IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30036-6-III

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STATE OF WASHINGTON, Respondent,

v.

RAMON GARCIA MORALES, Appellant.

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# APPELLANT'S BRIEF

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## I. INTRODUCTION

Ramon Garcia Morales and his brother, Jose Garcia Morales, were apprehended in Idaho and arrested for the murder of Alfredo Garcia and the attempted murder of Maria Beatris Ramirez de Garcia after the investigating officers, without obtaining a search warrant, used cell phone tracking technology to obtain location coordinates from Sprint Nextel. The information led directly to the seizure of Morales, whereupon he gave oral and written statements to the police that were subsequently introduced against him at trial.

For nearly three years leading up to the trial, Morales did not communicate or cooperate with his attorneys and began to physically deteriorate. At various points, he was required to be fed intravenously, and by the time of sentencing, Morales would urinate on himself. He did not bathe, shave, cut his fingernails, or otherwise take care of himself without express instructions. An evaluation by a defense expert indicated that he had an IQ of about 51 and suffered from mental retardation. Counsel repeatedly moved to find Morales incompetent to stand trial or, in the alternative, to appoint a guardian ad litem to represent his best interests in the prosecution. However, the evaluating psychologist from Eastern State Hospital, Nathan Henry, opined that Morales was malingering based on his responses to the only test he administered. Henry concluded that

Morales was competent to stand trial, based on his understanding that legally, Morales could not be incompetent unless he suffered from a mental disease or defect. Because Henry did not diagnose Morales with a mental disease or defect (in part because he did not administer any additional testing after concluding during the first evaluation that Morales was not putting forth sufficient effort in his responses), he concluded that Morales was competent. The trial court agreed with Henry and ordered that Morales was competent to stand trial, notwithstanding the overwhelming evidence of Morales's limited functionality, non-responsiveness and lack of communication with his legal counsel.

During the jury selection, it became evident that there was substantial pretrial publicity in the community that was biased towards Morales's guilt, and discussed the details of the case as well as the competency proceedings. Morales moved for a change of venue in light of the pretrial publicity and its impact on the jury pool. The motion was denied and the trial proceeded.

At trial, the court permitted the introduction of Morales's oral and written statements made when he was arrested in Idaho by use of the cell phone tracking technology. Morales was convicted of all charges and sentenced to 804 months in prison. On appeal, Morales contends that the

trial court erred in denying his motion to suppress his statements on the grounds that they were the fruit of an unlawful, warrantless search of the cell phone data. He further contends that the trial court erred in denying his motion to change the venue of the trial in light of the public atmosphere created by the substantial pretrial publicity that strongly suggested his guilt. Lastly, Morales asserts that the trial court erred in finding him competent to stand trial when he functioned at such a nominal level as to render the trial a complete breakdown of the adversarial proceedings. Moreover, the trial court applied an incorrect legal standard by requiring proof of a mental disease or defect before proceeding to the question whether Morales had the ability to understand the nature of the proceedings against him and to assist in his own defense. To the extent that RCW 10.77.010(15) requires proof of a mental disease or defect to establish incompetency to stand trial, Morales contends that the statute is unconstitutional in that it violates his right to due process of law.

For the foregoing reasons, Morales's conviction and sentence should be reversed and the cause remanded to the trial court to determine whether Morales was able to understand the proceedings and assist in his defense *regardless* of the presence of any mental disease or defect. Should Morales be deemed competent for retrial, the trial court should consider whether the pretrial publicity continues to taint the local

environment such that a change of venue should be granted. And, any retrial should exclude the statements Morales made in Idaho as the fruit of an unlawful, warrantless search.

## II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Morales's motion to suppress his statements as the result of a warrantless search.

ASSIGNMENT OF ERROR 2: The trial court erred in concluding that Morales had no reasonable expectation of privacy in the location coordinates provided to law enforcement by Sprint Nextel without a warrant.

