

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

LIONEL TATE,
Appellant,

vs.

Case No. 4D01-1306

STATE OF FLORIDA,
Appellee.

_____/

**MOTION FOR REHEARING, REHEARING EN BANC, CLARIFICATION AND/OR
CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE**

COMES NOW, Appellee, the State of Florida, by and through undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331, and hereby moves this Court for a rehearing, rehearing en banc, clarification, and/or certification of a question of great public importance and in support thereof states:

1. On December 10, 2003, this Court reversed Tate's first-degree murder conviction and mandatory life sentence and remanded the case for a new trial, holding that Tate's due process rights were violated by the trial court's failure to sua sponte order a **pre-trial** competency evaluation and by its denial of defense counsel's **post-trial** request to have Tate's competency evaluated.

2. The State would urge that this Court's opinion is incorrect for the following reasons: (1) it improperly relies upon facts **not known** to the trial court **pre-trial** in holding that the trial court had a sua sponte obligation to order a competency

evaluation; (2) it mistakenly applies the competency for trial standard to Tate's requests for a competency at sentencing determination; (3) it fails to apply the appropriate abuse of discretion standard and fails to give deference to the trial court's factual findings; and (4) it wrongly adopts a *per se* competency procedure regarding children tried as adults. Each of these circumstances requires further review independently of one another.

3. Based on the aforementioned, this Court has overlooked or misapprehended four points of law and fact in its opinion:

A. No Sua Sponte Pre-trial Competency Evaluation Was Warranted

It is well-established that a trial court is not required to order a competency evaluation **unless** it has **reasonable grounds** to believe that the defendant **may be** incompetent to proceed. Fla.R.Crim.P. 3.210(b). In evaluating whether the trial court should have sua sponte ordered a **pre-trial** competency evaluation, this Court is limited to the **facts known to the trial court pre-trial**. See Fuse v. State, 642 So.2d 1142, 1143 (Fla. 4th DCA 1994) (noting "the question presented...is whether there was sufficient evidence before the trial court in 1987 to raise the issue of competency to stand trial"); James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992) (holding that on appeal from a trial court's failure to sua sponte hold a competency hearing, an

appellate court may consider only the information before the trial court before and during trial).

This Court's opinion improperly merges the facts developed **post-verdict** with the facts known **pre-trial** and relies upon the "merged" facts to support its holding that reversible error occurred here when the trial court failed to sua sponte order a **pre-trial** competency evaluation. However, **none** of the facts brought out **post-verdict**, including the bare "assertions" made by Tate's appellate counsel, Tate, slip op. 2-4., can be considered in determining whether the trial court should have sua sponte ordered a **pre-trial** competency evaluation. Pre-trial, the most the trial court knew was:

-Tate had a **defense team** from the very beginning of the case, comprised of an experienced defense counsel (Jim Lewis), **an experienced consulting psychologist** (Dr. John Spencer), a **psychology resident** (Dr. Butts), **a psychiatrist** (Dr. Klass) and a **neuro-psychologist** (Dr. Mittenberg) (Vol. 24, T 78-79).

-Despite spending hundreds of hours with Tate, not one of these professionals raised the specter of Tate's competency during the 1 ½ years of pre-trial proceedings. (Vol. 24, T 79-80).

-Tate was also in contact, pre-trial, with a court-appointed psychologist, a State psychologist, and pre-trial supervisors for his electronic monitoring (R-753). No competency issue surfaced.

-Judge Lazarus observed Tate over the course of one year during numerous pre-trial hearings. Nothing about Tate's behavior triggered questions about Tate's competency during those hearings.

-On January 8, 2001, the trial court communicated directly with Tate, regarding Tate's rejection of the State's plea

offer (Vol. 24, T 80-82, 1/5/01 T 4-6). Tate "expressed" his desire to proceed to trial. No issue of competency was raised.

