IN THE COURT OF APPEALS OF VIRGINIA

ANTHONY TREMAINE STEWART,

APPELLANT,

v. **Record No. 1363-22**
Circuit Court No. CR 21-000215, -000216,
-000250, -000251 & -000865

COMMONWEALTH OF VIRGINIA,

APPELLEE.

FROM THE CIRCUIT COURT OF ROCKBRIDGE COUNTY
Christopher B. Russell, Judge

OPENING BRIEF (REVISED)

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INTRODUCTION

This appeal arises from a judgment of Circuit Court of Rockbridge County finding Anthony Tremaine Stewart guilty of five felony charges related to the possession and distribution of drugs and possession of "metal knucks" after having been previously convicted of a felony. Stewart was sentenced to 43 years and 12 months imprisonment with 22 years, 12 months suspended. [R. 151, 395-97.] The sole issue on appeal is whether the circuit erred in proceeding to trial were the evidence showed that Stewart, who had previously been adjudicated as unrestorably incompetent due to a permanent and irreversible traumatic brain injury ("TBI") and who was of substandard IQ, suffered from learning disabilities and required regular medical care for end stage renal disease which impacted his mental functions, was incompetent to stand trial as he was neither capable of assisting his defense counsel nor comprehending the nature of the proceedings against him.

The circuit court based its determination that Stewart was competent to stand trial on a single evaluation and despite a prior finding by another judge of the same circuit that Stewart was unrestorably incompetent. The court thereafter refused to reconsider the decision at all subsequent stages of the proceedings. Stewart appeals the judgment solely on the basis that the record as a whole establishes that his neuro-cognitive disability renders him incompetent to stand trial as a matter of law and,

thus, the circuit court abused its discretion in finding Stewart competent to stand trial.

ASSIGNMENT OF ERROR

> The Circuit Court erred in determining that Stewart was competent to stand trial where he had previously been determined to be unrestorably incompetent due to a permanent and irreversible traumatic brain injury, substandard IQ, learning disabilities and renal disease, had received no services subsequent to the determination that would have rendered him competent, and was unable to comprehend the nature of the proceedings or to give adequate assistance to his counsel to prepare a defense. [Preserved at R. 250-51, 323-24, 523-26, 535-36, 554-56, 1015-21.]

RELEVANT PROCEEDINGS

By warrants issued by a magistrate on October 7, 2020, Stewart was arrested for alleged violations of Code § 18.2-248 and -250. The Rockbridge County Grand Jury subsequently returned indictments against Stewart alleging multiple violations of those code sections as well as a violation of Code § 18.2-308 for the concealed possession of metal knucks after having previously convicted of a felony. [R. 1-2, 70-71, 74, 136, 146-50, 231.]

On January 25, 2022, Stewart filed a motion to dismiss the indictments on the ground that Stewart had previously been adjudicated unrestorably incompetent to stand trial by another judge of the circuit court in an order dated November 9, 2020. The motion alleged that since having been declared unrestorably incompetent, no services had been provided to Stewart and that his mental faculties remained

impaired due to a traumatic brain injury suffered when he was a teenager, as well as other factors. [R. 250-52.]

The Commonwealth opposed the motion to dismiss. The Commonwealth conceded that Stewart had been previously determined to be unrestorably incompetent with respect to the prior charges. However, the Commonwealth maintained that a subsequent evaluation of Stewart on the instant charges had determined that Stewart was competent to stand trial, despite the fact that the same limitations of his cognitive ability persisted. The Commonwealth contended this finding, without more, invalidated the prior finding that Stewart was unrestorably incompetent, permitting it to pursue not only the current charges but to seek new indictments on the previously dismissed charges. The circuit court denied the motion to dismiss in an order dated February 23, 2022. [R. 257-61.]

On June 21, 2022, Stewart filed a motion for a new evaluation of his competency to stand trial. The motion noted that Stewart had received no services to maintain his competency as recommended in the prior evaluations. The circuit court conducted a hearing on this motion on June 22, 2022 at which it stated that it would deny the motion, memorializing that ruling in an order of even date. [R. 378-81, 385, 560-61.]

Following jury trial in which Stewart was convicted, Stewart moved to set aside the verdict on the ground that he was at the time of trial incompetent in that he

was incapable of rendering meaningful assistance to his counsel or comprehending the nature of the proceedings. The Commonwealth opposed to motion for the same reasons stated in is response to the pretrial motion. [R. 323-31.] The motion to set aside the verdict was denied in an order dated July 7, 2022. [R. 379-85.]

