



BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE CRIMINAL CODE
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6

**IN THE MATTER OF THE FITNESS TO STAND TRIAL
AND
DISPOSITION HEARING OF**

MICHEAL JAMES ANTHONY PETRONIO

HELD BY: **Video**
January 14, 2022

APPEARANCES:	ACCUSED/PATIENT:	Micheal Petronio
	ACCUSED/PATIENT COUNSEL:	T. Magder
		Z. Zwanenberg
	DIRECTOR, AFPS:	Dr. A. Kolchak, P. Parnell
	ATTORNEY GENERAL:	G. Nelson

INTRODUCTION AND BACKGROUND

[1] On January 14, 2022, the British Columbia Review Board (the Board) convened a hearing to review a verdict of unfit to stand trial, made by the Supreme Court on December 10, 2021, in respect of Micheal James Anthony Petronio, a 35-year-old man. At the conclusion of the hearing, the Board was of the opinion that the accused is now fit to stand trial and made an order detaining him at the Forensic Psychiatric Hospital (FPH) pending his return to court.

[2] The index offence is the second-degree murder of JW, alleged to have occurred on January 2, 2020. Mr. Petronio allegedly killed the victim in a parking lot of a Shopper's Drug Mart in Surrey. The details of the incident can be found in the documents which form part of the disposition materials, and in particular, Exhibit 1-1.

[3] Mr. Petronio has been involved with mental health services since he was 18 years of age. The details of his psychiatric history can be found in the numerous reports which form part the disposition materials, and in particular Exhibits 8-1, 9-1, 13-1, and 14-1. Over the years, Mr. Petronio has been followed by the Early Psychosis Intervention Service as well as Surrey Mental Health Services. Notes from psychiatric care providers, and from staff during the accused's previous psychiatric hospitalizations, contain their observations of paranoia, disorganized thinking and depression as well as persistent substance misuse and medication non-compliance.

[4] After his arrest, Mr. Petronio was detained at Surrey Pre-trial. The day prior to jury selection was to begin for the trial of the case, his counsel raised concerns that the accused may not be fit for trial. A subsequent hearing took place to assess Mr. Petronio's fitness to stand trial. Dr. Kolchak provided a report to the court (Exhibit 9-1). He diagnosed the accused with an unspecified psychotic disorder, with schizophrenia or schizoaffective disorders as "rule out" diagnoses. He opined that the accused was not fit to stand trial because his ability to communicate was impaired by psychosis. Mr. Petronio told Dr. Kolchak that he was not able to converse because he feared that to do so would give unnecessary powers to evil forces. The accused believed that he would not receive a fair trial. Mr. Petronio was found unfit to stand trial on December 10, 2021, and was transferred from corrections to FPH.

EVIDENCE

[5] When Mr. Petronio was first admitted to FPH, he kept to himself and rarely communicated with nursing staff. He was disorganized in his speech and thoughts, and he displayed loose associations. When Dr. Kolchak advised Mr. Petronio that he had a psychotic illness, likely schizophrenia, the accused was shocked and challenged the diagnosis. However, he described to Dr. Kolchak a history suggestive of longstanding paranoid delusions and ideas of reference. He said that "Chinese characters" communicated with him. He said that he did not understand their actual meaning, but that they provided guidance for him. He said that he is involved somehow in a battle between good and evil but was unable to provide much context. He was hesitant to answer questions about this battle because he said he did not want to "empower the evil forces" by saying certain things.

[6] In his January 5, 2022 report prepared for the Review Board hearing (Exhibit 14-1), Dr. Kolchak's opinion remained unchanged from the opinion he provided to the court. He maintained that the accused was unfit to stand trial.

[7] At the hearing, Dr. Kolchak's evidence changed substantially. He testified that two weeks prior to the hearing, Mr. Petronio started responding to the new medication and experienced significant improvements in his mental state. He began to participate in fitness examinations with more depth and engagement. He understood and could describe court proceedings and participants. He was able to identify D. Turko as his lawyer, with T. Magder as her junior. He said he trusted them to be able to present his case and that he would be treated fairly by the court. He could identify his charges and understood the concept of an oath requiring one "to tell the truth". Mr. Petronio denied that he was engaged in a battle between good and evil, and denied that he was experiencing any other psychotic symptoms.

[8] In Dr. Kolchak's opinion, if the accused remains at FPH, he is likely to improve further. He said that the accused would likely present delayed responses to questions, but there was not likely to be derailment in his thought processes. He testified that the psychiatric care at FPH is better than the care the accused would receive at a correctional facility. Mr. Petronio appears to be on a steady trajectory towards more stable mental health. Dr. Kolchak described him as "fit but fragile" and recommended that he continued to be treated at the hospital for at least the next few months.

[9] Dr. Kolchak evaluated the accused's risk to the public as significant. The accused is capable of serious violent behaviour. He continues to experience psychotic symptoms of a paranoid nature and qualifies for the presence of a major mental disorder. He has used substances which have exacerbated his psychotic symptoms. He has no insight into his mental illness and the precipitant to his violence is not known. In Dr. Kolchak's view, outpatient management is not an option at this time.

[10] Mr. Petronio testified that he understood that his lawyers, Ms. Turko, Ms. Zwanenberg, and Ms. Magder will represent him. He said that there are no barriers to their communications. He believes that he will be treated fairly in court. He has concerns that he is not able to see his lawyers in person, but he felt that their written communications have helped his limited understanding and that his "medication is beneficial to [his] response".

[11] The accused said he agreed with Dr. Kolchak that he has a mental health issue and needs treatment. He said that he is receiving medication with "the generic name of clozapine". He would like to continue to take the medication.

