

STATE OF NORTH CAROLINA  
COUNTY OF MONTGOMERY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
Nos. 99 CRS 3818, 3820

STATE OF NORTH CAROLINA

v.

SCOTT DAVID ALLEN  
Defendant.

2019 FEB 16 P 3:37  
FILED  
BY  
MONTGOMERY CO., C.S.C.

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**ORDER FINDING DEFENDANT COMPETENT TO PROCEED**

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THIS MATTER came before the undersigned Senior Resident Superior Court Judge on December 19, 2018 in the Superior Court of Montgomery County for a hearing on Defendant's capacity to proceed. Defendant Scott David Allen ("Defendant") was present and represented by his appointed counsel, Mr. Michael L. Unti and Ms. Margaret C. Lumsden, and the State was represented by Assistant Attorney General Nicholas G. Vlahos and Special Deputy Attorney General Jonathan P. Babb. Upon review of the court file, transcripts, and record in this case, as well as the evidence presented at the competency hearing, the arguments of counsel, and the Court's colloquy with Defendant, the Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Defendant was convicted of first-degree murder on November 13, 2003 and sentenced to death on November 18, 2003, after a capital sentencing proceeding conducted pursuant to North Carolina law.

2. On March 3, 2006, the Supreme Court of North Carolina upheld the conviction and sentence, finding that Defendant received a fair trial free of reversible error in both the guilt and sentencing phases and that Defendant's death sentence was not disproportionate. State v. Allen, 360 N.C. 297, 626 S.E.2d 271, cert. denied, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

3. On July 2, 2007, Defendant's post-conviction counsel filed a motion for appropriate relief ("MAR") with this Court. On September 19, 2013, Defendant's post-conviction counsel filed a supplemental motion for appropriate relief ("SMAR") with this Court, supplementing MAR Claims 1, 2, 3, 8, and 9 and adding two claims, for a total of twelve claims for relief.

4. After the State filed an answer and motion for summary denial, this Court conducted a thorough review of the record and post-conviction pleadings and entered an order on August 18, 2016 granting the State's motion to dismiss Claims 1, 2, 4, 5, 6, 10, 11, and 12 of Defendant's MAR and SMAR. (08/18/16 Order Dismissing Certain Claims of Defendant's MAR and SMAR) In that order, this Court also summarily dismissed Claim 3 of Defendant's MAR and all subparts of Claim 3 of Defendant's SMAR except for Claims 3H, 3J, 3K, and that portion of 3I that related to the in camera examination of the sealed mental health and substance abuse records of State's trial witness Vanessa Smith ("Smith").

5. After conducting a limited evidentiary hearing on August 25, 2017, this Court entered an order on January 4, 2018 concluding that a further evidentiary hearing on SMAR Claims 3H, 3J, 3K, and that portion of 3I that relates to the in camera examination of Smith's sealed mental health and substance abuse records was unnecessary and that Defendant failed to establish any sufficient prejudice to warrant a full evidentiary hearing on those claims; therefore, this Court

dismissed those claims in its January 4, 2018 order. (01/04/18 Order Granting State's Motion to Dismiss Claims 3H, 3J, 3K and a portion of 3I of Defendant's SMAR)

6. This Court denied the State's motion to dismiss and granted Defendant an evidentiary hearing on Claims 7, 8, and 9 of his MAR and SMAR, which are all claims alleging ineffective assistance of counsel regarding the sentencing phase of Defendant's trial. (08/18/16 Order on State's Summary Denial Motion on Claims 7, 8, and 9) That evidentiary hearing began on February 12, 2018, concluded on February 15, 2018, and Defendant was present for the entire hearing.

7. At the conclusion of the February 12, 2018 hearing, this Court granted the parties' request to file post-hearing briefs at a later date, after the parties could obtain access to a transcript of the hearing. Subsequently, this Court via email directed both parties to prepare proposed orders in MS Word format to submit with their briefs.

8. On July 2, 2018, the parties submitted copies of their post-hearing briefs to the Court via email and sent the briefs to the Montgomery County Clerk of Superior Court for filing. The State's email to the Court requested that the time for submitting the proposed orders be extended, and Mr. Unti's email to the Court acknowledged that Defendant's post-conviction counsel agreed to the State's request for additional time to submit the proposed orders.

