

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT-ADULT DIVISION  
FOURTH JUDICIAL DISTRICT

**State of Minnesota**

Plaintiff,

-vs-

**AARON CHERRY,**

Defendant.

**MEMORANDUM OPPOSING  
STATE'S MOTION TO RECONSIDER**

Court File No. 27-CR-23-3198; 21-19577

TO: THE HONORABLE JUDGE OF DISTRICT COURT; AND JOSHUA LUGER, ASSISTANT  
HENNEPIN COUNTY ATTORNEY.

**STATEMENT OF FACTS**

On October 20, 2021 Defendant Aaron Cherry was charged with a felony Domestic Assault pursuant to Minn. Stat. § 609.2242 in case file 27-CR-21-19577. Concerns were raised regarding his competency to proceed and an evaluation pursuant to Minnesota Rule of Criminal Procedure 20.01 was ordered. The evaluator opined that Mr. Cherry was incompetent to proceed and he was found incompetent by the Honorable Lisa Janzen on November 23, 2021. The proceedings were suspended, although the State of Minnesota filed an intent to prosecute on November 29, 2021.

A six-month review evaluation was conducted and opined Mr. Cherry was now competent to proceed. That opinion was not challenged by the parties and Mr. Cherry was found competent on June 22, 2022 by the Honorable Lisa Janzen. Mr. Cherry ultimately pled guilty to that offense and was sentenced on September 15, 2022 for a probation term of three years; he remains on probation for that offense. A probation violation report was filed on March 6, 2023 alleging contact with the victim and failure to remain law abiding for the allegations in pending case 27-CR-23-3198. In 27-CR-23-3198 Mr. Cherry is alleged to have committed a felony No Contact Order Violation in violation of Minn. Stat. § 629.75.2(d)(1) and Domestic Assault in violation of Minn.

Stat. § 609.2242 on February 8, 2023. He was arrested on that date and has remained in custody ever since – 357 days as of the filing of this memorandum and counting.

Concerns over Mr. Cherry's competence were again raised and a Rule 20 evaluation on both files was ordered on March 7, 2023. That evaluator, Dr. Richard Coffin, opined that Mr. Cherry was competent, but the Defense challenged this opinion and a contested hearing was set. The request for a contested hearing was ultimately withdrawn, but no judicial finding was entered. Due to a change in circumstances and a substitution of counsel competence concerns were once again raised. The Honorable William Koch ordered an updated Rule 20 evaluation on July 31, 2023. The evaluator opined that Mr. Cherry was competent to proceed, but the Defense challenged that opinion.

A contested hearing was held on November 17, 2023 in front of Referee Lori Skibbie. Andrew Luger appeared for the State. Chelsea Knutson and Susan Herlofsky appeared for Mr. Cherry, who was also present. The State offered the testimony of Dr. Lauren Herbert and Exhibit 1: Dr. Herbert's August 31, 2023 report opining competence. Dr. Herbert interviewed Mr. Cherry for approximately five minutes via Zoom technology, during which Mr. Cherry remained mute. She made no attempt to conduct an in-person interview or correspond via writing. During the course of this extremely brief interview, Dr. Herbert testified she was unable to address confidentiality or establish rapport with Mr. Cherry. She was unable to make any determinations of Mr. Cherry's ability to engage in complex decision making or appreciation of the charges or proceedings. She did not conduct any psychological or cognitive testing. She did not obtain the most recent behavior logs or listen to any jail calls to aid in her determination of competency, although she did review some grievance forms that had nonsensical content.

Dr. Herbert testified that she did refer to Dr. Coffin's April 3, 2023 report in her forensic evaluation. However, Dr. Herbert testified that she was not involved in Dr. Coffin's evaluation of Mr. Cherry and that it is important for each evaluator to make their own independent determinations because they may see different behaviors, make different diagnoses, or even come to differing opinions related to competency. She also testified that mental health and competency are fluid and an individual's presentation can vary based on temporal, situational, and behavioral changes. Importantly, Dr. Coffin **did not** testify at the November 17, 2023 hearing and his report **was not** offered as an exhibit by the State, although the State relies heavily on its content in the memorandum arguing reconsideration.