ASSIGNMENT OF ERROR 3: The trial court erred in failing to enter findings of fact and conclusions of law supporting its ruling denying Morales's motion to suppress.

ASSIGNMENT OF ERROR 4: The trial court erred in denying Morales's motion for a change of venue when substantial pretrial publicity was given to the details of the case by the local newspaper, the Tri-City Herald, in a manner biased in favor of Morales's guilt, and to such a pervasive extent that nearly two-thirds of the jury panel had obtained some information about the case from the news coverage.

ASSIGNMENT OF ERROR 5: The trial court erred in entering Finding of Fact No. 20 in its Findings of Fact and Conclusions of Law – Competency Hearing dated June 28, 2011.

ASSIGNMENT OF ERROR 6: The trial court erred in entering Finding of Fact No. 11 in its Findings of Fact and Conclusions of Law – Competency Hearing dated May 14, 2011.

ASSIGNMENT OF ERROR 7: The trial court erred in concluding that Morales had the capacity to understand the proceedings against him and to assist his attorney in his own defense in its Findings of Fact and Conclusions of Law dated May 14, 2011 and June 28, 2011.

ASSIGNMENT OF ERROR 8: The trial court erred in requiring proof of a mental disease or defect as a condition of finding Morales incompetent to stand trial.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Were Morales's statements to law enforcement immediately after his arrest in Idaho the fruit of an unlawful search that permitted police to determine Morales's location and seize his person? YES.

ISSUE 2: Did Morales have a reasonable expectation in the privacy of the transmissions between his cell phone and cell towers – i.e., the "pings" –

such that police were required to obtain a warrant before obtaining coordinates derived from those "pings" from Sprint Nextel? YES.

ISSUE 3: Should the case be remanded for entry of findings of fact and conclusions of law sufficient to permit appellate review of the trial court's order denying Morales's motion to suppress? YES.

ISSUE 4: When the local newspaper published 103 articles during the span of Morales's case, describing the events of the crime and the competency proceedings in a manner biased against Morales, and nearly two-thirds of the jury panel had at least some familiarity with the case based on exposure to the pretrial publicity, did the trial court abuse its discretion in failing to grant a change of venue? YES.

ISSUE 5: Was there sufficient evidence to support the trial court finding that Morales did not have a genuine mental illness that would constitute a mental disease or defect? NO.

ISSUE 6: Was there sufficient evidence to support the trial court finding that Morales's lack of cooperation with his attorneys was a volitional act rather than a product of a mental disease or defect? NO.

ISSUE 7: Did the trial court abuse its discretion in concluding that Morales was competent to stand trial, notwithstanding the overwhelming evidence of Morales's lack of functioning? YES.

ISSUE 8: Did the trial court apply an incorrect legal standard that violated Morales's right to due process of law by requiring proof of a mental disease or defect in order to reach a conclusion of incompetency to stand trial? YES.

## IV. STATEMENT OF THE CASE

On December 28, 2010, police responded to a 911 call to find Alfredo M. Garcia and Maria Beatris Ramirez-DeGarcia shot in their home. CP 539. Garcia was dead, while Ramirez-DeGarcia was critically injured. CP 539. Their daughters, Erica and Maricela, witnessed the shooting and were able to identify the shooters as Ramon Garcia Morales and his brother, Jose Garcia Morales. CP 540; RP (Trial) 335-36, 355.[1]

On December 10, 2008, Pasco Police Detective William Parramore contacted Sprint-Nextel to obtain the location of the Morales brothers through their cell phones. RP (3.5, 3.6 motions and motions in limine)

[1] There are numerous volumes of verbatim reports of proceedings filed in this case. For identification purposes, any volume which is titled will be referenced by title (e.g. Trial RP, Competency Motion RP, Sentencing RP, etc. Any untitled volume will be referenced by the dates of the hearings transcribed in that volume (e.g. RP (2/10/09, 9/21/10, 1/18/11, 5/31/11)).

