

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FELONY DIVISION
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

-vs-

AARON CHERRY,

Defendant.

**NOTICE OF MOTION AND
MOTION FOR RELEASE**

MNCIS. Nos. 27-CR-23-3198,
27-CR-21-19577

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TO: THE COURT; AND TOM ARNESON AND JOSHUA LUGER, ASSISTANT
HENNEPIN COUNTY ATTORNEYS.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on Tuesday, February 6, 2024 at 1:30 p.m., or as soon
thereafter as counsel may be heard, Aaron Cherry will seek the following relief:

MOTION

Aaron Cherry requests that this court modify his conditions of release to permit
conditional release without posting monetary bail due to Mr. Cherry's incompetence. This
motion is made pursuant to Minn. R. Crim. P. 6, 20.01, *Jackson v. Indiana*, 406 U.S. 715
(1972), and upon all records, files and proceedings, and upon any oral or written arguments
the Court may entertain.

Respectfully Submitted,

OFFICE OF THE HENNEPIN COUNTY PUBLIC DEFENDER

By: /s/
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STATE OF MINNESOTA
COUNTY OF HENNEPINDISTRICT COURT-ADULT DIVISION
FOURTH JUDICIAL DISTRICT**State of Minnesota**

Plaintiff,

-vs-

AARON CHERRY,

Defendant.

**MEMORANDUM IN SUPPORT
OF MOTION FOR RELEASE**Court File No. 27-CR-23-3198;
27-CR-12-19577TO: THE HONORABLE JUDGE OF DISTRICT COURT; AND THOMAS ARNESON
AND JOSHUA LUGER, ASSISTANT HENNEPIN COUNTY ATTORNEYS.**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. A six-month review evaluation was conducted and opined Mr. Cherry was now competent to proceed; he 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. 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.

Concerns over Mr. Cherry's competence were again raised and a Rule 20 evaluation on both files was ordered on March 7, 2023. The evaluator opined that Mr. Cherry was competent to proceed, but the Defense challenged that opinion and a contested hearing was

held on November 17, 2023 in front of Referee Lori Skibbie. Referee Skibbie issued an Order, approved by the Honorable Julia Dayton Klein, on December 6, 2023 finding that Mr. Cherry is incompetent to proceed. The State filed a motion to reconsider on December 15, 2023. The matter was heard before the Honorable Michael Brown on January 31, 2024; Judge Brown denied the motion to reconsider but at that time denied a reduction of bail because Mr. Cherry did not have a residential address. Defense requested that the matter be reset for a bail hearing on the next available Rule 20 calendar. Mr. Cherry has been in custody since his arrest on February 8, 2023 – 363 days as of the filing of this memorandum and counting. The State has declined to pursue civil commitment of Mr. Cherry. He is next scheduled to have a six-month review of his competency on June 11, 2024. If he remains in custody until that date, he will have been incarcerated 490 days.

LEGAL ARGUMENT

The Minnesota Constitution provides, in Article I, Section 5 “[e]xcessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted.” Further, a person charged with an offense “*must* be released on personal recognizance or an unsecured appearance bond unless a court determines that release will endanger the public safety or will not reasonably assure a defendant’s appearance.” Minn. R. Crim. P. 6.02, subd. 1 (emphasis added). In those limited circumstances, the court must impose conditions that will reasonably assure person’s appearance, including placing the defendant under supervision, placing restrictions on travel or residence, requiring a bond ,or other necessary conditions. *Id.* The Court must review conditions of release on request of any party. Minn. R. Crim. P. 6.02, subd. 4.

But it is not so simple as considering the traditional legal considerations of bail. Mr. Cherry has been found incompetent pursuant to Minn. R. Crim. P. 20.01, subd. 2. (“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”). “The United States Supreme Court has stated that it would be cruel and unusual punishment to make the status of being mentally ill a crime.” *State v. Bauer*, 299 N.W.2d 493, 498 (Minn. 1980) (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)). In *Bauer*, the defendant shot and killed a police officer who was attempting to serve him with a mental health commitment order. He was indicted for murder and convicted, but his conviction was overturned due to competency-related concerns. *Id.* at 495. The defendant was found incompetent, as well as mentally ill and dangerous; he was subsequently civilly committed and held at various secure hospitals. *Id.* After numerous incompetency findings, the district court certified to the Minnesota Supreme Court the question of whether the indictment should be dismissed as a violation of (among other grounds) cruel and unusual punishment. In that case, the Court found that continued confinement of the defendant was not cruel and unusual because his confinement “is commensurate with his status as mentally ill and dangerous” and he was “confined in a setting designed to treat his mental illness to the greatest extent possible under the current state of medical knowledge.” *Id.* at 499. This case is not like *Bauer* because Mr. Cherry has not been civilly committed so there is no finding that he is mentally ill and dangerous. He is not in a state hospital receiving treatment for any mental illness – in fact, there has been finding that Mr. Cherry is mentally ill at all. Rather, there has been a finding he is incompetent due to cognitive impairment, something he has not and cannot receive treatment for while in the Hennepin County Jail.

In *Jackson v. Indiana*, the United States Supreme Court held that indefinite commitment of a deaf-mute, incompetent defendant “solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment’s guarantee of due process.” 406 U.S. at 731. In *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), the United States Supreme Court similarly noted that “[a] finding of ‘mental illness’ alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.

Assuming that that term can be given a reasonably precise content and that the ‘mentally ill’ can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.” In Mr. Cherry’s case, the State is functionally seeking indefinite detention of Mr. Cherry by imposing a bail of \$20,000 with conditions – an amount Mr. Cherry has been unable to post for a year and seems unlikely to be able to do in the future. The State has declined to pursue civil commitment of Mr. Cherry. He is neither mentally ill nor dangerous. He is incompetent, and the State’s attempt to have him held indefinitely while the proceedings are suspended violates the due process and excessive bail concerns outlined in *Bauer* and *Jackson*.

At the January 31, 2024 hearing, Judge Michael Browne declined to release Mr. Cherry on conditions without posting monetary bail because the address Mr. Cherry provided was of a post office and Mr. Cherry “had nowhere to go.” Homelessness is not a basis to deny conditional release and is excessive bail. Mr. Cherry provided an address at which he can receive mail for court notices. Mr. Cherry can stay in a homeless shelter.¹ Counsel for Mr. Cherry will further supplement the record orally at the bail hearing, but most social services such as Medical Assistance, General Assistance, or Community Access for Disability Inclusion (CADI) housing waiver are not available while incarcerated. Homeless shelters contacted on Mr. Cherry’s behalf require him to be out of custody before being able to secure a bed. The Court and the State have created the conditions by which Mr. Cherry is unhoused by keeping him in custody for a year, yet seek to hold his homelessness against him by making residential housing a condition of his conditional release. To do so at all violates the right to excessive bail and cruel and unusual punishment, let alone indefinitely because the proceedings are

¹ Of note, the new Minnesota Statute § 611.55, subd. 4, not yet implemented, governs the obligation of a forensic navigator to assist incompetent defendants. Among their duties, forensic navigators must assist in developing a bridge plan which includes “a confirmed housing address the defendant will use upon release, *including but not limited to emergency shelters*” (emphasis added). The statute clearly contemplates that homeless incompetent defendants may be released even without a permanent residential address.

suspended due to Mr. Cherry's incompetence. The Court should modify the conditions of release to permit release without bail.

RESPECTFULLY SUBMITTED,

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

By: /s/

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Dated: This 5th day of February, 2024.

MINNESOTA
JUDICIAL
BRANCH