SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART T-15
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

CARLOS RUBINO

Defendant
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Decision and Order
Indictment No. 1503/06
Docket Nos: 42996C-2005
50230C-2005

FABRIZIO, J.:

The issue before the Court is whether the defendant is competent to stand trial on three pending cases. In one case, the defendant is charged in a misdemeanor information with violating Penal Law § 215.50(3), Criminal Contempt in the Second Degree, based on an allegation that on June 26, 2005, he telephoned his mother, in violation of an order of protection, and told her, in substance, that he "had guns," and that if she had him arrested, he was going to kill her and "the whole family." In a second case, the defendant is charged in a misdemeanor information with violating Penal Law § 130.60(2), Sexual Abuse in the Second Degree, based on an allegation that between July 1 and August 31, 2004, he subjected a five year old girl to sexual contact. In the third case, the defendant is charged by indictment, *inter alia,* with violating Penal Law § 215.51(d), Criminal Contempt in the First Degree, a felony, based on an allegation that on March 12, 2006, the defendant violated an order of protection issued in favor of his sister when he threw a piece of cement through her living room window, and subsequently telephoned her.

These cases had been pending in the Domestic Violence Part,[1] and five different

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[1]These cases are all pending in Supreme Court, Bronx County, Criminal Term, pursuant to 22 NYCRR §42.1 and § 142.2[b]. *See People v. April Jones,* 2007 Slip Op 27482, 2007 N.Y. Misc. LEXIS 7689 (App. Term 1st Dept).

attorneys have been assigned to represent the defendant during their pendency. On February 28, 2007, Judge Judith Lieb ordered that the defendant be examined pursuant to CPL § 730.30(1), based upon an application by the defendant's attorney at the time, Michael D'Ambrosio, his fourth. The defendant was interviewed and evaluated in March and April 2007 by two court-appointed psychiatric examiners, Dr. Melissa Kaye and Dr. Judith Rosner, who in May 2007 each stated that it was their opinion that the defendant was unfit to proceed. Mr. D'Ambrosio was subsequently relieved and defendant's current attorney, Douglas Kahan, his fifth, was assigned. That attorney obtained the services of another psychiatric examiner, Dr. Robert Campion, who concluded in a report dated July 14, 2007 that the defendant was competent. The defendant disagreed with Dr. Campion's diagnosis that the defendant, while fit, had a Paranoid Personality Disorder, and Dr. Campion met with the defendant again in October 2007 for about two hours. Dr, Campion took no notes during that meeting, and issued no additional report.

Defense counsel moved to controvert Dr. Kaye's and Dr. Rosner's findings. On November 2, 2007, a hearing began before me, pursuant to CPL § 730.30(2), to determine whether the defendant was competent to stand trial. The Court heard testimony from Dr. Campion, Dr. Kaye, Karen Smollar, an attorney with the Bronx Defenders who first represented the defendant on these cases, Dr. Li-Wen Lee and Elizabeth Henderson, who both interacted with the defendant during a stay at Bellevue Hospital in April 2007, and the defendant himself. After listening to the evidence, reading the minutes from many calendar calls memorializing the interactions between the defendant, the court, and prior attorneys, and reading the reports of each of the psychiatric examiners who evaluated the defendant for competence as well as the medical record compiled during the defendant's psychiatric assessment at Bellevue, the Court concludes that the defendant is not competent to proceed to trial at this time.

"The test for competence is set forth in Criminal Procedure Law § 730.10(1)." *People v. Mendez,* 1 N.Y.3d 15, 19 (2003). That statute provides that a defendant is considered to be an "incapacitated person when, as a result of a mental disease or defect, [that individual] lacks capacity to understand the proceedings against him or to assist in his own defense." Criminal Procedure Law § 730.10(1). For the purposes of due process, a defendant "must have 'sufficient present ability to consult with his lawyer with a *rational* degree of *rational* understanding – and . . . a *rational* as well as a factual understanding of the proceedings against him'" in order to be competent to stand trial. *Mendez,* 1 N.Y.3d at 19 (*citing Dusky v. United States,* 362 U.S. 402 (1960)) (emphasis added).

