Hearing it was clear that McLean was paying careful attention, as he *sua sponte* interrupted testimony to request clarification of a ruling the Court had made. Comp. Tr. at 151.

In *Banks*, 513 Pa. at 341, 521 A.2d at 13, which our Supreme Court has quoted with approval, the Pennsylvania Supreme Court noted that the trial court, aside from experts and lay witnesses, also had many opportunities personally to observe the defendant not only at the

competency hearing, but also during hearings and pretrial motions. Upholding the competency finding, the Pennsylvania Supreme Court cited with approbation the trial court's following commentary:

> "As the trial Judge, I would also note at this time I had the opportunity to observe Banks' demeanor and participation during the course of the proceedings, and I found nothing to indicate or cast any doubt on his competency to stand trial. His behavior, demeanor and presentations throughout these proceedings corroborated rather than contradicted the finding of competency."

As a percipient observer of McLean in similar circumstances, this Court renews that same sentiment.[12]

This Court is satisfied from all of the reliable evidence presented that Andrew McLean is competent to stand trial. The Court further orders, consistent with both Dr. Wall and Dr. Myers' belief that competency counseling classes significantly assist McLean, that he shall remain at ESH and shall continue with such classes (be they one-on-one or in group fashion). *See In re Tavares*, 885 A.2d at 150.

Indeed, by the time the matter is reached for trial, it may well be that Dr. Myers will also agree that McLean is competent. After all, he has prophesied that McLean's competency would likely improve with some psychotherapy or about eight to twelve competency counseling classes. Comp. Tr. at 81. By the time this case is tried, McLean will have already attended dozens of such counseling sessions.

The motion to find Andrew McLean incompetent to stand trial is denied.

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[12] This Court finds unavailing Mr. Kando's contention that McLean simply "parrots," without comprehension, legal propositions and phrases which he has heard from his prison inmates. In the first place, Dr. Myers declined to subscribe to that assertion. Comp. Tr. at 95-96. Secondly, as noted earlier, it is clear from the ACI telephone calls, which Dr. Myers has never considered, that McLean's comprehension of the Court process and legal principles goes far beyond mere rote repetition. *Supra* at 26 n.9.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	State of Rhode Island v. Andrew McLean
CASE NO:	P1/2015-3840AG
COURT:	Providence Superior Court
DATE DECISION FILED:	March 27, 2019
JUSTICE/MAGISTRATE:	Krause, J.
ATTORNEYS:	
For Plaintiff:	Joseph J. McBurney, Esq. Jeffrey Q. Morin, Esq.
For Defendant:	Robert Kando, Esq.