Following receipt of the presentencing report, the circuit court entered a final order of conviction and sentencing dated August 15, 2022. Stewart was sentenced to 43 years and 12 months imprisonment with 22 years, 12 months suspended. Stewart timely noted an appeal from this judgment. [R. 395-400.]

STATEMENT OF FACTS

Stewart does not contest the sufficiency of the evidence to support the offenses of conviction. Quite the reverse, Stewart is a person of obvious limited mental capacity who has been repeatedly taken advantage of by others with criminal intent. He is childlike and trusting by nature, making him the quintessential patsy for those who would profit from his disability, as demonstrated by his lengthy from his involvement in the criminal justice system and the record of mental competency evaluations arising therefrom, which warrants recounting in full. The most comprehensive summary of Stewart's mental competency evaluations is found in the Commonwealth's own exhibits to its opposition to the motion to dismiss the indictments.

Stewart's competence to stand trial has been evaluated numerous times in the past with varying opinions across evaluators. His first competency to stand trial ("CST") evaluation was performed by Monica Pilarc, Ph.D. on August 8, 2000 when he was 21 years old, but neither the context of the evaluation nor Dr. Pilarc's opinion are found in record. [R. 265]

Stewart underwent a forensic neuropsychological evaluation with Thomas Ryan, Ph.D. on March 6, 2008 at age 29. The test results showed extremely low intellectual functioning (FSIQ = 68) and diffuse cognitive deficits with prominent executive dysfunction and memory impairment. Dr. Ryan concluded that these deficits were due to Stewart's history of learning disability plus the effects of severe TBI, which caused further decline. [R. 266]

On April 16, 2015, Stewart underwent a CST evaluation with Kenneth Showalter, Ph.D. Secondary sources indicate that Dr. Showalter found Stewart to be incompetent to stand trial and he was subsequently hospitalized on June 22, 2015 in efforts to restore competence. According to a report by Erin Gallagher, Psy.D., Stewart was reevaluated on July 7, 2015 and was again found incompetent to stand trial due to cognitive deficits that limited his factual and rational understanding of relevant legal knowledge and concepts. [R. 266.]

Stewart was evaluated by Stephanie Bajo, Psy.D. and Beth Arredondo, Ph.D. Testing suggested variable engagement, which was presumed secondary to a

combination of cognitive and learning difficulties as well as possible guardedness, but his results were interpreted as a valid depiction of his neuropsychological functioning. As in 2008, Stewart demonstrated extremely low intellectual functioning (FSIQ = 68) and reading comprehension (1^{st} – 2^{nd} grade level). Cognitive testing indicated relatively widespread impairment consistent with his 2008 evaluation. The profile appeared consistent with his history of severe TBI and longstanding learning disabilities, with possible additional contribution from chronic kidney disease which was now impacting his mental faculties. Regarding restoration efforts, Drs. Bajo and Arredondo stated, "If compensatory strategies are unsuccessful in increasing his comprehension of current legal proceedings, it is unlikely that he will achieve an adequate level of understanding in the future due to the stability of his cognitive deficits." [R. 266.]

On September 3, 2015, Elisha Agee, Psy.D. and David Rawls, Ph.D. evaluated Stewart's trial competence. Based on his prior neuropsychological evaluations and their CST evaluation findings, Drs. Agee and Rawls opined that Stewart met the standard for trial competence. However, their evaluation did not address the established fact of Stewart's extremely low intellectual functioning or TBI and it does not appear that this finding was every adopted by any court. [R. 266.]

On March 5, 2016, Dr. Showalter re-evaluated Stewart's trial competence and noted some improvement in his factual understanding of the legal process after

restoration efforts, likely due to his repeated evaluations training him to give "correct" answers; however, Dr. Showalter opined that Stewart was incompetent to stand trial based on his lack of "requisite rational capacities for trial competence." He was again found incompetent to stand trial on March 14, 2016. [R. 266-67.]

Michael Bell, Ph.D. evaluated Stewart's competency to stand trial in September 2016. Dr. Bell found Stewart incompetent to stand trial due to limited cognitive resources and a lack of rational understanding. Following this report, Stewart was found *unrestorably* incompetent for the first time. [R. 267.]

Dr. Bell re-evaluated Stewart on July 24, 2017 and again found him incompetent to stand trial based on his cognitive deficits. Dr. Bell stated, "Stewart *has never been competent to stand trial since his traumatic brain injury at age sixteen* (16) and *there is no plausible scenario given the constraints of the current field of neuroscience in which he will obtain competency to stand trial*." (Emphasis added.) Dr. Bell opined that Stewart would not benefit further from restoration efforts. [R. 267.]