40-42. Parramore filled out a form for Sprint Nextel and called them approximately every fifteen minutes until they began receiving coordinates. RP (3.5, 3.6 motions and motions in limine) 56. The coordinates were obtained using Sprint Nextel's equipment and did not involve any installation of any device on the telephone or the cell tower. RP (3.5, 3.6 motions and motions in limine) 50-51. On December 11, 2008, Parramore received latitude and longitude coordinates from the company. RP (3.5, 3.6 motions and motions in limine) 44. The State acknowledged that this information was obtained from "pings" between the cell phone and the cell phone towers, and the information was provided by the cell phone company without a warrant. RP (3.5, 3.6 motions and motions in limine) 76.

As a result of this information, which placed the location of Jose Garcia Morales's cell phone in Elmore County, Idaho, local law enforcement located and arrested both Morales brothers. CP 367. Pasco officers traveled to Elmore County to interview Morales and obtained incriminating statements from him. RP (3.5, 3.6 motions and motions in limine) 9, 13-14; RP (Trial) 627-30.

During the interview, Morales told Pasco Detective Kirk Nebeker that Alfredo Garcia had excluded him from employment, which had

caused him financial difficulty. Accordingly, Morales decided to go to Alfredo and tell him to either give Morales part of the money that he lost out on, or he would kill him. Morales told Nebeker that he and his brother were armed with .45 caliber and 9 millimeter pistols. When they went to the Garcias' home, they had a long conversation and then the Garcias came at them, so he shot them both. Morales denied ever pointing his gun at Erica or Maricela. Jose Morales took the guns and they left, driving toward Idaho on the way to Soledad, California, to see Ramon's brother. RP (Trial) 628-30. Morales provided a written statement. RP (Trial) 630.

The day after Morales was apprehended in Idaho, Parramore prepared a request for a pen registration and trap and trace from the Superior Court. RP (3.5, 3.6 motions a motions in limine) 51, 76; CP 367, 404-07. Although the order was granted, no pen register or trap and trace was ever installed. CP 367, 408-10. Following a CrR 3.5/3.6 hearing, the trial court concluded that Morales had no expectation of privacy in the "[p]ings off of cell phone towers" and denied the motion. RP (3.5, 3.6 motions and motions in limine) 82. However, the trial court did not enter findings of fact and conclusions of law supporting its ruling.

Morales was charged with first degree murder and attempted first degree murder and held on one million dollars' bail. CP 538, 541-42. As

the proceedings progressed, he became withdrawn and unresponsive, refusing to communicate with counsel. CP 506. The court stayed the proceedings and ordered that Morales undergo a mental health evaluation by Eastern State Hospital on May 18, 2009. CP 524-29. Nathan Henry, a licensed psychologist from Eastern State Hospital, evaluated Morales on July 10, 2009, and filed a report with the court.[2] CP 510-21. Henry administered only one test, the Test of Memory Malingering ("TOMM"), from which he determined that Morales "was not putting forth adequate effort on the task and may have been malingering."[3] CP 514-15. However, he observed that "the presence of malingering does not preclude the presence of genuine psychopathology. It is possible for a person who is malingering to also have a genuine mental illness." CP 515.

Morales was also, apparently, evaluated by Dr. Tedd Judd, who submitted a report indicating that Morales had mild mental retardation and was not competent to stand trial.[4] CP 523, 497. Henry conducted a second interview in January 2010, at which point Morales was slow to

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[2] Henry apparently prepared three separate reports; however, only one was filed of record. RP (Competency Motion) 41.

[3] Henry defined "malingering" as "feigning impairment for the purpose of secondary gain." CP 515.

[4] Dr. Judd's report does not appear to have been made part of the record before the trial court, and thus, is not available to this court on review. Furthermore, it is not clear whether Dr. Judd was successfully able to complete an evaluation due to lack of verbal response from Morales. CP 469.

respond but was able to provide accurate responses to questions such as identifying the year and the month, as well as his location. RP (Competency Motion) 63-65. A third evaluation was performed at Eastern State Hospital in May 2010. RP (Competency Motion) 68-69.