In the somewhat unique circumstances of this case, the People have moved to confirm the findings made by Drs. Kaye and Rosner that the defendant is not competent. Even though the defendant's prior attorney requested the 730 examination, it is the defendant's contention that he is in fact competent, and he asserts that the People should bear the burden of proving that he is not competent. Of course, a defendant is presumed to be competent. *People v. Tortorici,* 92 N.Y.2d 757, 765 (1999). In New York, where there is evidence supporting a finding that a defendant may not be competent, the burden is on the prosecution to establish a defendant's competence, by a preponderance of the evidence. *People v. Christopher,* 65 N.Y.2d 417 (1985). However, "Article 730 makes no mention of who has the burden of . . . disproving competency and by what standard." *Mendez,* 1 N.Y. 3d at 19. While the Supreme Court has recognized that "a state is free to place the burden on the defendant to prove incompetency by a preponderance of the evidence," *Mendez,* 1 N.Y.3d at 19-20 (*citing Cooper v. Oklahoma,* 517 U.S. 348 (1996)), this Court has found no reported case in this State which would require the People to bear the burden of establishing a defendant's lack of competence. Notably, the allocation of "a burden of

proof is not constitutionally mandated . . . but is a creature of judicial construction." *People v. DelRio,* 220 A.D.2d 122, 126 - 27 (3rd Dept. 1996) (citing *Medina v. California,* 505 U.S. 437, 446 (1992)). Since the Court of Appeals has uniformly recognized that a defendant is not required to establish his own competence to stand trial, the Court places the burden on the People to establish by a preponderance of the evidence that the defendant is not competent to stand trial.

The Court's decision that the People have met their burden is not rendered lightly. The defendant's current attorney believes and strongly advocates that the defendant is presently competent, and will be able to assist him in a rational way in defending him at trial. Ms. Smollar testified that she never requested a 730 examination because she did not believe that the defendant was not fit to stand trial when she represented him on these matters in 2005 and 2006. Since a defendant's attorney may be "in the best position to assess a defendant's" fitness to stand trial, a court should weigh factual statements made by a defendant's attorney very heavily in determining whether that defendant is currently able to assist in his or her defense in a rational way. *People v. Gelikkaya,* 84 N.Y.2d 456, 460(1994); *see also People v. Carbonel.* 296 A.D.2d 858 (4th Dept. 2002).

Moreover, the defendant is a well-educated individual who, at one point in 2003, convinced another judge in a previous case, in which he was also charged with violating an order of protection issued in favor of his mother, to allow him to represent himself. The defendant, who is about 40 years old, testified that he has a lengthy history of psychiatric hospitalizations, beginning from the age of 10. He insists, however, that there is "nothing wrong" with him, and that he has been repeatedly "misdiagnosed," and attributes this to collusion between mental health professionals and members of his family. Of course, even a documented history of actual psychiatric illness is not grounds, in and of itself, to find that a defendant is not competent to

stand trial. *See e.g. People v. Tortorici,* 92 N.Y.2d at 763; *People v. Gelikkaya,* 84 N.Y.2d at 460. In this case, after considering defense counsel's statements and all of the evidence presented, the best that can be said about this defendant in terms of his fitness is that he does appear to have a factual understanding of the charges against him, as well as a basic grasp of courtroom proceedings. However, the Court has been persuaded by a preponderance of the evidence that the defendant's overall thought process is decidedly irrational, due to the presence of real active psychiatric issues and acute paranoia, and this makes him currently unable to have a rational understanding of the charges and assist his attorney in any rational manner.

All three psychiatric examiners are in agreement that the defendant has a Paranoid Personality Disorder, an Axis II diagnosis under the DSM. The evidence of the existence of that disorder is well-documented by each examiner. For example, Dr. Rosner notes that the defendant "expressed the paranoid belief that his attorney was using the CPL § 730 exam as a 'smoke screen' to conceal mistakes in his defense, and the defendant alleged that his treating psychiatrist [at Bellevue] was being manipulated as part of the plan." The defendant told Dr. Rosner that he believed his then defense attorney and the court were also working together in ordering the 730 exam "to delay his case and thereby force him to accept a plea bargain." In his report, Dr. Campion noted that during his own examination there was "a near constant return to the same theme," in that the defendant consistently insisted that he was the victim in these cases and that he was forced to violate the order of protection in the most recent case because he had been victimized months prior to that crime and the police and the prosecutor did nothing to investigate his claims. Significantly, the defendant acknowledged that his anger and his preoccupation with his family makes him a danger to them, but told Dr. Campion that he was unconcerned with any

future legal charges that might result from a confrontation with his family members because it would be a "homicide/suicide."