A neuropsychological evaluation report by Monique Wilson, Ph.D. in October 2017 indicates that Stewart scored below expectations on tests of performance validity. The cause of his difficulty on performance validity tests was unclear but could include fatigue, low mood, pain, and secondary gain. Dr. Wilson did not opine that Stewart was malingering. [R. 267.]

Stewart's trial competence was subsequently evaluated by Luke Romanow, M.D. and Brian Kiernan, Ph.D., who noted Stewart's limited ability to learn and recall information related to trial competence. Drs. Romanow and Kiernan concluded that Stewart did not meet the standard for trial. While they noted that the roles of cognitive deficits, poor effort/exaggeration were unclear to them, they did not conclude that Stewart was malingering. [R. 267.]

On November 27, 2017, Drs. Romanow and Kiernan re-evaluated Stewart's CST. Stewart demonstrated good learning and recall of information relevant to his daily functioning, but he remained guarded and defensive when reviewing information related to trial competence. During his CST evaluation, he demonstrated adequate factual knowledge of legal concepts and "simple, but rational reasoning skills." Drs. Romanow and Kiernan opined Stewart competent and felt that his limited effort was due to his cognitive impairment, rather than secondary gain and not due to malingering. [R. 267.]

Stewart was evaluated by doctors at the University of Virginia's Institute for Law, Psychiatry and Public Policy ("ILPPP") on January 24, 2019. They opined that he was cognitively impaired, and though partially aware of the legal significance of certain questions over others, was nonetheless incompetent to stand trial. [R. 267.]

Dr. Bell re-evaluated Stewart's CST on October 8, 2019, and this time opined that he was competent to stand trial. Dr. Bell felt that while Stewart had cognitive

deficits due to TBI, they were not as severe Dr. Bell originally thought. He also felt that Stewart was aware enough to know how to avoid being found competent to stand trial. [R. 267.] This is the only instance of an evaluator expressing an opinion that Stewart was malingering.

The two most recent opinions regarding Stewart's competence were prepared by Scott D. Bender, Ph.D., a Board-Certified Clinical Neuropsychologist with the ILPPP. These reports contain relevant personal information concerning Stewart's background, including that he has never lived on his own or obtained a driver's license. Stewart has no close friends. He could not correctly recall his age when he was injured in a traffic accident resulting the severe TBI from which he still suffers regular seizures. [R. 268.]

When in a controlled environment such as living at home with his mother, he can perform most daily functions required for self-care. Stewart incorrectly reported that he does not take prescription medication, and when challenged said that he also regularly remembered to take his medications, a claim disputed by his family. [R. 268, 270.]

Dr. Bender reported that although Stewart's arm had injured during an arrest, Stewart could not recall how this happened, only that he was arrested and then "unarrested" so that he could be taken to the hospital. Stewart requires dialysis three time a week but could not recall the location of the facility where he receives this

treatment except that it is near a department store in Lexington. He does not comprehend the nature of his illness, beyond understanding that if he does not receive treatment "[i]t messes up my blood." [R. 268.]

Family members reported that Stewart is easily distracted and often fails to follow through on simple tasks. He becomes irritable when these failings are noted. Stewart also confuses his own thoughts with what someone else has said and that he will argue that a certain event occurred when in fact it had not. Dr. Bender noted this was exemplified by Stewart's inaccurate claim that he had been incarcerated for an extended period.[1] [R. 268.]

Stewart's cousin reported to Dr. Bender that Stewart suffers from auditory hallucinations. She reported an incident where he thought he heard his ex-girlfriend's voice and searched the house for her, convinced that she was hiding in the cousin's son's room. [R. 268.]

Stewart's mother reported to Dr. Bender that Stewart has not been able to read or spell since his TBI. She described him as very restless and as often pacing. She felt that being evaluated repeatedly has taken a toll on him and that he says things that do not make sense to her. [R. 268.]

[1] At one point the report indicates that Stewart claimed to have been in jail for 18 years and at another 18 months; neither claim would be accurate.

According to Dr. Bender, during his interview of Stewart, he presented as polite but defensive. He seemed generally uninterested in answering questions, especially if they required some thought or consideration. His poor motivation and reluctance were not limited to questions about competency but certainly included them. [R. 268.]

Stewart's answers were often vague yet insistent, while at other times he simply responded, "I don't know." His behavior and responses indicated that he did not see the significance of the evaluation to him, which was in contrast to his mother and cousin who both appeared (and acknowledged being) quite concerned about his competence to stand trial. [R. 268.]

Stewart's speech was fluent but clipped and grammatically poor. He followed simple commands without difficulty but had trouble with compound sentences and multi-stage questions. He typically showed mild irritability and responded "I don't know" to these types of questions. Stewart's attention span was very short. While his thought processes were logical and free from overt delusional content, he did seem to believe that certain events had occurred that in reality had not, such as his belief that he had been incarcerated for a lengthy period. [R. 268.]