While at Eastern State Hospital, Morales was very withdrawn, did not participate in interviews or respond to questions, did not eat or shower without being told, required assistance in washing his hands and trimming his fingernails, behaved inappropriately by attempting to eat a salad dressing packet, and stayed in bed with a blanket over his head. RP (Competency Motion) 69-70, 116. Nurses noted that he was disorganized and had cognitive deficits. RP (Competency Motion) 116. At some point, Dr. Judd tested his IQ with a result of 51, which placed him in the range of moderate mental retardation. RP (Competency Motion) 112-13. Evidence was also presented that while Morales was able to obtain a driver's license, he had to take the test eleven times before passing. RP (Competency Motion) 125. Nevertheless, Henry did not conduct any testing for developmental disability; instead, he concluded that Morales was not putting forth a good faith effort based on the single instance of the TOMM, "so no additional testing after that." RP (Competency Motion) 126.

Ultimately, Henry concluded that Morales was malingering and did not diagnose any mental disease or defect; thus, he presumed that Morales was competent to stand trial. RP (Competency Motion) 72; CP 516. Following a hearing at which only Henry and Nebeker testified, the trial court found Morales competent to stand trial. RP (Competency Motion) 140; CP 483. The trial court did not enter findings of fact and conclusions of law in support of its order.

During the time before trial, Morales became increasingly withdrawn, nonresponsive, and unable to take care of his basic needs such as showering or going to the bathroom. CP 469; RP (10/12/10, 2/18/11, 4/8/11) 15. Counsel believed that he lacked meaningful comprehension of the legal system. CP 470. He did not interact with counsel and remained in a catatonic state during visits. CP 470. Morales did not converse with counsel about trial strategy or plea offers. CP 472. Eventually, he required that his food be delivered intravenously as he would only occasionally eat. CP 295. By the time of sentencing, Morales was urinating himself and did not respond to an ammonia smelling salt placed under his nose. RP (Sentencing) 3.

Counsel requested appointment of a guardian ad litem to represent Morales's best interests, or to withdraw due to a breakdown in the

attorney-client relationship. CP 452-56; RP (10/12/10, 2/8/11, 4/8/11) 3-5. The motions were denied. RP (10/12/10, 2/8/11, 4/8/11) 3-5. In February 2011, the trial court again caused Morales to be evaluated for competency in light of counsel's concerns about his non-responsiveness. RP (Motions) 89-98; CP 392.

A second competency hearing was held in April, 2011, at which Henry testified that he still did not have evidence of the existence of a mental disease or defect, thus Morales had the capacity to stand trial. RP (Motions) 126-32. At the same time, Henry acknowledged that Morales was not feigning his deteriorating physical presentation, his lack of cooperation, or the inadequate care of his personal needs. RP (Motions) 131. Once again, the trial court found Morales competent to stand trial. RP (Motions) 146; CP 378. The trial court entered findings of fact and conclusions of law in support of its decision, in which it essentially re-stated Henry's testimony. Finding of Fact 11 states,

> This court finds the defendant is continuing to malinger competency related impairments and his lack of cooperation with his attorneys is a volitional act, rather than the product of a mental disease or defect.

CP 297. The trial court concluded that Morales had the capacity to understand the proceedings against him and assist his attorney in his own defense. CP 297.

Shortly before trial, the State filed an amended information, which added two counts of assault in the second degree and firearm enhancements to all counts. CP 370-73.