In addition to diagnosing the defendant with a Paranoid Personality Disorder, Dr. Kaye also found the defendant to be psychotic. Specifically, she concluded that the defendant's "history and clinical presentation is consistent with the diagnosis of Psychosis Not Otherwise Specified.. He has an underlying Personality Disorder with Paranoid and Borderline Features and has experienced depressive and psychotic symptoms. An underlying diagnosis of Schizoaffective Disorder cannot be ruled out." Dr. Kaye agrees with Dr. Rosner that the defendant's paranoia prevents meaningful assistance with an attorney, because the defendant can only view himself as a victim in these cases, but not in the way that a rational person who believes themselves to be falsely accused of a crime would. The defendant admits that he is in fact guilty of some of the crimes charged. He is completely wedded to the belief that a court will dismiss his cases in the interest of justice following a "Clayton" (*People v. Clayton,* 41 A.D,2d 204 (2nd Dept. 1973)) hearing, pursuant to CPL §§ 210.45 and 170.40, because some of the people who have accused the defendant of criminal acts – including his mother, sister and brother-in-law – have, according to the defendant, committed criminal acts against him that predated any of the charges in the pending matters.

According to Dr. Kaye, the defendant's view of this is unshakable, and his belief that his attorneys are not assisting him is based on a delusional thought process. Dr. Kaye's conclusion is borne out by the defendant's own testimony at the hearing. Dr. Kaye acknowledged that defendants and their attorneys frequently clash over trial strategy and tactics, and this alone would not be evidence of unfitness. However, she noted that "when a defendant believes that it

involves a conspiracy, we're talking about a different situation." In this case, when Dr. Kaye asked the defendant the simple question "what was going on in the courtroom . . . he went into the whole conspiracy theory, explaining how . . . [h]is lawyers weren't representing him and they were on his family's side." And it is this fixed, false belief that makes the defendant incapable of providing rational assistance to an attorney. One aspect of this belief repeated itself during the hearing. During his testimony, the defendant insisted that none of the attorneys assigned to represent him ever discussed his cases at any length with him – a view that is contradicted by the testimony of one of those attorneys, Karen Smollar, and the minutes from calendar appearances of two other attorneys.

Ms. Smollar testified that she met with the defendant on almost a daily basis in her office during the lengthy period she represented him. During this time, the defendant's conversations centered on past events involving his family. The defendant insisted that Ms. Smollar get evidence that he felt was needed to support his plan to present the court with a Clayton motion, have the court order a hearing on that motion, compel testimony from family members, and have the court dismiss all charges. During this period, Ms. Smollar filed substantive motions in the first two pending misdemeanor cases, obtained discovery, and prepared those cases for trial – things that the defendant claims to be unaware of. When he was arrested on the felony charge, the defendant testified that he insisted on appearing before the grand jury and telling them the truth – namely, that he in fact was guilty of the felony contempt charges, but also was a victim of past assaults. After the indictment was voted, Ms. Smollar was apparently doing her best to work on a defense; the defendant had other plans, insisting that she obtain items he deemed necessary for his Clayton motion. When Ms. Smollar apparently did not comply with the defendant's

irrational requests, he became angry and expressed that anger in court. He wrote on the bottom of an order of protection dated April 10, 2006, "My rights are being violated. I want to be properly represented by Ms. Smollar . . . I need to obtain evidence that she refuses to discuss or obtain." But Ms. Smollar did discuss the things the defendant wanted to discuss, at length; he did not accept the fact that as his attorney, she viewed his requests as irrelevant to the cases or to a defense. According to Ms. Smollar, when the defendant went on the record in open court and railed against her in a similar vein, accusing her of not doing her job or listening to him, and demanded a new lawyer, the judge granted his request. Ms. Smollar testified that she did not oppose the request, in part because she realized that her own relationship with the defendant had moved beyond an attorney-client one to in which she was in danger of being a social worker rather than a legal advocate.