A brief motor-sensory exam was conducted. It showed that Stewart has nystagmus and gaze impersistence. In neuropsychological testing, Stewart scored below most conventional cutoffs for adequate effort. In one test his results were

lower than expected and were no better than "near chance levels." Throughout, he presented as tired and poorly engaged, and occasionally provided irrelevant responses. [R. 269.]

Stewart's IQ was found to fall within the extremely low range (WASI-II FSIQ = 65, 1 percentile), consistent but slightly higher than the estimate from January 2019 (FSIQ = 58). He failed to grasp the concept of counting backwards but performed "relatively well" on counting forwards. His multiple cognitive tests all fail within the extremely low range and suggest broad impairments across cognitive domains. While he was able to repeat words from a list and shows a normal learning curve, he could not recall any of the words after a delay and instead asked if the examiner was referring to "the story" she read to him earlier. Consistent with his relatively intact ability to repeat information, his best performance on a sentence repetition request was in a borderline range, and he had much more difficulty on tests requiring comprehension or synthesis of material scoring in an extremely low range. His answers over the course of testing were often haphazard and impulsive and lacked substance or deliberation. [R. 269.]

Regarding the understanding of the charges against him, Stewart stated that he was charged with destroying police property (a police officer's badge), possession of marijuana, fighting, drunk in public, and malicious wounding of an officer. Stewart's mother indicated that these charges are not all current despite his insistence

that they are and said that Stewart gets them confused with prior charges. She indicated that he also "just makes up" things, saying that he has been charged with offenses that he never committed or for which he was never charged. [R. 269.]

Stewart knew his attorney's name and thought the job of a defense attorney is to "defend me *against the judge*." (Emphasis added.) He said the prosecution's job is to "find me guilty." He said that the judge "sits there . . . he's the man in court, right? He decides if you're guilty." Stewart said he would ask his mother, not his attorney, if he had a question about court proceedings. He said that he had heard of a jury on "In Heat of the Night" but did not know what it was beyond that. When asked to repeat competency related information, he had significant difficulty but eventually did, however he continued to show almost no retention of the information. [R. 269.]

Dr. Bender described Stewart as "an exceptionally challenging case" and noted that other evaluators disagreed about his competency to stand trial while also acknowledging the difficulty coming to a confident determination. Dr. Bender noted that methods for making determinations of feigning and malingering are limited by their ineffectiveness in low IQ populations. Thus, the indicators of feigning in the present case are of questionable validity and utility. Regardless of the conclusions made by prior evaluators on Stewart's competency and the possibility of

malingering, there was general agreement among the examiners that Stewart's TBI and other neuro-cognitive deficits are permanent. [R. 270.]

Concerning whether Stewart was malingering, Dr. Bender concluded that Stewart's history of learning disabilities, severe TBI, and extremely low IQ, all of which predate any involvement with the criminal justice system, and the effects of his chronic kidney disease all impair his cognitive functions. Individuals with neurocognitive disorders due to TBI and/or very low IQ are more susceptible to giving the appearance of malingering than are non-impaired individuals. This appears to be the case for Stewart, and the protracted process of trying to determine his competency to stand trial has likely had adverse effects on him and his willingness to put forth optimal effort, rather than a deliberate attempt to deceive the evaluator. [R. 270.]

Dr. Bender found the evidence of neurocognitive impairment to be compelling, while also acknowledging that over the course of many evaluations, Stewart seemed to have come to view some interview questions to be more consequential than others and providing the "correct" answers rather than giving a considered and thoughtful response. While this is a relevant finding, it is not the same thing as a demonstration of competency to stand trial. Despite this increased awareness, Dr. Bender concluded Stewart still fails to appreciate the overall importance of the evaluations, due to impaired conation, a sense of purpose,

motivation and volition when tasked with a decision. Patients with frontal lobe injuries like Stewart's TBI often lack conation, which has wide-ranging effects on the individual's ability to make decisions that are in their best interest because they do not assign a value to the decision. Dr. Bender concluded that Stewart lacks conation and does not appear to fully comprehend the consequences of his actions or inactions. [R. 270.]

Dr. Bender concluded that Stewart was unlikely to be consciously feigning or malingering. Most importantly, Dr. Bender conceded that "this is a difficult case and it is possible that Mr. Stewart's competency is unknowable given the current state of the science." Accordingly, Dr. Bender concluded that Stewart was incompetent to stand trial and that his "competency is very unlikely to be restored, given the nature and severity of his TBI, learning disability, chronic kidney disease, and severe neurocognitive deficits." [R. 271.]