These facts raised no red flags and do not establish reasonable grounds to question Tate's competency. The Court's opinion refers to Tate's "extremely young age" and "lack of previous exposure to the judicial system," Tate slip op. 2, as reasons mandating a competency evaluation. While Tate was 12 ½ at the time of the crime, he **was almost 14** by the time of trial. Further, by the time of trial Tate had been exposed to the judicial system for 1 ½ years, having attended numerous pre-trial proceedings, including extensive hearings on the "wrestling" and "immaturity" issues (R-753).

Similarly, "the complexity of the legal proceedings" and "the fact that [Tate] was denied [the] protection afforded children fourteen and older under section 985.226(2), Fla. Stat., which provides for a waiver hearing to determine whether the child should be tried as an adult," Tate, slip op. 4, are, by themselves, inadequate grounds to justify an evaluation. Contrary to this Court's conclusion, the standard for competency does not change or become higher as the potential sentence becomes longer. Moreover, section 985.226(2), Fla. Stat., does not require that a competency evaluation be provided before a juvenile is transferred to be tried

as an adult.¹ Rather, the focus of the statute is upon the crime charged and the defendant's criminal history. The closest the statute comes to considering the juvenile's attributes are the factors of his "sophistication and maturity" and "prior commitments to institutions." Yet, neither equates to a competency factor under Dusky--neither determines "whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him."

Finally, the opinion discounts the trial court's assessment that Tate had the ability to understand the plea offer and proceed to trial, implicitly suggesting it was incompetent to reject a plea of three years when faced with a mandatory life sentence upon conviction. Tate, slip op. at 3. However, that is not the standard for determining competency. Clearly, defendants are permitted to take risky gambles or make incorrect decisions as to trial defenses or gambles as to length of sentence that might be imposed, without being suspected of incompetency. The facts known by the trial

¹ All that is contemplated, as paraphrased below, is that the trial court consider: (1) seriousness of the offense and need to protect the community; (2) was the offense committed in aggressive, violent, premeditated, or willful manner; (3) was the offense against a person or property (more weight given violent offense against person); (4) strength of probable cause; (5) judicial economy to dispose of all criminal charges in one court; (6) sophistication and maturity of the child; (7) juvenile's criminal history; (8) prospects of protecting the community and rehabilitating the child.

judge, **pre-trial**, simply do not establish reasonable grounds to believe that Tate might be incompetent. Consequently, the trial judge did not have reasonable grounds **pre-trial** to believe that Tate might be incompetent and was not required to **sua sponte** order a competency evaluation.

Additionally, nothing compelling was presented **at trial** warranting a competency evaluation for trial purposes at that time. The relevant facts developed during trial were:

- No insanity plea or insanity defense was presented.
- No evidence of mental disease or defect was presented at trial.
- Tate presented an "immaturity" defense ("mental age" of 9-10), arguing a lack of the ability to form the specific intent necessary to commit premeditated murder, through the expert testimony of neuro-psychologist, Dr. Mittenberg.
- The State strongly rebutted Dr. Mittenberg's testimony with expert testimony from neuro-psychologist, Dr. Sherri Bourg-Carter, who disagreed with Mittenberg's findings.
- The trial court communicated directly with Tate for a second time at trial, inquiring whether he would be testifying (R-754). No competency concern was raised, nor was one raised when Tate was remanded to the Sheriff's custody after the verdict was announced (R-754).
- The trial court observed Tate's behavior during the two-week trial and specifically noted that Tate's "disinterest" was not related to any "lack of ability" to understand (R-754).

The opinion makes reference to Tate's "immaturity," "developmental delays" and supposedly low IQ, as factors warranting a competency evaluation. Tate, slip op. 4-5. However, the State presented expert testimony, through Dr. Sherri Bourg-Carter,

rebutting Tate's "immaturity" defense and his expert's (Dr. Mittenberg's) testimony (T 1800-26).² Significantly, the jury and the trial court, heard from Tate's expert doctors, saw their credibility damaged on cross-examination and **rejected** Tate's immaturity defense by finding him guilty of first degree-murder and therefore, able to form the specific intent necessary to commit first-degree murder. None of the facts developed **at trial** constitute reasonable grounds to believe Tate might be incompetent.