Nevertheless, Dr. Herbert opined based on that prior evaluation and her five-minute interview that Mr. Cherry was competent and suffered from antisocial personality disorder, cannabis use disorder, and malingering. She testified that the antisocial personality disorder diagnosis is based on a juvenile conduct disorder diagnosis from 2009, and further that this diagnosis has a historical bias involving young black men that may make it more difficult to rule out underlying mental illness. Dr. Herbert testified that malingering is the intentional production of false or exaggerated symptoms motivated by external incentives such as financial compensation or avoiding criminal prosecution, presented in Mr. Cherry's case through his mutism. She acknowledged that Mr. Cherry's mutism could undermine any external incentives – his cases have been in competency-related proceedings for nearly a year during which time he has remained in custody and his mutism and other communication difficulties render him unable to communicate with his attorney. Mutism can be a symptom not only of mental illness, but a cognitive impairment or neurocognitive disability. Dr. Herbert did not do any testing to determine whether Mr. Cherry

suffered from a mental illness, cognitive impairment, or malingering. Dr. Herbert also acknowledged that she could not say whether Mr. Cherry could rationally consult with counsel.

The Defense offered the testimony of Chelsea Knutson. She testified that Mr. Cherry has never verbally communicated with her during her representation, despite her attempting multiple communication styles. Mr. Cherry has only communicated to Ms. Knutson through writings that are nonsensical and not in response to her questions. Ms. Knutson testified that she has never received any clear communication from Mr. Cherry on whether he understands the charges, whether he wants to plead guilty or have a trial, or whether he wants to testify in his defense. She could identify no clear benefit to Mr. Cherry from failing to communicate with her. Ultimately, she opined that she is not able to meaningfully represent Mr. Cherry due to his inability to communicate in any format with her.

Referee Skibbie issued an Order, approved by the Honorable Julia Dayton Klein, on December 6, 2023 finding that Mr. Cherry is incompetent to proceed. She explicitly found that while Dr. Herbert's opinion was credible, it was not persuasive. In contrast, Referee Skibbie found that Ms. Knutson's testimony was persuasive in concluding that Mr. Cherry is unable to participate in the proceedings and rationally consult with counsel. Ultimately Referee Skibbie found that the State had failed to meet its burden to prove that Mr. Cherry does not suffer from a mental illness or cognitive impairment and is able to rationally consult with counsel and participate in his defense. The State filed a motion to reconsider on December 15, 2023. The matter was assigned to be heard by the Honorable Michael Browne over the Defense's objection to having the matter heard by another judicial officer. This memorandum follows.

## **LEGAL ARGUMENT**

### **I. This Matter Should Be Heard by the Judicial Officer Who Presided Over the Contested Hearing.**

The contested hearing was heard by Referee Skibbie, who is appointed pursuant to Minn. Stat. § 484.70. The State did not object to the matter being heard by a referee in lieu of a district court judge, although it had the ability to do so. Minn Stat. § 484.70, subd. 6. The powers of a referee include hearing matters, recommending findings of fact, and issuing orders subject to confirmation by a judge. *Id.* at subd. 7. All of these procedures were followed in this case. The State did not request a motion for judicial review of the Referee's order, which is governed by that same statute. *Id.* The State asked for a motion to reconsider. The Rules of Criminal Procedure do not contain a specific provision allowing motions to reconsider earlier rulings, but the silence on the subject does not preclude them. *State v. Montjoy*, 366 N.W.2d 103, 107-08 (Minn. 1985) (holding that a prosecutor properly moved for clarification and reconsideration on an omnibus order); *State v. Papadakis*, 643 N.W.2d 349, 356-57 (Minn. Ct. App. 2002). Reconsideration may be more efficient, rather than allowing a decision with the potential for error to stand on the record only to be reverse or remanded through appeal. *Montjoy*, 366 N.W.2d at 107-08. *See also State v. Needham*, 488 N.W.2d 294 (Minn. 1992) (Remanded to reopen Omnibus Hearing). The State asks this Court to reconsider the findings based upon the testimony and evidence received at the November 17, 2023 hearing. There has been no transcript ordered of the hearing, and in any event a transcript would not give another judicial officer the ability to properly weigh the testimony presented in court based on persuasiveness and nonverbal cues. Another judicial officer would not be able to reconsider the testimony it did not receive. The Court should not permit the matter to be heard by another judicial officer.