Based upon Dr. Bender's report, Judge Malfourd Trumbo determined that Stewart was not competent to stand trial on charges that pre-date the instance offenses. He further concluded that Stewart was unrestorably incompetent in an order date March 10, 2020. The court denied the Commonwealth's motion to reconsider this ruling in an order dated November 9, 2020 dismissing those charges, *after* Stewart had already been arrested for the instant charges. [R. 272-75.]

On the instant charges, the Rockbridge County General District Court entered an order do determine whether Stewart was competent to stand trial on November 6, 2020 – that is, three days prior to the circuit court's determination that Stewart was unrestorably incompetent. The evaluation was performed by Clair Bryson, Ph.D. of the ILPPP, who filed her report with the Court on December 15, 2020. [R. 276-291.]

The evaluation by Dr. Bryson reported that Stewart was "exhausted" and that his speech was "slow and mumbled." Stewart was "largely unable to understand or engage in discussions that required the use of hypotheticals, even when they were simplified." "While he at times conflated the information discussed, or confused time periods, he could largely be redirected to focus on one event at a time. He tended to become perseverative and repeatedly return to a rigid, concrete understanding or aspect of a discussion." [R. 285.]

According to Dr. Bryson, "Stewart's thinking was difficult to follow." "[H]is affect flattened, and he became less engaged, when discussing his legal history and information relevant to trial competence. He required frequent prompting and encouragement to elicit additional responses, which were somewhat successful but limited by his cognitive limitations." Stewart's "global and cognitive ability and orientation were severely impaired." Although he did score somewhat higher in this area than in prior evaluations, he misstated the date and was confused as to the reason for the interview and testing. "Stewart's spontaneous speech was paraphasic and

mildly slurred but generally fluent and comprehensible. He lacked confidence in his thinking and language skills and gave up easily when asked to consider answers beyond his initial thought." [R. 286-87.]

Stewart demonstrated minimal, basic, and at times cynical understanding of legal concepts, including plea options, courtroom personnel, and general court proceedings. When asked directly, he typically denied knowledge of courtroom personnel and proceedings, then offered haphazard, incorrect guesses, or endorsed a cynical view of the legal system. However, when repeatedly questioned or when discussing trial proceedings in less formal conversation, he demonstrated a basic understanding of some legal topics. He was able to identify the roles of the judge and counsel but referred to a jury as having "8 people." He provided "simple, accurate" definitions of pleas. [R. 287-88.]

Dr. Bryson concluded that Stewart "demonstrated adequate, albeit concrete and basic, *factual understanding* of legal terminology and courtroom protocol." (Emphasis original.) When he required additional information about the legal process, "he demonstrated the ability to retain newly acquired information, as long as it was presented in a highly simplified form." [R. 288.]

With respect to his rational understanding of the offenses with which he was charges, Stewart was unable to name the offenses, but was able to provide a basic description of the alleged activity. His ability to discuss his desire concerning his

defense was "simplistic, concrete, and likely overly optimistic, [but] not illogical or irrational." Stewart stated that it was advisable to have an attorney represent him "so he can help me." [R. 289.]

Dr. Bryson concluded that Stewart was competent to stand trial but would "a high level of support in order to participate in his legal proceedings . . . focusing on one charge or step in the proceedings at a time, and providing concrete, simple options (perhaps visually, if possible) may be strategies defense counsel can employ to facilitate his ability to understand and make legal decisions. A slow pace, simplified language, and frequent checks for understanding (e.g., asking him to paraphrase what he heard) will likely also benefit Mr. Stewart during court proceedings." [R. 291.]

Although online records indicate that the general district court conducted preliminary hearings on April 4 and April 19, 2021, there is no indication in the record available to this Court that the general district court received Dr. Bryson's report or made any ruling on Stewart's competence to stand trial. On May 3, 2021, the Rockbridge County Grand Jury returned indictments against Stewart on two (2) counts of possession of a schedule I or II controlled substance, one counts of distribution of a schedule I or II controlled substance, and possession of a concealed weapon by a convicted felon. On November 1, 2021, the grand jury returned a further

indictment for distribution of a schedule I or II controlled substance. [R. 146-50, 231.]

On January 25, 2022, Stewart filed a motion to dismiss the charges against him on the ground that he was unrestorably incompetent to stand trial. While recognizing that the most recent evaluation, then more than a year old, concluded that Stewart was competent to stand trial, it was Stewart's contention that the substance of that report and the record as a whole established that Stewart, who suffers from TBI and has a sub-functional IQ, is incompetent to stand trial as a matter of law. The Commonwealth objected to the motion, citing Dr. Bryson's report as sufficient for the circuit court to find Stewart competent to stand trial. In an order dated February 23, 2022, the court denied the motion to dismiss, but did not make an express finding that Stewart was competent to stand trial. [R. 250-262, 523-40.]