Finally, nothing presented **post-verdict** warranted holding a competency evaluation, for trial purposes, at that time. Post-verdict, the trial court learned that Dr. Sherri Bourg-Carter actually conducted a competency evaluation of Tate at 12 ½, shortly after his arrest, in August, 1999, and found him competent to stand

² Even though this Court strives to characterize Tate's IQ of 90 or 91 as pointing to incompetency, such scores are within the average range. The normal range is 90-110. To suggest that a person of average intelligence requires a competency evaluation merely because he has not been exposed to the justice system and is of a young age, without more, is contrary to what this Court said in Fuse v. State, 642 So. 2d 1142 (Fla. 4th DCA 1994) (finding trial court did not have sufficient evidence before it to order sua sponte a competency evaluation where judge knew mental health professional evaluated Fuse's competency, the professionals' trial testimony did not suggest Fuse was incompetent to stand trial, counsel did not bring issue to court's attention, the defendant had a low IQ, but did not exhibit unusual courtroom behavior). **Expanding the Court's holding to its logical conclusion, any person no matter the age who has not been previously exposed to the criminal justice system would be entitled to a competency hearing.**

trial (Vol. 24, T 83).³ Nothing had happened to change her opinion. Trial counsel, Jim Lewis, was aware, at least by April 2000, that Dr. Bourg-Carter had performed a competency evaluation of Tate and found him legally competent (SR 12-16, 26-31) (Dr. Bourg-Carter's deposition). Weighted against all the abovementioned facts, were Tate's appellate counsel's "bare" assertions that Tate: did not understand the consequences of the proceedings and going forward (Vol. 24, T 74-77); was drawing pictures, playing with a pencil/pen and not paying attention (Vol. 24, T 74-75); and had "no clue" what was going on regarding whether to waive his attorney/client privilege and let Jim Lewis testify (T Vol. 25, T 49-50). The trial court properly concluded that those bare assertions did not establish "reasonable" grounds to believe

³ The trial court had appointed three experts-defense psychologist (Dr. John Spencer), State psychologist (Dr. Sherri Bourg-Carter), and court psychologist (Dr. Brannon)- to perform a psychological evaluation and risk assessment of Tate because he requested to remain free on bond (Vol. 23, T 12-13, 22-25, T 40-44). In order to avoid multiple testing of Tate, it was agreed that Dr. Bourg-Carter would conduct the testing and each expert would interview Tate (Vol. 24, T 12-13). Dr. Bourg-Carter testified that she informed Dr. Spencer and defense counsel, Jim Lewis, that she planned to perform a competency evaluation of Tate and neither objected (Vol. 25, T 65-70). In fact, both waived their presence at the testing (Vol. 25, T 31, 72). Immediately prior to conducting the testing, Dr. Bourg-Carter spoke with defense counsel, Tate and his mother, **and received an informed consent to conduct a competency evaluation** (Vol. 25, T 74-76). Afterwards, Dr. Bourg-Carter went over the test results with Dr. Spencer and **twice** provided Dr. Spencer with a copy of the competency evaluation (Vol. 25, T 78-84). A copy of Dr. Bourg-Carter's competency evaluation was admitted into evidence at the hearing.

Tate might be incompetent. As opined in Kleinfeld v. State, 665 So.2d 1059, 1061-62 (Fla. 1995) (J. Pariente, specially concurring), “[t]o belatedly claim competence is no more than an attempt to win another trial.”

B. Different Tests For Determining Competency

The opinion also fails to recognize that different tests⁴ are used for determining **competency to stand trial** versus **competency to be sentenced** and fails to apply the appropriate standard to Tate’s different requests. Only one of Tate’s post-verdict requests was for a competency evaluation for trial purposes, the other two were requests for a competency evaluation for sentencing/post-trial purposes which are necessarily evaluated under a different standard. And most glaring, the Court’s opinion improperly merges facts from all three requests together and analyzes them all under the competency for trial standard.

The test to determine mental **competency to stand trial** “is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him.” Hill v. State, 473 So.2d 1253, 1257 (Fla.