It was the irrational, delusional thought process that derailed the attorney-client relationship between the defendant and Ms. Smollar. She was his attorney longer than anyone else, providing zealous representation during that period. Yet, the defendant was unable to recognize this, and hurled unfounded accusations in her direction in open court, making it impossible for her to continue that representation. The defendant testified that Ms. Smollar told him that she believed that a Clayton motion would be successful – something she herself never testified to at the hearing. Given her zealous representation, it is unimaginable that she would not file one if she believed that such a motion would be litigable. The defendant's stated belief that this attorney thought that he had a viable motion to dismiss appears to be just another example of his delusional thought process. Remarkably, the defendant testified that he does not recall or believe that he asked that Ms. Smollar be relieved – testimony that this Court would consider to

be incredible in a witness with no psychiatric issues. In fact, the defendant's psychiatric problems prevented him from having rational discussions with Ms. Smollar about a defense, and those same problems prevent him from currently appreciating that it was his own psychosis that necessitated the termination of the attorney-client relationship.

The defendant's claims that two of his subsequent attorneys – Darren Wizenberg and Michael D'Ambrosio – failed to spend any time with him discussing his cases is contradicted by statements in the very minutes of calendar appearances the defendant submitted to the Court, as well as by detailed portions of the defendant's hearing testimony. For example, on August 3, 2006, Mr. Wizenberg reported in an afternoon calendar call that he and the defendant "did speak for some time" during the lunch recess; the defendant immediately contradicted his attorney and said "No we did not" and spent the rest of the court appearance complaining about how he needed "adequate representation." On the next court date, a mere six days later, Mr. Wizenberg told the court that "there's been two days where I had extensive discussions with Mr. Rubino. I believe the discussions have spanned several hours. I am of the conclusion that we are not only [of] completely divergent views of how to proceed and fight all three dockets, but I am of the mind set that he, in his mind, has a completely different view that actually precludes me from fighting these cases the way I see fit." Mr. Wizenberg added that he had "spoken with Mr. Rubino for about two hours already today, and he, contrary to counsel's advice, has insisted on making a bail application." It is impossible to reconcile these contemporaneous statements with the defendant's hearing testimony that Mr. Wizenberg never discussed the defendant's version of events, and planned strategy, with him. Rather, the minutes support the conclusion that the defendant's psychiatric issues prevented him from having any rational discussion with Mr.

Wizenberg about the cases, or understanding what Mr. Wizenberg was trying to suggest to him. The defendant insisted that he had Mr. Wizenberg relieved because he claims that Mr. Wizenberg lied to him about preparing and filing relevant a Clayton motion. Even though Mr. Wizenberg never actually filed any motions, the evidence demonstrates that the defendant had no ability to rationally assist Mr. Wizenberg in their preparation because of his psychiatric problems.

Equally remarkable is the defendant's claim that Mr. D'Ambrosio, his next attorney, did not discuss the "facts" with him. In a calendar appearance in the Domestic Violence part on January 28, 2007, Mr. D'Ambrosio noted that he had met with the defendant "two and a half hours before lunch and after lunch" that day. He told the court that he understood that the cases "involve[d], for the most part, problems he has had on and off with his family, his mother, his sister, and his brother-in-law, for a number of years. And my client is upset that he was victimized by his brother-in-law, and his brother-in-law's brother, and that he was physically assaulted." Then, at the defendant's request, Mr. D'Ambrosio made a bail application. The defendant had been incarcerated for several months at this point, and had been represented by four attorneys during this period. Yet, the application the defendant insisted his lawyer make focused solely on allegations involving his family. Mr. D'Ambrosio told the court, "my client states that it wasn't brought out that there was [an] assault upon him by various members of his family and his extended family. And that there was a cover up of this crime between the police . . . he reported this to the District Attorney's Office who he says has failed to investigate this assault upon his person, and to the Throgs Neck police; that he reported this incident to Sergeant Whittaker, and that his brother-in-law had admitted that he assaulted him." The prosecutor pointed out that all of this had been part of the record on previous occasions, and the court denied

the application to change the defendant's bail conditions.