After voir dire, Morales moved for a change of venue based on substantial pretrial publicity, citing 103 articles published in the local newspaper between December 11, 2008, and June 2, 2011. CP 194-232. Responses to the jury questionnaire indicated that after excusing 34 jurors, including two that stated during the group voir dire that they could not remain impartial because of Morales's appearance and lack of participation, 24 jurors, or nearly two-thirds of the panel, had some media exposure to the case. CP 195. During individual voir dire, many of the prospective jurors expressed familiarity with details of the case. RP (Trial) 36-37 (knew man and wife were shot in front of the kids, brother also charged); 52 (angle of news stories favored Morales's guilt, two brothers and mental health issues involved); 56 (two men had come and shot the dad and mom and two kids, bothered that kids had seen what happened to parents); 63 (two brothers entered the house, injured mother and shot father, two children were witnesses, mental health issues); 65 (Morales making the choice to act the way he was, according to the newspaper); 66 (upset about being denied job opportunity, cell phone tracking); 69-71 (one brother on a hunger strike, work they were not

included on); 88 (two brothers arrested for killing a man and injuring his wife); 92 (two brothers shot two people, killed the father and injured the mother, in front of the two daughters, dispute over work); 94 (hunger strike, multiple evaluations at Medical Lake, deemed competent to stand trial, brother involved); 101-02 (two shooters, one person killed and one injured); 112-14 (something to do with work, brothers); 118 (somebody was shot, mental illness); 120 (two brothers suspected of murdering a guy and girl friend or wife); 132 (broke into home, shot man and injured woman, mental issues, won't clothe himself or cooperate with his lawyers); 141 (competency, brought into courtroom in wheelchair); 151 (man killed, wife injured); 153 (question about mental state, brother involved); 154-57 (two evaluations, brothers killed man and hurt wife, caught them in Idaho, not cooperating or communicating, teenage girls witnessed); 169-72 (the man killed two people, media biased in favor of guilt). The trial court denied the motion. RP (Trial) 183.

The trial proceeded, and the State presented evidence from a number of law enforcement officers and forensic scientists, Maria Beatris Ramirez Garcia, Erica Garcia, and Maricela Garcia, as well as the written statement taken from Morales in Idaho. CP 53. The defense did not present any evidence. RP (Trial) 673. The jury convicted Morales as

charged and returned special verdicts finding that he was armed with a firearm at the time of the crimes. CP 54-61.

Defense counsel renewed its motion to evaluate Morales's competency before sentencing. CP 37-39. The trial court denied the motion. RP (Sentencing) 4. Morales was sentenced to 806 months' imprisonment. CP 16. He appeals. CP 10-11.

## V. ARGUMENT

### I. The trial court erred in denying Morales's motion to suppress evidence obtained as the result of a warrantless search of transmission information between Morales's cell phone and cell phone towers that permitted them to locate the cell phone and arrest Morales.

Following a hearing with testimony, the trial court denied Morales's motion to suppress evidence obtained from his cell phone without a warrant, but did not enter findings of fact and conclusions of law supporting its ruling. Under CrR 3.6(b), written findings and conclusions are required to be entered following an evidentiary hearing on a motion to suppress. Remand is not required if the oral record is sufficient to permit appellate review. *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003). In this case, the trial court's oral ruling is minimal, consisting

solely of one paragraph. RP (3.5, 3.6 motions and motions in limine) 82. Should this court determine the record is inadequate to permit appellate review, the case should be remanded for entry of findings of fact and conclusions of law. However, the trial court expressly stated that there was no privacy information in the "pings" between cell phones and cell towers as the basis for its denial. RP (3.5, 3.6 motions and motions in limine) 82. Morales contends that this conclusion is legally erroneous and that the motion to suppress, accordingly, should have been granted.

It is well established that article I, section 7 of the Washington Constitution provides greater protections than those afforded by the Fourth Amendment. *State v. McKinney*, 148 Wn.2d 20, 26, 60 P. 3d 46 (2002) (*citing City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). The Washington State Supreme Court has recognized privacy interests in telephone records. *See, e.g., State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Similarly, both the Washington Supreme Court and the U.S. Supreme Court have found that placement of a GPS device on a defendant's vehicle for purposes of tracking location requires a warrant. *U.S. v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012); *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003).