⁴ Appellate counsel admitted that there are different standards, stating the reason his first request was for a competency evaluation for trial purposes, not sentencing, was because he understood “the difference in standards. **And I’m afraid if we look at it in sentencing posture, the law may not be on my side** (Vol. 24, T 76).

1985), quoting Dusky v. United States, 362 U.S. 402 (1960). **Competency to be sentenced** is a less stringent standard. Competent at sentencing requires a defendant understand the nature and effect of the possible sentences that could be imposed and understands why imposed. See Pericola v. State, 499 So.2d 864, 867 (Fla. 1st DCA 1986). "[T]he purpose of determining competency to stand trial is 'to insure that all persons who must defend themselves in the criminal arena are mentally capable of assisting in the conduct of that defense.'" Id., citing Hayes v. State, 343 So.2d 672, 673 (Fla. 2d DCA 1977). At sentencing, "a defendant has been found guilty; no further defense "in the criminal arena" need be conducted." Id.

Here, as the trial court noted, the first time a competency hearing/evaluation was requested was **post-verdict**, at the first of a three-day hearing on Tate's motions for new trial, held on February 16, 2001 (T Vol. 24-26, R 754). Newly-named defense/appellate counsel, Richard Rosenbaum, **orally** requested a competency evaluation "**for trial purposes, not for sentencing purposes,**" (Vol. 24, T 75-76),⁵ arguing that Tate did not

⁵ The opinion cites to a motion for a Cottle hearing (R 515-33), as Tate's first request for a competency evaluation. Tate, slip op. 1-2. However, the motion does not assert that "Tate did not know or understand the consequences of proceeding to trial and that he was unable to assist counsel before and during trial." Tate, slip op. 1-2. No request for a competency evaluation was made when the motion was denied on the **second** day of the hearings (Vol. 25, T 4).

understand the consequences of the proceedings and going forward (Vol. 24, T 74-77). Rosenbaum noted that Tate was drawing pictures, playing with a pencil/pen and not paying attention (Vol. 24, T 74-75).⁶ The State recollected that Dr. Sherri Bourg-Carter found Tate competent in August, 1999 (Vol. 24, T 83) and that trial counsel, Jim Lewis, was aware of Dr. Bourg-Carter's evaluation pre-trial (SR 12-16, 26-31, Vol. 24, T 83, SR 138, 149). The trial court denied the request.⁷ (Vol. 24, T 74, 84, R-754).

Two weeks later, Rosenbaum requested a **current** competency evaluation, arguing that Tate was at a crucial stage of the proceedings (a post-trial motion) and there was an issue regarding whether Tate was going to waive his attorney/client privilege and let his trial counsel (Jim Lewis) testify, but Tate had "no clue" what was going on (T Vol. 25, T 49-50). Counsel informed the trial

⁶ The opinion cites these facts, Tate, slip op. 2, but also improperly adds the following:

Counsel also pointed out that "his eyes are moving around," which counsel interpreted as indicating that he did not understand.

Tate, slip op. 3. **The record clearly reflects that counsel did not make that statement at the February 16, 2001, hearing.** Rather, it was made two weeks later, at the second day of hearings, held on March 2, 2001, when appellate counsel asked for a competency evaluation for sentencing/post-trial purposes.

⁷ In addition to the facts pointed out by the State, the trial court noted that it had personally discussed with Tate, immediately prior to trial, Tate's rejection of the State's plea offer, observed Tate's conduct in court (Vol. 24, T 74), and found that the motion did not comply with Rules 3.210 and 3.214, Florida Rules of Criminal Procedure (Vol. 24, T 84, R 754).

court Tate's mother had instructed him to not waive the privilege and Tate was deferring to his mother. Rosenbaum, however, did not believe these decisions were being made in the best interest of Tate (Vol. 25, T 49-50). He also observed that Tate could not make up his mind (Vol. 25, T 54).⁸ The trial court concluded that not being able to make up your mind or acceding to your mother's wishes is not a basis for competency (T Vol. 25, T 54).⁹

⁸This Court's opinion states that "Tate's trial counsel wanted to testify further in support of the request for a post-trial competency hearing, but was concerned about his ability to do so without a waiver of the attorney-client privilege." Tate, slip op. 3. However, the record reflects that trial counsel, Jim Lewis, did not make a single comment during the entire discussion on this issue (Vol. 25, T 48-74). Similarly, there is no record support for this Court's conclusion that "[s]ignificantly, defense counsel wanted to reveal what led him to believe that Tate was not competent during trial, but was apparently precluded from doing so." Tate, slip op. 3.