9. Subsequently, Defendant mailed a letter to this Court which he dated "July 10" and in which Defendant claimed he did not personally receive a copy of Defendant's post-hearing brief until "July 9." The letter was filed in the office of the Montgomery County Clerk of Superior Court on July 23, 2018. In that letter, for the first time before this Court, Defendant raised an objection to his receiving relief in the form of a new capital sentencing proceeding. Also,

Defendant expressed a desire to discharge his current post-conviction counsel and indicated he may wish to proceed pro se.

10. Defendant sent two additional letters to this Court which he dated August 5, 2018 and October 17, 2018 respectively. In the October 17, 2018 letter, Defendant again expressed a desire to discharge post-conviction counsel, but indicated that he wanted them replaced with new counsel. That letter was filed in the office of the Montgomery County Clerk of Superior Court on November 13, 2018.

11. This Court construed Defendant's letters filed on July 23, 2018 and November 13, 2018 as Defendant's pro se motions to (1) discharge his current post-conviction counsel and (2) withdraw Claims 7, 8, and 9 of his MAR and SMAR.

12. Considering the gravity of these motions, this Court ordered a forensic evaluation of Defendant pursuant to its own motion to determine whether Defendant is competent to proceed in making these decisions. Dr. Bruce R. Berger, MD, ("Dr. Berger") a certified forensic examiner and contract psychiatrist at Central Regional Hospital, was appointed as the Court's expert to perform the evaluation of Defendant concerning his capacity to proceed. After conducting his evaluation, Dr. Berger produced an eleven-page report, dated December 6, 2018, in which Dr. Berger concluded within a reasonable medical certainty that Defendant currently does have the capacity to understand his current charges, potential penalties, and does have the ability to participate in a meaningful way in his legal proceedings and work with an attorney in an affirmative way, should he choose to do so; therefore, Defendant is currently capable of proceeding.

13. The State, Defendant's post-conviction counsel, and Defendant himself had no other evidence to present on the issue of Defendant's capacity to proceed.

14. Dr. Berger was present for this hearing and was available for both direct and cross-examination; however, all parties, including Defendant himself, declined to examine Dr. Berger and accepted the conclusion of his forensic evaluation.

15. Based on the forensic evaluation conducted by Dr. Berger and the Court's observations of Defendant in open court, the Court finds Defendant does not suffer from any type of significant mental disease or defect. Defendant is capable of dealing with the issues of this case in an intelligent, knowing, and voluntary manner. Defendant is aware that he lacks legal training or knowledge and that the lack of legal training or knowledge could prove a hindrance to him if he decides to proceed pro se.

16. The Court finds that Defendant does have the capacity to proceed with his motions, does have the ability to participate in a meaningful way with his legal proceedings, and does have the ability to work with his attorneys in an affirmative way, should he choose to do so.

#### CONCLUSIONS OF LAW

1. This matter and these parties are properly before this Court pursuant to N.C. Gen. Stat. §§ 15A-1001, 15A-1002, 15A-1411, 15A-1415, and 15A-1420.

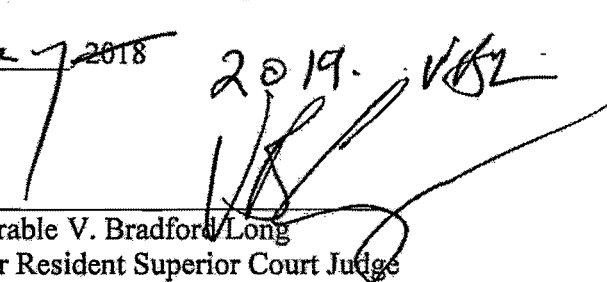
2. Defendant is able to understand the nature and object of the proceedings against him, is able to comprehend his own situation in reference to the proceedings, and is able to assist in his defense in a rational and reasonable manner. Defendant does not suffer from a mental illness or defect that keeps him from doing so.

3. Defendant is capable of proceeding to prosecute his motions and to exercise his constitutional rights to proceed pro se or with counsel.

**IT IS THEREFORE ORDERED:**

1. Defendant has the capacity to proceed with his pro se motions filed July 23, 2018 and November 13, 2018.

2. Defendant has the capacity to proceed with the remainder of the legal proceedings initiated by the filing of his MAR and SMAR. Accordingly, this matter shall proceed.

This the 6 day of February 2018 2019 VBZ  
  
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Honorable V. Bradford Long  
Senior Resident Superior Court Judge