In determining whether a search violates article I, section 7, the court must first decide whether the action in question intruded upon a person's "private affairs." *McKinney*, 148 Wn. 2d at 27 (*citing In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997)). Generally, private affairs are "those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). This determination is not "merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold." *McKinney*, 148 Wn. 2d at 27 (citing *McCready*, 123 Wn.2d at 270).

In the present case, Morales has a reasonable expectation of privacy in the transmission of information between his cell phone and cell towers, which information may be used to determine his specific location. As observed in *Gunwall*,

> A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society . . . The concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.

106 Wn.2d at 67 (*quoting People v. Sporleder,* 666 P.2d 135, 141 (Colo.1983)). Likewise, in *Jones*, Justice Alito recognized the growing ubiquity of cell phones and the ability to use them to track the location of cell phone users:

> Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

132 S. Ct. at 963 (J. Alito, concurring).

Simply put, a cell phone is a modern necessity just as a land line phone was determined to be a necessity of modern life in *Gunwall*. Yet, the simple act of turning on the cell phone may enable a cellular service provider to triangulate the location of the phone to a specific latitude and longitude. RP (3.5, 3.6 motions and motions in limine) 57. It is entirely unreasonable to suggest that, by the act of turning on one's cell phone, one

intends to thereby waive all privacy interests in the phone's transmissions with the cell phone towers and the information that can be derived from those transmissions.

In an analogous setting, the Supreme Court has protected electric consumption records. *Maxfield*, 133 Wn.2d 332. In *Maxfield*, the employee of a public utility district volunteered information about the defendant's increased electric utility consumption to law enforcement. 133 Wn.2d at 335. Police used the information to obtain a search warrant, leading to the discovery of a marijuana grow operation. *Id.* The *Maxfield* court concluded, "While the privacy interest in electric consumption records may be characterized as 'minimal,' it is still a privacy interest subject to the protections of article I, section 7." 133 Wn.2d at 340. If a person has a privacy interest in the information that can be read from his or her electrical meter, surely that person has a similar expectation of privacy in the "pings" between his or her cell phone and the service provider's cell towers.

Another line of cases has precluded the use of GPS technology to track a suspect's location without a warrant. In *Jackson*, for example, the Washington Supreme Court disagreed with the State that the placement of GPS tracking devices simply augmented the senses of the officers in

tracking the defendant's location. 150 Wn.2d at 261-62. In distinguishing between a law enforcement officer's ability to directly observe and follow it from the use of GPS tracking technology, the *Jackson* court stated,

> It is true that an officer standing at a distance in a lawful place may use binoculars to bring into closer view what he sees, or an officer may use a flashlight at night to see what is plainly there to be seen by day. However, when a GPS device is attached to a vehicle, law enforcement officers do *262 not in fact follow the vehicle. Thus, unlike binoculars or a flashlight, the GPS device does not merely augment the officers' senses, but rather provides a technological substitute for traditional visual tracking. Further, the devices in this case were in place for approximately two and one-half weeks. It is unlikely that the sheriff's department could have successfully maintained uninterrupted 24-hour surveillance throughout this time by following Jackson. Even longer tracking periods might be undertaken, depending upon the circumstances of a case. We perceive a difference between the kind of uninterrupted, 24-hour a day surveillance possible through use of a GPS device, which does not depend upon whether an officer could in fact have maintained visual contact over the tracking period, and an officer's use of binoculars or a flashlight to augment his or her senses.

*Id.* Similarly here, the State could not have located Morales's location by simple use of an officer's senses had it not, effectively, converted Morales's cell phone into the kind of tracking device held to require a warrant in *Jackson* and *Jones*.