Without question, Mr. D'Ambrosio plainly understood all of the "facts" that the defendant believes to be relevant to his plan to have the cases dismissed in the interest of justice. That the defendant testified he continues to believe that this attorney did not have lengthy discussions with him about issues he believes to be important is further evidence of how clouded his thought process has become because of his mental illness. Even more bizarre is the defendant's claim that Mr. D'Ambrosio did nothing to investigate the allegations he raised, or understand his desire for a Clayton hearing. The defendant himself testified that Mr. D'Ambrosio wrote to him on January 22, 2007, advising him that "he doesn't believe that I am going to be granted nor going to win a Clayton hearing." Upon receipt of the letter, the defendant testified that he "felt either [his attorney] was completely incompetent or there was something seriously wrong with his representation." The defendant also indicated that Mr. D'Ambrosio wrote to him on another occasion, indicating the District Attorney's office had agreed to investigate the defendant's allegations that he had been the victim of an assault by his brother-in-law and others. The defendant testified that he "felt it was strange that [his lawyer] would go to the DA," and expressed disbelief that the prosecutor agreed to investigate the allegations. And, the defendant also testified that Mr. D'Ambrosio wrote him another letter about issues the defendant had raised concerning a car. The defendant alleged that some years earlier his mother had misappropriated a car that actually belonged to him. Mr. D'Ambrosio discussed this issue with both the assistant district attorney and Ms. Smollar. When Mr. D'Ambrosio reported back that the assistant district attorney indicated that the defendant's mother said that the car belonged to her, because the title was in her name, and said that Ms. Smollar did not have any documentation to the contrary –

documentation the defendant continues to insist he left with Ms. Smollar – the defendant testified that he responded by making a series of phone calls to Mr. D'Ambrosio and Ms. Smollar about the car – something that had absolutely nothing to do with any of the facts of the current cases. According to the defendant, this all resulted in the defendant's "cursing" at Mr. D'Ambrosio over the telephone, and threatening him, and becoming verbally abusive. And it appears at this point that Mr. D'Ambrosio reached his own conclusion that the defendant was not fit to proceed, and requested the 730 examination.

Once again, this only underscores Dr. Kaye's and Dr. Rosner's opinions that the defendant's psychiatric conditions make him currently unable to provide any rational assistance to any defense attorney. The defendant believes that his attorneys do not listen to him, do not know the facts he insists are important, and as a result do not work zealously to defend him. During the hearing, the defendant said that "under no circumstances were [Mr. Wizenberg and Mr. D'Ambrosio] going to represent me whatsoever." In fact, every attorney appears to have gone to great lengths to try to have rational conversations with the defendant, only to ultimately be intimidated, threatened and accused of conspiring to bring about his conviction by working behind the scene with the prosecutor, the court and his family. During the hearing, the defendant pointedly accused his current attorney of not spending enough time with him discussing the case, and of not investigating every nuance that the defendant would like investigated. The Court observed the defendant's current attorney's patience in dealing with the defendant, as well as his vigilance in representing him. Although counsel vigorously argues that his client is fit to proceed, it is the Court's conclusion that in fact the defendant's thought process is controlled by his own paranoid ideas, and that everything he does is colored by these ideas, and that this prevents him

from rationally understanding the charges against him or rationally assisting in his defense..

Dr. Rosner even pointed out how the defendant's psychiatric problems renders him unfit to proceed to trial on the sex abuse case. Dr. Rosner wrote that in March 2007, when she "directly asked about that charge, he states 'That's all part of it (the family dispute), it's all connected,' in a manner that suggests that his pervasive paranoid beliefs about his family may extend to an understanding of the events leading to that arrest." There are no facts on the record to show that the charges in the sexual abuse case involve any member of the defendants family. The defendant testified that he made no such statements to Dr. Rosner, testimony that the Court does not credit. At the hearing, during his direct examination, when the defendant was asked what happened after he was arrested on the sex abuse charges, he testified that he continued to speak with his attorney at the time, Ms. Smollar, "about fixing my rap sheet . . . and [employees of the Bronx Defenders] were telling me they were going to file a case [to fix the rap sheet] . . . my family puts me up in a motel for about a month. For about a month I was talking with Karen. I was talking with my family . . . and my mother had been avoiding meeting with me and Karen for the entire year . . . and this was interesting because this meeting took place after another fallout with my family a month after I was bailed out where my family was lying . . ." There was no mention of any discussion about a defense to that case; there was only testimony about the defendant's family. The testimony supports the conclusion that Dr. Rosner's opinion is still valid.