The trial judge found it significant, in his written order denying the requests, that the trial attorney, Jim Lewis, did not join in or sign the subsequently filed written motion and was not copied with it (R-755).

⁹ The question, as stated, was whether Tate was going to let trial counsel testify:

COURT: He can't make up his mind is not a basis for competency. I think acceding to the wishes of his mother, who you had requested and I granted opportunity to talk for the past ten or fifteen minutes, is not a basis for competency. The question is whether Lionel Tate is allowing Mr. Lewis to take the witness stand or not take the witness stand; but when he takes the witness stand, then everything is fair game. **And let the record reflect that Mr. Tate is nodding his head in the**

A written motion requesting a **current** competency evaluation

affirmative. Do you understand that, Lionel?

APPELLANT: **Yes, sir.**

COURT: And do you understand that if I allow you to call- allow your co-counsel to call Mr. Lewis, that everything that he's talked to you about could very well come out. Do you understand that, come out in front of everybody; do you understand that?

APPELLATE COUNSEL: Judge, **let the record reflect his eyes are moving around in disbelief and doesn't understand.**

THE COURT: Now why did you put in disbelief? What is the basis of the statement? His eyes are moving around, yes. I'm not going to accept your evaluation of disbelief or otherwise, Mr. Rosenbaum. You're just adding gratuitous words. And let's be accurate what the record is going to show.

APPELLATE COUNSEL: Yes, sir.

THE COURT: I asked Lionel Tate if he understood, and his answer was yes. I'm telling him again. If you allow Mr. Lewis to take the witness stand, that everything he and you talked about could come out. Anything. Do you understand that, that it would be brought out in front of everybody? **He says no.** Okay. All right.

(Vol. 25, T 54-56). Because Tate answered "no" when asked whether he understood the waiver of attorney-client privilege, after answering "yes", the trial court commented that it was going to have Tate evaluated for **sentencing purposes** (Vol. 25, T 55-56). The State objected arguing that the motion did not comply with rule 3.210, for various reasons. (Vol. 25, T 69-71).

was finally filed on March 6, 2001, **asserting that Tate was incompetent to proceed, after all other tactics failed.**¹⁰ The State countered that there were no reasonable grounds to believe that Tate was incompetent to proceed **to sentencing** (R-672-687).¹¹

This Court's opinion relies heavily upon the defense's affidavits Tate, slip op. 2,5, and totally disregards the trial court's written findings, that these affidavits were "legally insufficient." Rosenbaum's affidavit, the court noted, spoke only in generalities and did not contain any specific reason warranting an evaluation/hearing (R-756). It raised "inability to communicate" without any clarification, improperly raised Tate's

¹⁰ Affidavit from Rosenbaum, defense co-counsel Denise Bregoff and from defense psychiatrist, Dr. Wiley Mittenberg (R-649-663) were attached. This Court's opinion improperly characterizes these affidavits "that Tate was not presently competent and that, pre-trial, he was not competent to assist counsel or to decide whether to take the state's plea offer." Tate, slip op. 2. None of the affidavits refer to Tate's ability to decide whether to take the plea.

¹¹ In addition to the insufficiency of the motion and affidavits, the State attached an affidavit from Dr. Sherri Bourg-Carter, reiterating that she had conducted a competency evaluation of Tate, in accordance with the Dusky standards, and found him competent; "[i]n fact, he reasonably and accurately answered some competency questions that many adult defendants have difficulty answering, such as the meaning of no contest and plea bargain." (R-685-86). Dr. Bourg-Carter noted "absent severe psychiatric decompensation or a severe head injury, there would be no reason for his competency status to change." (R-686). She further observed that Tate had a history of changing his response or behavior as the issues in the case changed and that Dr. Mittenberg's opinion that Tate was operating at the mental age of a 4th grader was inconsistent with his findings (R-686).