On June 21, 2022, Stewart filed a motion for a new evaluation of his competency to stand trial. The motion noted that Stewart had received no services to maintain his competency as recommended in the prior evaluations. The circuit court conducted a hearing on this motion on June 22, 2022 at which it stated that it would deny the motion, doing so by an order of even date. [R. 378-81, 385, 560-61.]

As Stewart does not challenge the sufficiency of the evidence to sustain the convictions, the incidents of the jury trial in this matter are not relevant to the issue

raised in the appeal. However, a summary of the evidence may assist the Court in evaluating the question of Stewart's competence.

The five indictments cover separate offense dates of November 26, 2019 and October 6, 7, an 13, 2020. On November 26, 2019, police responded to a report of an individual, subsequently identified as Stewart, behaving erratically in an area of Lexington. When police approached Stewart, he attempted to flee. Police found methamphetamine and a metal knucks which appeared to have been discarded by Stewart during a brief chase. [R. 339-40.]

The October 6, 2020 offense arose from a statement by a Sarah Ruley obtained by police after she was found to be in possession of methamphetamine during a traffic stop. Ruley alleged that she obtained the drug from Stewart. [R. 340, 664-67.] Based on Ruley's statement, law enforcement personnel maintained surveillance in the area of Stewart's residence and conducted a traffic stop of a vehicle operated by Tabitha Wills in which Stewart was a passenger shortly after midnight on October 7, 2020. Stewart was in possession of approximately $1,000 in currency and methamphetamine was found in a console of the vehicle. [R. 340-41.]

On October 13, 2020, law enforcement personnel again conducted surveillance in the area of Stewart's residence. Police followed a vehicle driven by Christian Hobson in which Stewart was a passenger and conducted a traffic stop on

Interstate 81. Again, police recovered cocaine secreted on Stewart's person. [R. 341.]

Following Stewart's conviction, he filed a motion to set aside the verdict on the ground that he was not competent to stand trial. The motion was argued on July 5, 2022, with Stewart's counsel again asking the circuit court to recognize that Stewart was unrestorably incompetent. The court denied the motion in an order dated July 7, 2022. [R. 386.]

The circuit court received a pre-sentence report which contained additional details concerning Stewart's neuro-cognitive disability. The report noted that at the time Stewart suffered the TBI, there was "a general consensus that he would need close surveillance in his natural environment to assure that proper judgments are made to situational demands." Additionally, the report noted that "[m]edical records . . . reflect[] that in 2015, Mr. Stewart required prompting and assistance with activities of daily living. He was also described as vulnerable to exploitation by others due to cognitive deficits and his eagerness to please." [R. 350-51.]

The report also discussed Stewart's mental instability including his report of visual and auditory hallucinations, passive suicidal ideation, and unspecified homicidal ideation. The report further noted that Stewart had a prior history of diagnosis of bipolar disorder and psychotic episodes, but that he had received no treatment for any of these conditions since his 2019 evaluation. [R. 351.]

At a sentencing hearing held August 9, 2022, the Commonwealth did not put on any evidence other than to have the court receive the presentence report. Stewart sought to present testimony from Dr. Bender. The Commonwealth objected to Dr. Bender's testimony, asserting that "we're not relitigating the issue of competency" and that Dr. Bender's "report is part of the record." The circuit court stated, "No, we're not, but I am going to take the motion under advisement." Stewart's counsel interjected that he was not seeking to relitigate the issue of Stewart's competency to stand trial, but to introduce evidence concerning Stewart's mental state for sentencing. The court stated that it would permit questions for that purpose. [R. 1042-43.]

Dr. Bender testified that Stewart has significant neuro-cognitive disfunction. Bender noted that the cause of the dysfunction stems from multiple sources, including congenital learning disabilities, Stewart's TBI and the effects of his end stage renal disease. According to Dr. Bender, Stewart requires daily assistance to deal with his neuro-cognitive disfunction as he "is impaired broadly so his attention span is impaired so that puts him at risk of, of missing important details or even not even details, just important concept because he's inattentive and distracted." The disfunction effects his memory and his ability to weigh decisions of every sort. [R. 1044-46.]

The circuit court sentenced Stewart to 43 years and 12 months imprisonment with 22 years, 12 months suspended. Stewart timely noted an appeal from this judgment. [R. 395-400.] This appeal followed.