Of the three psychiatric examiners, Dr. Campion stands alone in his belief that the defendant's paranoid personality disorder, while extreme, did not prevent the defendant from being able to view the charges in a rational manner or impair the defendant's ability to provide rational assistance to his attorney. Dr. Campion agreed that the defendant "sees himself

essentially as a victim of many people he comes into contact with," including "his mother, his father, his siblings, the mental health system, the legal system." But, Dr. Campion does not believe that the defendant's beliefs rise to the level of a "delusion.."Although the defendant admitted to Dr. Campion that he knowingly and intentionally violated an order of protection by breaking a window in order to have "his day in court . . . where he would have a Clayton hearing motion, which he hoped to win," the doctor opined that the defendant's actions demonstrate merely that he makes "unwise" decisions, but are not evidence of his being irrational or delusional. Certainly, reasonable minds may differ about what constitutes a rational understanding of charges in a criminal case in the context of assessing competence to proceed. But, there has to be some basic objective threshold of what "rational" means in such a context. *See e.g. United States v. Hasan*, 344 F. Supp. 386 (S.D.N.Y. 2004). In this case, the defendant's paranoid, psychotic and delusional thought process has resulted in his having the unshakable belief that his lawyers have failed to represent him adequately because they are intentionally sabotaging his case because the have each decided against making a Clayton motion. He insists that all of the psychiatric examiners, including Dr. Campion, have either intentionally or through incompetence misreported things he said, and have continued to misdiagnose him, and that this may all be part of a continuing pattern of his family trying to use the mental health system to cover up years of their own abuse and neglect of the defendant. And, he believes that judges have been partners in the conspiracy as well. All of this has prevented him from ever having any rational discussion about these cases with his attorneys. Thus, the Court agrees with Drs. Kaye and Rosner, that the defendant does not have a "sufficient present ability to consult with his attorney with a rational degree of rational understanding of the charges." *Dusky,* 362 U.S. at 402.

In fact, even Dr. Campion wrote that "[t]he one area where I had questions about Mr. Rubino's competency, given his history of outbursts in the courtroom, is his ability to control his behavior." At the time he wrote his report, Dr. Campion opined that the defendant "now understands that such behavior is self-defeating, and that he would be able to control himself." During his testimony, Dr. Campion stressed that he believed that the defendant trusted his current attorney "at this point"and acknowledged that his determination about defendant's fitness to proceed was based upon his current evaluation. That is, of course, the legal standard, because a competency determination must be based on contemporaneous data. *See e.g. People v. Morton,* 173 A.D.2d 1081, 1083 (3rd Dept. 1991); *Cf. People v. Pena,* 251 A.D.2d 26, 32 (1st Dept. 1998). As the hearing progressed, the Court observed that Dr. Campion's opinion about the defendant's ability to control his behavior as well as his ability to work with his current attorney was incorrect.

Initially, the defendant was not overly disruptive. At times, he appeared agitated, especially when a witness would testify about the existence of a psychiatric disorder, but he was not speaking out. The defendant did have many conversations with his attorney as the witnesses testified. This made it appear as if he had in fact gained the ability to control himself and work with an attorney. The Court was aware of this, made statements about it on the record, and even asked Dr. Kaye if she had observed the defendant interacting with his attorney. Dr. Kaye candidly admitted that she was impressed with the defendant's ability to control himself. It seemed to the Court at that point that the defendant had found an attorney he could relate to, and this seemed to indicate that he was fit to proceed.

But, as it turned out, this was about the last time that the defendant behaved reasonably in

the courtroom. While Dr. Kaye was still on the stand, the defendant began speaking out when there was a question about whether the defendant was in fact satisfied with Mr. Kahan's representation. The defendant launched into a lengthy monologue, in which he accused the prosecutor of lying, and the doctors who interviewed him of misrepresenting what he said, "because I do feel there seems to be a problem about the interpretation of what I am saying and what actually happened and how I actually feel." The defendant's outburst left everyone sitting in stunned silence, and Dr. Kaye's testimony terminated abruptly.