"age" and "mental age" as **per se** reasons to find him incompetent, improperly raised Tate's ability to understand fully **past** trial proceedings, alleged that Tate did not understand the sentencing procedure, which was refuted by Tate's statements in his PSI and Department of Juvenile Justice staffing and alleged that Tate could not "integrate", "synthesize", "appreciate the spectrum of possible ramifications" and is "grossly deficient," which are not grounds substantiated by the rule.¹²

The court found Dr. Wiley Mittenberg's affidavit to be untimely because the last time he saw Tate was **nine (9) months** before swearing to his affidavit (R-756). "[F]or Dr. Mittenberg to swear that the defendant is now incompetent without a basis renders his affidavit as insufficient to support counsel's motion." (R-756). The basis of Dr. Mittenberg's opinions were Tate's age and mental age and the court found his views to be based on his observations of Tate nine (9) months earlier.

This Court's opinion also improperly evaluates Tate's second oral request and written motion under a "competency to stand trial standard". The requests were to have **Tate's present competency evaluated**. A less stringent sentencing standard is applicable to them. Had this Court applied the correct competency standards to Tate's requests, it would have found that the trial court did not

¹² Rosenbaum's associate, attorney Denise Bregoff's affidavit was similarly rejected as a rehash of the other two (R 757).

err in denying them. This is so because Tate understood the nature and effect of the possible sentences that could be imposed and understood why imposed. The concept for understanding the consequences of waiving attorney-client privilege is not complicated. Tate's PSI demonstrates that he comprehends and can appropriately and logically comment on matters, his demeanor was always appropriate, albeit he might have been bored or inattentive at times, and his knowledge of what was going on was adequate. See Kilgore v. State, 688 So.2d 895, 898-99 (Fla. 1996). Courts are not required to accept defense counsel's representations concerning a defendant's competence. See Scott v. State, 420 So.2d 595 at 597 (Fla. 1982) (quoting Drope v. Missouri, 420 U.S. 162, 177-78 (1975)).

C. Standard of Review

The opinion also applies the erroneous standard of review to the trial court's decisions regarding whether to order a competency evaluation. In both Kelly v. State, 797 So.2d 1278, 1280 (Fla. 4th DCA 2001), and Hodgson v. State, 718 So.2d 330, 331 (Fla. 4th DCA 1998), this Court stated that "[a] trial court's decision regarding whether to hold a competency hearing is governed by an abuse of discretion standard." Id. at 331. See also, Lawrence v. State, 846 So.2d 440, 447 (Fla. 2003) ("[a] trial court's decision regarding whether to hold a competency hearing will be upheld absent an **abuse of discretion**"); Robertson v. State, 699 So.2d

1343, 1346 (Fla. 1997), receded from on other grounds, Delgado v. State, 776 So.2d 233 (Fla. 2000) (noting that "a defendant has a due process right to a determination of competency to stand trial whenever there is reasonable grounds to doubt the defendant's competency," and that "[c]onsistent with [that] long-standing rule, [rule] 3.210(b) requires the trial court to order a competency hearing on its own motion whenever it has reasonable grounds to believe that the defendant is not mentally competent to proceed, but holding that "on this record the trial court **did not abuse its discretion** by failing to hold such a hearing"); Hall v. State, 654 So.2d 253 (Fla. 1995) (concluding that the record did not reflect a clear **abuse of discretion** as to denial of the motion for a competency evaluation); Brockman v. State, 852 So.2d 330 (Fla. 2d DCA 2003) (holding that trial court **abused its discretion** by not scheduling competency hearing).