In surveillance cases, the question whether the defendant enjoys a reasonable expectation of privacy turns in large part on whether the information has been exposed to the public. *U.S. v. Maynard*, 615 F.3d

544, 558 (2010) (*quoting Katz v. United States,* 389 U.S. 347, 351, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967)). Although *Katz* establishes that "What a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection," courts have recognized that the degree of surveillance permitted by modern technology vastly exceeds what the public reasonably expects another may do. 389 U.S. at 351. In *Maynard*, the Court of Appeals for the D.C. Circuit held that a warrant was required to install a GPS device on the defendant's vehicle and track the vehicle's location over a substantial length of time. The *Maynard* court reasoned,

> "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene." Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

615 F.3d at 562 (internal citations omitted). Yet this is precisely the kind of information that would be readily available to police without any warrant requirement should this court determine that Morales lacks a reasonable expectation of privacy in the cell phone transmissions used to track his location. The State has proffered no rational limiting principle that would prevent its use of cell tracking technology to the same extent as the *Maynard* court disapproved.

Finally, to the extent the State suggests that *Jackson* and *Jones* are distinguishable because the use of a GPS requires placement of a physical object where the use of cell phone tracking technology does not, the distinction is without a difference. Physical intrusion, or trespass, is no longer the touchstone of whether an unlawful intrusion occurs; as held by the U.S. Supreme Court, "the Fourth Amendment protects people, not places." *Jones*, 132 S. Ct. at 950 (*quoting Katz,* 389 U.S. at 351). The question is simply whether a person has a reasonable expectation of privacy in the area searched. *Id.* It would be revolutionary for this court to hold that a person lacks a reasonable expectation of privacy in the transmissions from his cell phone.

Here, the use of the cell tracking technology without a warrant is equivalent to converting Morales's cell phone into a GPS device without

his knowledge or consent. Such technology, unchecked, permits the State to obtain an extraordinary amount of private, personal information by monitoring the person's whereabouts. There is no precedent for the trial court's conclusion that Morales lacked a reasonable expectation of privacy in the "pings" between his phone and the cell towers, and compelling reasons exist why this court should conclude that such a privacy interest exists. A contrary holding would effectively require the public to choose between utilizing a necessary medium of modern communications, or revealing private information about one's location to the government at will. Moreover, there is no evidence in the record to suggest that the public has any knowledge that such technology is readily available, such that use of a cell phone could be construed as an assumption of the risk that the cellular transmission information could be secretly monitored. A reasonable person expects that his or her cell phone is used to make phone calls, not to continuously transmit information to the government. Accordingly, this court should hold that Morales had a privacy interest in the cellular transmissions that the police intercepted.

The second prong of article I, section 7 requires "authority of law" before an individual's private affairs can be disturbed. As stated in *Gunwall*,

> Generally speaking, the "authority of law" required by Const. Art. 1, § 7 in order to obtain records includes authority granted by a valid, (i.e., constitutional) statute, the common law or a rule of this court. In the case of long distance toll records, "authority of law" includes legal process such as a search warrant or subpoena.

106 Wn.2d at 68-69 (citations omitted).

There is no question in this case that the State did not obtain a warrant prior to intercepting the cellular transmissions. As such, information obtained by exploiting the illegality is fruit of the poisonous tree and must be excluded. *State v. Early*, 36 Wn. App. 215, 220, 674 P.2d 179 (1983) (*citing State v. Aydelotte,* 35 Wn. App. 125, 131, 665 P.2d 443 (1983)). Here, Morales's statements made shortly after his arrest were the fruit of the arrest itself, which was only possible because of the illegal interception. The statements should have been suppressed.

**II. The trial court erred in denying Morales's motion for a change of venue when the jury panel had been exposed to substantial pretrial publicity biased towards Morales's guilt and detailing aspects of the case, such as Morales's multiple competency evaluations, that were not admissible evidence in the case.**

A criminal defendant has a constitutional right to a trial by an unbiased jury. *State v. Young*, 158 Wn. App. 707, 714, 243 P.3d 172

(2010). A change of venue should be granted when necessary to provide a fair and impartial trial, and a defendant need only show a probability of unfairness or prejudice. *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987). "The question that the court must ask "is not whether the community remembered the case, but whether the jurors at ... trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Young*, 158 Wn. App. at 715 (*quoting Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). "Adverse pretrial publicity can create a presumption in a community that jurors' claims that they can be impartial should not be accepted, and the totality of circumstances is examined to decide whether such a presumption arises." *Jackson*, 150 Wn.2d at 227.

