

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

DEDHAM DISTRICT COURT
DOCKET NO. 2154CR000670

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COMMONWEALTH

FEB 27 2023

v.

DISTRICT COURT
DEDHAM DIVISION

THEODORE MCCARRICK

**DEFENDANT'S MOTION TO DISMISS
FOR LACK OF COMPETENCY TO STAND TRIAL**

Pursuant to G.L. c. 123, §§ 15(d) and 16(f), Defendant Theodore McCarrick, now 92-years-old, respectfully requests that this Court dismiss the pending criminal complaint, because he suffers from significant, worsening, and irreversible dementia and, thus, is legally incompetent to stand trial. Proceeding against Mr. McCarrick, given his impaired cognitive function, would violate his fundamental rights to due process under the Fourteenth Amendment to the U.S. Constitution and article 12 of the Massachusetts Declaration of Rights.

In further support of this motion, Mr. McCarrick states as follows:

1. On July 28, 2021, a criminal complaint issued against Mr. McCarrick, charging three counts of indecent assault and battery on a person over 14 years in violation of G.L. c. 265, § 13H, all involving the same complainant, J.G., and arising from incidents that allegedly occurred at a family function in Wellesley, Massachusetts, nearly 50 years ago on June 8, 1974.

2. On September 3, 2021, Mr. McCarrick pleaded not guilty, and he maintains his innocence of all charges. Mr. McCarrick did not sexually assault J.G., either in Wellesley in 1974 or any other place at any other time.

3. Although a jury trial would afford Mr. McCarrick the opportunity to confront his accuser, prove his innocence, and vindicate his reputation, “a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense *may not be subjected to trial.*” *Commonwealth v. Prater*, 420 Mass. 569, 574-75 (1995) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (holding that “prohibition” on trial of incompetent defendant is “fundamental” to “adversary system of justice”)) (emphasis added); see *Commonwealth v. Hill*, 375 Mass. 51 (1978) (citing 14th amend. to U.S. Const. and art. 12 of Mass. Decl. of Rights).

4. Once the issue of competency has been raised, the Commonwealth bears the burden to establish, by a preponderance of the evidence, that the defendant is, in fact, competent to stand trial. See *Commonwealth v. Simpson*, 428 Mass. 646, 654 (1999). Indeed, “where there exists ‘a substantial question of possible doubt’ as to whether the defendant is competent to stand trial,” a court is required to address the issue, because the “[f]ailure to make an inquiry into competency . . . would deprive the defendant of his constitutional right to a fair trial.” *Commonwealth v. Crowley*, 393 Mass. 393, 399 (1984) (quoting *Hill*, 374 Mass. at 54); see *Commonwealth v. Vailes*, 360 Mass. 522, 524 (1971) (citing *Pate v. Robinson*, 383 U.S. 375, 378 (1966)).

5. Under the familiar, three-prong standard, a defendant is *not* competent to stand trial if he lacks the present capacity (a) “to understand the nature and object of the proceedings against him,” (b) “to consult with counsel,” or (c) “to assist in preparing his defense.” *Id.* at 398 (quoting *Drope*, 420 U.S. at 171). Importantly, each prong is independent, such that a significant deficit regarding any one of them renders a defendant incompetent. For example, in *Crowley*, the SJC reversed the convictions of a defendant who lacked “the capacity to communicate effectively with his lawyers,” because the “sufficient present ability to consult with his lawyer with a reasonable

degree of rational understanding” is an “essential element” of legal competency. *Id.* at 389-99 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)); *see id.* at 395 (noting experts’ opinions that defendant was “unable . . . to assist defense counsel” or “to pay attention to the proceedings” and defense counsel’s testimony that “defendant was unable to communicate with him in any meaningful way or to assist in the preparation of his defense”); *see Hill*, 375 Mass. at 58 (holding defendant was incompetent and vacating convictions in part because his psychiatric problems “prevented his effective cooperation with counsel”).

6. Here, Mr. McCarrick is not legally competent to stand trial. While he has a limited understanding of the criminal proceedings against him, his progressive and irreparable cognitive deficits render him unable to meaningfully consult with his counsel or to effectively assist in his own defense.

7. Dr. David Schretlen, a professor of psychiatry and behavioral science at the Johns Hopkins University School of Medicine who specializes in the cognitive and functional consequences of various neuropsychiatric disorders, including Alzheimer’s disease and other forms of dementia, has thoroughly examined Mr. McCarrick in person at his residence in Missouri. A copy of Dr. Schretlen’s CV is attached hereto as Exhibit A.

8. On December 5, 2022, Dr. Schretlen administered an extensive battery of neuropsychological tests on Mr. McCarrick to assess his cognitive function, memory, and competence. Dr. Schretlen also interviewed staff at the assisted-living facility where Mr. McCarrick currently resides.