This was the first in a series of outbursts that took place during the rest of the hearing. After Dr. Kaye left the witness stand, the defendant addressed the Court, saying, "I sat through this courtroom, and I have listened to people tell you what my words are or what is in my head. And I can tell you they are far from what I actually – what I think. And I had requested that these meetings be taped, be taped because – meetings with the doctors be taped. So [there] wouldn't be confusion because [there] seems to be a constant confusion [about] exactly what I'm saying." On the next day, as soon as the case went on the record, the defendant insisted on speaking out, and said "I don't believe that my attorney is defending me properly." His attorney explained that the defendant wanted him to try to locate a videotape that might have been made during the defendant's stay at Bellevue that might have depicted an incident briefly referred to in the defendant's hospital record. In addition, defense counsel said that the defendant "would like me to bring in his family as witnesses for this hearing. And I . . . have told him that I don't believe the court is going to allow [it]. I don't know that it's relevant testimony, and I don't think it's appropriate." The Court had in fact already indicated that the defendant's grandmother had no relevant evidence to offer on the question of defendant's fitness, and agreed that the defendant's

other family members also had no relevant testimony to offer. At this point, the defendant spoke for several minutes, without interruption, stating at one point that "it is not to my benefit for my mother and family to hide behind the doctors and testify through the doctors in this case."

The Court cautioned the defendant many times about not speaking out, but the defendant continued to do so throughout the hearing when he was not on the witness stand. And, his demeanor and statements while testifying further demonstrated that he is unable to control himself and has a penchant for irrational, paranoid and delusional thoughts. For example, while on the stand, the defendant became angry and agitated when the Court attempted to adjourn the case for a lunch recess after the defendant had basically testified in a narrative manner for more than an hour and a half. The defendant accused the Court of purposefully cutting him off and leapt to the incorrect assumption that the Court would not allow him to continue his testimony. Significantly, later on during his testimony, the defendant bizarrely accused the Court of having personal conversations with his mother when the Court asked the defendant if it were true that he said that he would kill his mother if he went upstate – something Dr. Campion testified that the defendant said to him during an interview in October 2007. The defendant said " I would like to make this clear to answer the judge's question. The reference that if I go upstate. If I said to my mother that if I go upstate that I would kill them, I like to put this on the record that this was a recent statement that was made, recently called my mother. So for the judge to - - for the judge to know that - - the judge to know that, then it's very clear that there are some discussions behind the scene because I had never mentioned that until - - until I was arguing with my mother. My mother. I don't know. It was - - I called my mother on Sunday [two days earlier] . . . We had a discussion about it."

The defendant's delusion that the Court would be involved in ex parte communications with his family was so fixed that it interfered with the defendant's ability to recall what a witness had said at the hearing, even to the point of the defendant's expression of dismay when the Court made a record that no such conversation with his mother had ever taken place. All of this confirmed Dr. Kaye's and Dr. Rosner's conclusions about the defendant's paranoia and further demonstrated how his mental illness makes him unable to have a rational understanding of the charges and the legal proceedings.

Moreover, the defendant's testimony itself during the hearing betrays his own belief that he is fit to proceed. First of all, the overall content of the defendant's testimony, which lasted for several hours, dealt in significant part with his family. Moreover, when the defendant was repeatedly asked if he had assisted or was able to assist attorneys, his response was always the same; "I tried to." In his mind, the defendant sincerely believes that he attempted to assist his past attorneys, and that he has the ability to assist his current attorney in a rational manner. But his mind is so riddled with paranoid thoughts, delusions, and allegations, fueled by a host of active serious psychiatric problems, that even though he believes that his assistance will help in his defense, he is in fact incapable of offering any rational assistance to an attorney.