## **II. Referee Skibbie Did Not Err in Finding that the State Failed to Prove Mr. Cherry Is Competent by a Fair Preponderance of the Evidence.**

“A defendant is incompetent and must not plead, be tried, or be sentenced if the defendant due to mental illness or cognitive impairment lacks ability to: (a) rationally consult with counsel; or (b) understand the proceedings or participate in the defense.” Minn. R. Crim. P. 20.01, subd. 2. The State bears the burden of proving that Mr. Cherry is competent by a fair preponderance of the evidence. *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (quoting *State v. Ganpat*, 732 N.W.2d 232 (Minn. 2007)). Unless the State can meet that burden, the court *shall* enter an order finding that the defendant is incompetent – an explicit presumption of incompetence. Minn. R. Crim. P. 20.01, subd. 5 (emphasis added).

The State offered two pieces of evidence in an attempt to meet its burden: the testimony of Dr. Lauren Herbert and her report. The State’s memorandum places great emphasis on Dr. Coffin’s opinion in his April 3, 2023 report when arguing for reconsideration. But neither Dr. Coffin’s testimony nor his report was offered during the hearing. A contested competency hearing is an evidentiary hearing governed by both the Minnesota Rules of Criminal Procedure and the Minnesota Rules of Evidence. Minn. R. Crim. Pro. 20.01, subd. 5; Minn. R. Evid. 1101. Because Dr. Coffin did not testify, his opinion of competence (not a judicial finding, as the State erroneously suggests) was not able to be cross-examined. Most importantly, Dr. Coffin’s report was from April, nearly five months prior to Dr. Herbert’s report and seven months prior to the contested hearing. As Dr. Herbert clearly testified, competency and mental health is fluid. Dr. Coffin did not have the most recent, nor most pertinent, information as it relates to Mr. Cherry’s competence, and should not be given greater weight than the testimony of Dr. Herbert or Ms. Knutson. Referee Skibbie properly considered the testimony of both those witnesses and determined that Ms. Knutson was more persuasive; therefore the State failed to meet its burden.

The State finally argues that mutism alone is not a mental illness for purposes of competency. Mutism may not be a mental illness, but it can be a symptom of a mental illness or a cognitive impairment as Dr. Herbert testified. The State improperly shifts the burden by arguing that “there is no evidence to suggest that the defendant is not malingering.” It is the State’s burden to prove that Mr. Cherry does not have a mental illness or a cognitive impairment. Dr. Herbert did no testing to determine whether he suffered from any mental illness or cognitive impairment. She did not do any testing to determine whether he was malingering, although such testing exists. She met with him for five minutes and rendered an opinion, despite acknowledging that antisocial personality disorder can be accompanied by bona fide mental illness, mental illness can develop or increase in severity over time, and cognitive impairments may appear over time. With such little investigation or evidence, the State could not have met its burden that Mr. Cherry did not have a mental illness or cognitive impairment, which is reflected in Referee Skibbie’s findings. The State also argues “there is no evidence that the Defendant cannot understand the legal proceedings or charges against him, only evidence that he will not communicate regarding legal issues.” That is flatly contravened by the evidence presented in the hearing. Dr. Herbert and Ms. Knutson both testified that they are unable to determine whether Mr. Cherry understands the legal proceedings in this case because he is unable to communicate. Ms. Knutson further testified that his writings and nonverbal responses are nonresponsive to her questions and suggest a lack of understanding. The evidence shows that Mr. Cherry does not understand these proceedings, and the State has not shown that he is competent by fair preponderance of the evidence. The Court should deny the State’s motion for reconsideration.

**CONCLUSION**

The motion should properly be heard before the factfinder Referee Skibbie. The State has not proven by a preponderance of the evidence that Mr. Cherry is competent. The Court should deny the State's motion for reconsideration.

Respectfully Submitted,

OFFICE OF THE HENNEPIN COUNTY PUBLIC DEFENDER  
MICHAEL BERGER - CHIEF PUBLIC DEFENDER

By:                     /s/                      
Chelsea Knutson  
Attorney No. 0398617  
Assistant Public Defender  
701 4<sup>th</sup> Avenue South, Suite 1400  
Minneapolis, Minnesota 55415  
Telephone: 612-596-7889