ARGUMENT AND AUTHORITIES

Standard of Review

Whether a defendant is competent is a determination of fact left to the discretion of the circuit court. *Dang v. Commonwealth*, 752 S.E.2d 885, 893 (2014). A court abuses its discretion in three principal ways: "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Lawlor v. Commonwealth*, 738 S.E.2d 847, 861 (2013).

The Court will find an abuse of discretion by a clear error of judgment has occurred only when the record demonstrates that reasonable jurists should not differ as to the proper result. *Grattan v. Commonwealth*, 685 S.E.2d 634, 644 (2009). While the evidence will be reviewed in the light most favorable to the Commonwealth, the written reports concerning Stewart's competency may be evaluated by this Court independently to judge whether the record fairly supports the trial court's action. *Clark v. Commonwealth*, 865 S.E.2d 421, 426 (2021).

The Record as a Whole Demonstrates that Reasonable Jurists Could Not Differ in Determining that Stewart was not Competent to Stand Trial and the Circuit Court Erred in Concluding Otherwise

Clearly, this case does not involve a typical assertion of incompetence where the circuit court's determination of the defendant's competence to stand trial occurs in a setting devoid of any prior context based upon a single evaluation ordered by the court and conducted close in time to the court's making its determination of the defendant's competence. Rather, the record shows that Stewart has been subject to a revolving-door of justice throughout his adult life in a system that is incapable of providing due process in any meaningful way because that system refuses to acknowledge that individuals with neuro-cognitive impairments are not, and cannot be, amenable the same procedures as neuro-typical defendants. That system relies upon the informed, but nonetheless imperfect, ability of medical science to determine what a given individual can comprehend of the world around him and of the criminal justice system in particular.

At the same time, the record demonstrates that even when that system recognizes the defendant's different status, it fails to provide any meaningful alternative to addressing their situation by providing mental health care to assure that the cycle will not repeat, simply turning him lose to be victimized again and returned to the system. Stewart recognizes that his argument in part involves matters of public policy which are generally not the province of the courts to address and rectify.

However, there comes a time when the courts cannot stand mute in the face of the utter failure of the elected branches to address the inadequacy of the law to provide justice and due process to classes of citizens who most desperately need the protection of the law.

In *Atkins v. Commonwealth*, 534 S.E.2d 312 (2000), just such an instance presented itself – the failure of the judicial process to account for the impact of a defendant's neuro-cognitive disability in death penalty cases. In *Atkins*, a majority of the Supreme Court of Virginia determined that there was no error in the absence of provision for finding that a death sentence was not appropriate because of the reduced culpability of a defendant with a substandard IQ. *Id.* at 318-21.

Two justices dissented from this decision. Justice Hassell considered that the death penalty was excessive and disproportionate when applied to a person of Atkins' low mental ability. *Id.* at 321 (Hassell, J., dissenting). Justice Koontz, concurring in Justice Hassell's view, expressed a broader rationale for finding that Atkins should not be subject to the death penalty. In language later quoted by the United States Supreme Court in its decision reversing the judgment in *Atkins*, Justice Koontz observed that

> [I]t is indefensible to conclude that individuals who are [neuro-cognitively disabled] are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population, A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.

Id. at 325 (Koontz, J., dissenting); *see Atkins v. Virginia*, 536 U.S. 304, 310 (2002).[2]

This Court is now presented with an opportunity to recognize that due process requires what a moral and civilized society demands with respect to the treatment of individuals with severe neuro-cognitive disabilities. The Court should find that reasonable jurists, considering Stewart's history as a whole, could not differ as to the conclusion reached by Judge Trumbo that Stewart was unrestorably incompetent to stand trial and that Judge Russell's subsequent contrary determination resulted from a failure to consider all the relevant evidence, or even if all the evidence was considered, in weighing that evidence Judge Russell committed clear error and thus, an abuse of discretion, in finding Stewart competent.

Due process requires that only competent defendants should be subject to criminal prosecution. *Clark*, 865 S.E.2d at 424. A criminal defendant's fitness to stand trial is a critical consideration in administering justice and complying with the due process mandate of prosecuting only those competent to understand the proceedings and participate in their own defense. *Id.* When a circuit court analyzes

[2] The original text included a term which at the time was used in statutory language to identify individuals with neuro-cognitively disabilities. Subsequently, the Code of Virginia has been amended to remove this term, as it is now recognized as hurtful to persons with such disabilities, and the text as quoted here has likewise been emended to reflect this understanding. *See* 2012 Acts of the Assembly, Ch. 476 and 507.

whether a defendant has the capacity to understanding and participate in his trial, the court must appreciate how the defendant's mental health may impact all stages of the proceedings to guarantee a fair criminal justice system. *Id.*

A defendant is competent to stand trial when he has the present ability to understand the proceedings against him and consult with his lawyer with a reasonable degree of understanding at every significant stage of the proceedings. *Dusky v. United State*s, 362 U.S. 402, 402 (1960) (per curiam). Under Code § 19.2-169.1(A), a court is required to order a competency evaluation if there is "probable cause to believe" the defendant "lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense" at any critical point during pre-trial, trial, and sentencing.