9. Since then, Dr. Schretlen has also interviewed a close family member, who has been in regular contact with Mr. McCarrick for decades, and conferred with his attorneys, who

have represented Mr. McCarrick in this case (and a related civil action by the same complainant, J.G., in New Jersey) for many years.

10. Based on his testing and evaluation, and as documented in his Report, attached hereto as Exhibit B¹, Dr. Schretlen has concluded that Mr. McCarrick is not competent to stand trial, under the applicable legal standard, because Mr. McCarrick suffers from a “severe cognitive disorder” and “everyday functional disability,” which together establish the criteria for a diagnosis of “dementia,” likely due to Alzheimer’s disease. Schretlen Report at 12-13.

11. Mr. McCarrick’s “dementia renders him incapable of meaningfully assisting in his own defense,” including “participating in strategic decision-making” and “following courtroom proceeding and live testimony in real time.” *Id.*

12. Despite a very high level of premorbid functioning, Mr. McCarrick “performed below expectation on nearly two-thirds of the cognitive tests administered” by Dr. Schretlen. *Id.* at 12. Mr. McCarrick “performed worse than 92% of reasonably healthy men of similar background and estimated premorbid ability on 13 (38%) of the cognitive measures.” *Id.*

13. In addition, his “reported inability to retrieve memories of the alleged incident and potential witnesses, as well as any exculpatory factors related to it are consistent with his demonstrated performance on neuropsychological testing and reports of those who know him well.” *Id.* at 13.

14. “[T]hese factors render [Mr. McCarrick] unable to meaningfully assist in his own defense, communicate effectively with counsel, testify reliably, follow courtroom proceedings in real time, and challenge prosecution witnesses.” *Id.* at 13-14.

¹ Pursuant to Trial Court Uniform Rule VIII, and with the assent of the Commonwealth, Mr. McCarrick has moved to impound Dr. Schretlen’s Report.

15. Further, because Mr. McCarrick's dementia is "irreversible" and "likely will progress over time," there is no realistic expectation that he might be "restor[ed] to competence" in the future. *Id.* at 14.

16. Although Mr. Carrick remains intelligent and articulate, "it is not enough" that he may be "oriented to time and place" or that he might have "some recollection of events" to find that he is competent to face the pending criminal charges against him. *Dusky*, 362 U.S. at 402. Even a defendant who knows why he is in court and has a "general understanding of the judicial process and the roles of the various participants in that process" may, nevertheless, be incompetent if he cannot "communicate effectively with his lawyers" and is "unable to assist his counsel in preparing a defense." *Crowley*, 393 Mass. at 396, 399. That is the case for Mr. McCarrick, because his dementia—and the resulting deficits of cognitive function and memory—prevent him from meaningfully consulting with counsel and effectively participating in his own defense.

17. As a result, Mr. McCarrick is unable to exercise many constitutional rights that lay at the foundation of our adversarial system and protect the guarantee of a fair trial, including the right to confront his accuser, *see Crawford v. Washington*, 541 U.S. 36, 42 (2004) (describing right of confrontation as "bedrock procedural guarantee"); specifically, to cross-examine J.G. about his false and uncorroborated allegations, *see Pointer v. Texas*, 380 U.S. 400, 405 (1965) (describing right of cross-examination as "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal"); and to testify in his own defense, if he so chooses, *see Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (recognizing right to testify in own's own defense is "essential to due process of law in a fair adversarial system," because "the most important witness for the defense in many criminal cases is the defendant himself") (quoting *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)). "To exercise these rights in a meaningful way, [a] defendant must

have some ability to confer intelligently, to testify coherently, and to follow and evaluate the evidence represented.” Note, “Incompetency to Stand Trial,” 81 Harv. L. Rev. 454, 457 (1967) (cited in *Hill*). In short, Mr. McCarrick’s dementia severely constrains his constitutional rights to establish his own innocence. In such circumstances, a criminal trial would be inconsistent with due process.

For the foregoing reasons, Defendant Theodore McCarrick respectfully requests that this Court find he lacks the legal competence to stand trial and, further, that his competence is unlikely to be restored in the foreseeable future, and, on that basis, dismiss the pending criminal complaint against him.

Respectfully submitted,

THEODORE MCCARRICK

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CERTIFICATE OF SERVICE

I, Daniel N. Marx, counsel for Defendant Theodore McCarrick, certify that on February 27, 2023, I caused a copy of the foregoing document to be served by U.S. mail and email on ADAs Meagan Monahan, Lisa Beatty, and Alix Beamon.



Daniel N. Marx