Under the abuse of discretion standard of review, the appellate court must pay substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford v. Ford, 700 So. 2d

191, 195 (Fla. 4th DCA 1997), Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

In contravention of a plethora of opinions, the Court did not apply an **abuse of discretion** standard in reviewing the trial court's actions in failing to **sua sponte** order a **pre-trial** competency evaluation and subsequently denying defense counsel's **post-trial** request to have a competency evaluation.¹³

No deference was afforded the trial judge's factual determinations, despite the fact that the trial court sat through one year of pre-trial hearings, a two-week trial and days of post-trial motion hearings. Judge Lazarus observed Tate, the lawyers, the numerous experts and witnesses in this case for a significant length of time and therefore, the trial judge was in the "best position" to evaluate the veracity of the parties and the need for such a competency evaluation/hearing. Judge Lazarus, in denying an evaluation, did not **believe** the arguments presented that there was a need for a competency hearing. (R-753-58). The trial judge found it incomprehensible that the mental health professionals, in almost daily contact with Tate since the time of his arrest, would all fail to seek a competency evaluation/hearing if one was needed (R-

¹³ Tate's due process rights were not violated absent a finding that the trial court abused its discretion in denying his requests.

753). Furthermore, the judge disbelieved the representations being made **because they were inconsistent with his observations of Tate for over a year.**

The court's order clearly and properly questioned the **timing** of the request for a competency evaluation (Vol. 25, T 49, R-755). This Court's opinion affords no deference to the timing of Tate's "post-verdict competency to be sentenced motion" and more importantly, fails to restrict and limit the pertinent facts regarding "when they became known" in chastising the trial court for not holding either a pre-trial or post-verdict competency determination sua sponte. The factual and credibility determinations made by Judge Lazarus should have been followed because nothing in this record justifies a ruling to the contrary. Applying deference to the court's findings, it cannot be said that "no reasonable person would take the view adopted by the trial court."

D. Per-se Rule

This Court's holding essentially creates a **per se** rule that every young child tried as an adult must be evaluated for competency. At the outset, this Court opined:

The question we resolve, here, is whether, due to his extremely young age and lack of previous exposure to the judicial system, a competency evaluation was constitutionally mandated to determine whether Tate had sufficient present ability to consult with his lawyer with a reasonable degree of rational

understanding and whether he had a rational, as well as factual, understanding of the proceedings against him. We conclude that it was.

Tate, slip op. at 2. The framing of the question creates a **per se** requirement that a competency evaluation is required anytime a young defendant lacking prior exposure to the judicial system is before the court. Although this Court's opinion later retreats from any **per se** rule, the analysis employed, facts relied upon, and resolution of the matter, establish that a **per se** rule has been created.

In its final analysis, this Court reasons:

We also recognize that competency hearings are not, *per se*, mandated simply because a child is tried as an adult. However, in light of **Tate's age**, the **facts developed pre-trial and post-trial**, and his lack of previous **exposure to the judicial system**, a competency hearing should have been held, particularly given the complexity of the legal proceedings and the fact that he was denied this protection afforded children fourteen and older under section 985.226(2), Florida Statutes, which provides for a waiver hearing to determine whether the child should be tried as an adult. Further, the brief plea colloquy, taken alone, was not adequate to evaluate competency given his age, immaturity, his nine or ten-year-old mental age, and the complexity of the proceedings.

Even if a child of Tate's age is deemed to have the capacity to understand less serious charges, or common place juvenile court proceedings, it cannot be determined, absent a hearing, whether Tate could meet competency standards incident to facing a first-degree murder charge involving profound decisions

regarding strategy, whether to make disclosures, intelligently analyze plea offers, and consider waiving important rights.

The record reflects that questions regarding Tate's competency were not lurking subtly in the background, but were readily apparent, as his immaturity and developmental delays were very much at the heart of the defense. It is also alleged that his I.Q. of 90 or 91 means that 75% of children his age scored higher, and that he had significant mental delays.

. . .

At a minimum, under the circumstances of this case, the court had an obligation to ensure that the juvenile defendant, who was **less than the age of fourteen, with known disabilities raised in his defense and who faced mandatory life imprisonment**, was competent to understand the plea offer and the ramifications thereof, and understood the defense being raised and the state's evidence to refute the defense position, so as to ensure that Tate could effectively assist in his defense.