Sadly, Dr. Campion testified that the defendant told him that he would rather remain in jail awaiting a decision about whether an as yet unmade application for the Clayton hearing he so desperately seeks has been granted, and would agree to plead guilty if a judge denied his application to have the case dismissed in the interest of justice. None of the attorneys yet involved in the case have agreed to file such a motion; one of them flat out told that defendant that such a motion would not be successful. The defendant believes that once an attorney knows

all the facts, a Clayton motion will be filed, and a judge will grant a hearing. The defendant's irrational failure to accept the fact that no attorney will file such a motion has caused repeated delays, since new attorneys have to be assigned on a regular basis. These delays have prevented these cases from proceeding for nearly two years. The defendant blames the delay on his attorneys; in fact, the delay has been the defendant's responsibility, and has occurred because he has never been able to have a rational discussion with any attorney about his cases, or express even a willingness to listen to any lawyer's advice unless that attorney agrees with him.

This is not to suggest that a defendant who chooses to explore the possibility of dismissal of a case in the interest of justice is unfit. The motion to dismiss is the interest of justice may, of course, be a legally viable mechanism to pursue in a particular case. Even if a defendant were to insist on filing one in a case in which his attorney advises against such a course, that also would not make a defendant unfit to proceed. In this case, however, the defendant not only insists on filing such a motion, and becomes belligerent with attorneys who advise against it or outright refuse to file one, but he also believes that his lawyers' advice against filing such a motion is somehow the product of a conspiracy between the attorneys, the psychiatrists, his family members, and the court, and his ability to engage in rational discussions is poisoned by that belief.

The defendant's unwillingness to discuss any other way of proceeding is all the more irrational because the defendant has been down this very road before. The defendant filed a *pro se* application for a Clayton hearing in 2003, in connection with a then pending case in which he was charged with assaulting his mother, threatening to kill his sister, and eleven separate instances of violating orders of protection issued in favor of his mother and sister. In that case, he

demanded that the court order a hearing based upon allegations raised about his past relationship with his family, including instances of past assaults by members of his family, his mother's alleged misappropriation of his car, and his having been misdiagnosed as having a personality disorder by prior psychiatric examiners who were conspiring with members of his family. In a thoughtful, lengthy and clearly worded decision dated February 26, 2004, Judge Joseph Dawson stated in substance that he had assumed, for the sake of the decision, that all of the factual allegations the defendant made were true, but denied the motion to dismiss the case in the interest of justice, finding that even if they all were true, the defendant was not entitled to such relief.

At the CPL 730 hearing, the defendant testified that no one, including that judge, had ever given him the decision, and the first time he ever saw it was when this Court provided it to both sides during the hearing. He further said that if he had read it, he never would have pled guilty in that case. Once again, if the defendant were rational, the Court would find this statement to be incredible. After all, as the defendant continues to say, his mission for years has been to have his day in court *vis a vis* a Clayton hearing, at which his mother and other family members would be required to come into court and testify, not about the crimes with which the defendant is charged, but about how they have victimized the defendant during his entire life. He himself prepared a lengthy and detailed set of motion papers requesting the hearing. He pled guilty at a time subsequent to the court's decision. His statement about never having seen the court's written decision seems completely unbelievable, because this defendant would have demanded to see it. Although he was appearing *pro se* that case, he blames two prior attorneys who were acting as legal advisors and never had anything to do with the motion, including Ms. Smollar, and the

judge who decided the motion, for withholding the decision from him. But, the statement is understandable, because it appears to be just another example of the delusion described by Dr. Kaye, that judges, lawyers and his members of his family are conspiring against him.

Thus, the evidence at the hearing demonstrates, by a preponderance of the evidence, that the defendant would be denied due process if these cases proceeded to trial, because his psychiatric problems, including his psychosis, his paranoid personality disorder, and his delusions, prevent him from being able to meet the *Dusky* standard for fitness. Accordingly, the Court finds that the defendant is not currently fit to stand trial. As a result, a final order of observation is issued on dockets 42996C-2005, and 50230C-2005, and those cases are dismissed. The defendant is committed to the custody of the Commissioner of Mental Hygiene on the charges contained in Indictment Number 1503/06, to be returned to court at such time as the commissioner determines that he is once again fit to proceed.

The foregoing constitutes the decision and order of the Court.

Dated: January 9, 2007
Bronx, New York

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RALPH FABRIZIO
A. J.S.C.