[12] Mr. Petronio testified that he knows he was charged with second degree murder. He was able to testify about the actors in a criminal trial. He understood that a defence lawyer represents the accused and that there is a lawyer to represent the victim. He said that the judge would make the best decision and decide the best course of action and determine what sentence to order if a person is found guilty. If found guilty of murder, he would expect a federal sentence.

[13] When asked what it would mean if a judge found a person not guilty, Mr. Petronio said that the judge had "chosen to take into consideration the defendant and jury's objections" and "not proceed with a judicial sentence". He was able to describe evidence at a trial as "video evidence" and "witnesses' evidence".

[14] Mr. Petronio said that he uses his time at FPH to learn Mandarin Chinese. When asked about Chinese characters, Mr. Petronio said, "when I talk about characters in my mind, they could be interpreted as characters of all types and forms". He said he uses characters to help him communicate with others.

[15] A hypothetical scenario describing a theft in a store was put to Mr. Petronio. He was able to identify that the cashier would be a witness. He said it would be up to the police to decide whether to take the accused into custody. He said the accused would have a defence counsel to represent him, and there would be a Crown counsel on the other side.

Mr. Petronio said the judge would make the ultimate decision at a trial after “consideration of forms of evidence”.

[16] After Mr. Petronio’s evidence, Dr. Kolchak testified that he maintained his opinion that the accused is presently fit to stand trial. He expects that there will be further improvements in the accused’s mental health over the next few months.

FITNESS TO STAND TRIAL

[17] The meaning of unfit to stand trial is set out in s. 2 of the *Criminal Code* as follows:

unfit to stand trial means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.

[18] The essential question for the Board is to determine whether an accused is intellectually capable of a rudimentary understanding of court processes and capable of participating meaningfully in a trial. The threshold level for fitness to stand trial is low and expressed as a limited cognitive capacity. The Ontario Court of Appeal in *R. v. Morrissey*, 2007 ONCA 770 commented as follows:

[T]he "limited cognitive capacity" test has been accepted across the country and was adopted by the Supreme Court of Canada in *R. v. Whittle*, 1994 CanLII 55 (SCC), [1994] 2 S.C.R. 914, [1994] S.C.J. No. 69, 92 C.C.C. (3d) 11, at pp. 933-34 S.C.R., pp. 25-26 C.C.C. It requires only a relatively rudimentary understanding of the judicial process -- sufficient, essentially, to enable the accused to conduct a defence and to instruct counsel in that regard. It is in that sense that the accused must be able "to communicate with counsel" and relate the facts concerning the offence. (Para 27)

[19] Unfit to stand trial is a legal, not a psychiatric or medical construct. Some courts have expanded their interpretation of the “limited cognitive capacity” test beyond the traditional low threshold as set out by the Supreme Court of Canada in *Whittle* (supra). These decisions have incorporated the concept that the accused must be able to

meaningfully participate in the proceedings and not merely be a confused spectator at his trial.

POSITIONS OF THE PARTIES

[20] All of the parties agreed that Mr. Petronio was fit to stand trial. Mr. Parnell for the Director submitted that the accused was “fit but fragile” and should be kept at the hospital pending his return to court. All of the parties agreed that the accused should remain in the hospital until his return to court for his fitness to stand trial hearing.

FITNESS TO STAND TRIAL – BOARD’S DECISION

[21] The Board concluded that, in its opinion, Mr. Petronio is fit to stand trial. His testimony revealed that while he does not have a perfect understanding of court processes and that his thought processes are still somewhat disorganized in response to some areas of questioning, he has a basic understanding sufficient to meet the legal standard of “limited cognitive capacity”. He is able to describe the court process and understands the nature and object of the proceedings. He understands the concepts of a guilty plea and a not guilty plea and is able to describe the possible outcomes of a trial. He is able to describe the roles of the court participants and the role of the judge. He is able to communicate meaningfully with counsel and believes that counsel will assist him at trial. He believes that he will receive a fair trial.

[22] Mr. Petronio is currently fit to stand trial, but it is notable that his ability to communicate will continue to improve over the next few months as his clozapine medication reaches therapeutic levels. Mr. Petronio will be returned to court for a re-trial of his fitness to stand trial.

DISPOSITION

[23] In considering the appropriate disposition after the accused is found fit to stand trial, the Board is governed by s. 672.48(2) and s. 672.49(1) of the *Criminal Code*.

672.48 (2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.

672.49 (1) In a disposition made pursuant to section 672.47 the Review Board or chairperson may require the accused to continue to be detained in a hospital

until the court determines whether the accused is fit to stand trial, if the Review Board or chairperson has reasonable grounds to believe that the accused would become unfit to stand trial if released.

[24] The Board agreed with the parties that Mr. Petronio would likely become unfit to stand trial if moved from FPH. He is undergoing a medication change and, while there have been improvements to his mental health to date, he is not yet at therapeutic levels. Clozapine requires extensive testing to determine if there are medical contraindications, and Mr. Petronio will receive appropriate psychiatric care at FPH. Mr. Petronio's illness is not yet well understood, and he has no real insight into his mental disorder. He continues to experience psychosis. Outpatient placement is not an option as the accused requires significant management and supervision and there has been no community placement yet identified to meet his needs and to protect the public. The Board concluded that Mr. Petronio is "fit but fragile" under section 672.49(1). In order to maintain the positive trajectory of his mental health progress, Mr. Petronio will remain at FPH.

Reasons written by I. Friesen in concurrence with Dr. J. Smith and P. Acton.

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