If the discretion applied to reaching the judgment of the circuit court that Stewart was competent to stand trial were to be limited to the just the conclusion reached in the last evaluation, which was prepared more than a year prior to the circuit court's overruling of the motion to dismiss, Stewart concedes that the standard of review would favor the summary affirmance of the conviction. However, Stewart contends, and the record of the case demonstrates, that the circuit court either failed to consider the relevance of Stewart's long history of mental incompetence and the prior findings that he was not amenable to restoration to competency, or misapplied the totality of the evidence in concluding that Stewart was competent to

stand trial where he had received no services or otherwise showed any significant improvement in his mental capabilities after having been found unrestorably incompetent in a separate proceeding while the current case was underway.

In each instance in which Stewart was evaluated, his IQ was determined to be no higher than 68 and as low as 58 and was consistently described as having the cognitive level of a primary school age child. Even when an evaluator concluded that Stewart was competent, it is clear that this was based on a rudimentary understanding of the legal process, not on a considered ability to comprehend the proceedings and to provide meaningful assistance to his defense counsel. At the very least, the length of time between the evaluation ordered by the general district court and the subsequent presumptive determination of competence by the circuit court suggests that the latter court should have considered the broader array of evidence which showed that the opinions as to Stewart's mental faculties varied widely over time, rather than relying on the conclusion of a single evaluation.

Throughout the proceedings, Stewart's counsel expressed to the circuit court his grave concern that Stewart was not competent to appreciate the significance of the proceedings and to provide meaningful assistance for his defense. While due process does not require courts to accept without question a lawyer's representations concerning the competence of his client, an expressed doubt by defense counsel is unquestionably a factor which should be considered in assuring that due process is

afforded to the defendant and, counsel's representations deserve serious consideration by the circuit court. *Dang*, 752 S.E.2d at 896.

In *Dang*, the Court concluded that the circuit court's ability to observe the defendant assuaged any concern that it failed to take counsel's concerns into consideration. *Id.* at 897. Here, however, the record does not demonstrate, as it did in *Dang*, that the court took any measures to assess Stewart beyond the rote recitation of the standard colloquy it would undertake with any defendant concerning his plea and readiness for trial. Several evaluators noted that Stewart was capable of providing the expected responses to such questions without having a clear or considered understanding of the legal significance of doing so.

When the record is viewed in its entirety, it is clear that Stewart's lack of a meaningful understanding of the criminal process, apart from his familiarity with its rudimentary structure merely from repeated encounters, results from his permanent, irreversible neuro-cognitive disability. Conflicting opinions of the experts as to whether at a given point Stewart was minimally competent cannot override the reality that Stewart is not truly capable of being treated as a neuro-typical defendant. The circuit court's judgment in this case notwithstanding, any reasonable jurist reviewing Stewart's entire history could not differ as to the conclusion that Stewart is not competent to participate in criminal proceedings or give meaningful assistance

to his defense counsel, and the circuit court's contrary judgment constitutes an abuse of discretion.

CONCLUSION

For these reasons, the judgment of the circuit court should be reversed and the case remanded for entry of an order finding Stewart to be unrestorably incompetent and the charges against him dismissed.

Respectfully submitted,

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CERTIFICATE

1. The appellant is Anthony Tremaine Stewart, who is represented by Melvin L. Hill, Esquire (SB # 24117), P.O. Box 73, Roanoke, VA 24002, T: 540-342-1851, F: 540-342-1853, mhilllaw@aol.com and John S. Koehler (VSB # 35971), The Law Office of James Steele, PLLC, Post Office Box 21652, Roanoke, VA 24018, T: (540) 632-5994, F: (540) 215-7452, john@jamessteelelaw.com.

2. The appellee is the Commonwealth of Virginia, which is represented by Arron J. Campbell, Esq., Office of the Attorney General, 202 North Ninth Street, Richmond, VA 23219 via email at ACampbell@oag.state.va.us and oagcriminal litigation@oag.state.va.us

3. On January 9, 2023, I provided a copy of the Opening Brief to all counsel of record as set forth herein.

4. The length of the Opening Brief is 6,871 words.

5. The appellant does not waive oral argument, and desires to present argument to a panel of the Court in person.

6. Counsel are retained.

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