Tate, slip op. at 4-5. Any *per se* rule usurps the Legislature's constitutional authority to determine the manner in which a person may be tried, gives added protection to certain classes of defendants not warranted by any rational basis, and undermines the first-hand assessment by the trial judge.

By mandating a *per se* rule, the Court has elevated to "suspect class status" the prosecution of "children", which is contrary to the legislative treatment of juvenile offenders and criminal defendants for purposes of competency determinations. See K.D. v. Dept. Juvenile Justice, 694 So.2d 817, 818 (Fla. 4th DCA 1997).

The *per se* rule also violates the legislative intent, as expressed in Section 985.225, Fla. Stat., the transfer statute. Under Section 985.225, Fla. Stat., a juvenile who is indicted for a crime punishable by death or life imprisonment, is automatically transferred to adult court. The Legislature has elected to treat those who commit the most serious crimes differently. The Legislature leaves it to the citizens selected as grand jurors, the conscious of their community, to determine whether the child should be indicted. If the grand jury makes that determination, the child must be tried as an adult. The constitutionality of the transfer statute is unassailable as this Court reaffirmed in Brazill v. State, 845 So. 2d 282 (Fla. 4th DCA 2003).¹⁴ This Court providing a non-recognized class of persons greater protection is violative of the Legislative intent, and this Court's opinion in Brazill.

Further, grafting a requirement for a competency determination for children transferred to adult court under Section 985.225 Fla. Stat., or assuming that such a determination is made automatically under Section 985.226 Fla. Stat., violates well-settled rules of statutory construction. Where the language of the statute is unambiguous, it is not subject to judicial construction, "however

¹⁴There appears to be a typographical error in the Tate opinion quoting Brazill. This Court states "When the grand jury does not return an indictment, a juvenile thirteen and under is not subject to section 985.266(2). Tate, slip op. at 7). The State suggests that this Court meant to refer to section 985.226(2).

wise it may seem to alter the plain language." State v. Jett, 626 So. 2d 691, 693 (Fla. 1993). Only where the trial judge has a factual basis for suspecting the defendant's competency must he order a competency evaluation and hold a hearing on the matter. See St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982) (quoting Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918)).

4. Alternatively, the State would request that this Court certify the following question as one of great public importance:

IS A TRIAL COURT REQUIRED TO SUA SPONTE ORDER A COMPETENCY EVALUATION EVERY TIME A DEFENDANT COMES BEFORE THE COURT WHO IS OF A YOUNG AGE, WHO IS REPRESENTED BY COUNSEL, WHO HAS A UNIQUE TRIAL STRATEGY AND WHO MAY BELATEDLY PLACE HIS/HER IQ/MENTAL CONDITION AT ISSUE?

5. I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance. Further, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to this Court's decisions in Kelly v. State, 797 So.2d 1278, 1280 (Fla. 4th DCA 2001), Hodgson v. State, 718 So.2d 330, 331 (Fla. 4th DCA 1998), and Fuse v. State, 642 So.2d 1142, 1143 (Fla. 4th DCA 1994) and the Florida Supreme Court's decisions in Lawrence v. State, 846 So.2d 440, 447 (Fla. 2003), and Robertson v. State, 699 So.2d 1343, 1346 (Fla. 1997).

WHEREFORE, Appellee respectfully requests this Court grant this motion for rehearing, rehearing en banc, clarification and/or,

alternatively, certify the question above as one of great public importance.

Respectfully submitted,
CHARLES J. CRIST, Jr.
Attorney General
Tallahassee, Florida

DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907
1515 N. Flagler Drive
9th Floor
West Palm Beach, Fl 33401
(561) 837-5000

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing, Rehearing En Banc, Clarification, and/or Certification of a Question of Great Public Importance" has been furnished by U.S. Mail to: RICHARD ROSENBAUM, Law Offices of Richard Rosenbaum, 350 East Las Olas Blvd., Suite 1700- Las Olas Centre II, Ft. Lauderdale, Fl. 33301, this ___ day of December, 2003.