A decision on a motion to change venue is reviewed for an abuse of discretion, which examines whether the trial court's decision is manifestly unreasonable, or based on untenable grounds or reasons. *Young*, 158 Wn. App. at 714. Factors to consider in evaluating whether a change of venue should be granted include:

> (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial

> jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

*Id.* at 715 (*citing State v. Crudup,* 11 Wn. App. 583, 587, 524 P.2d 479 (1974)).

In this case, the trial court did not consider the *Crudup* factors on the record; it simply stated that it was not granting the motion. RP (Trial) 183. However, review of the *Crudup* factors weighs strongly in favor of concluding that the extensive, biased pretrial publicity so tainted the jury panel that jurors' claims of impartiality should have been disregarded and the trial moved to a new venue.

a. The inflammatory or noninflammatory nature of the publicity.

Throughout individual voir dire, prospective jurors repeatedly expressed their belief that Morales had shot a man and his wife in front of their children. RP (Trial) 36-37, 52, 56, 63, 88, 92, 101-02, 132, 151, 154-57, 169-72. Additionally, numerous jurors acknowledged that they were aware of Morales's mental health issues, including the conclusion that he was "faking it." RP (Trial) 52, 63, 65, 69-71, 94, 118, 132, 141, 153, 154-57.

In addition, defense counsel submitted as an appendix to the motion examples of news articles obtainable online from tri-cityherald.com involving Morales. CP 212-232. Included in the press coverage were recent articles concerning Morales vomiting in court during the 3.5/3.6 hearing, CP 212-13; the ruling on his competency motion, including references to a "hunger strike" and his deteriorating condition, CP 213; his return to Eastern State, describing him as "unkempt," "unresponsive" and "unable to help his lawyers prepare for trial," CP 214; a headline describing him as "stonewalling to avoid trial," CP 214; a headline referring to his "competency issues" and describing how he was not speaking to his defense attorneys, bathing or getting dressed, and was being fed intravenously, CP 216; references throughout to Morales "gunning down a husband and wife", CP 218-26; and at least one article on how the victim, Alfredo Garcia, "spent hours building his American dream," CP 227.

The pretrial publicity was extremely inflammatory in that it depicted Morales as a crazed, unkempt murderer who was trying to fake mental illness to avoid standing trial.

b. The degree to which the publicity was circulated throughout the community.

Counsel for Morales noted that the Tri-City Herald, the local paper in which the articles were published, is the only local paper and reaches over 80% of the homes in the Tri-Cities market. CP 204. The prospective jurors' responses to the jury questionnaires revealed that 51 of the 72 prospective jurors had obtained at least some information about the case from the media. CP 207-10. Thus, conservatively, the publicity reached at least two-thirds of the local population.

c. The length of time elapsed from the dissemination of the publicity to the date of trial.

The publicity was extensive and ongoing, including a flurry of articles within just a few days of trial and throughout jury selection. CP 212-13. The articles began within days of the crime and continued throughout the pretrial proceedings. CP 212-32.

d. The care exercised and the difficulty encountered in the selection of the jury.

The trial court observed that "everybody" had heard of the case. RP (Trial) 2-3. Likewise, the State commented that it would be "easier to list the ones that didn't hear about the case." RP (Trial) 5. Nevertheless, the trial court permitted individual voir dire of prospective jurors who stated they had learned of the case through the media. RP (Trial) 5.

While a number of jurors were excused for cause, numerous others who reported that they knew something about the case from the media coverage were not excused. CP 195; RP (Trial) 32-175. Only 14 prospective jurors in the final pool reported no media exposure to the case. CP 195. Of the final jurors selected, all had learned something about the case from the media. CP 196.

e. The familiarity of prospective or trial jurors with the publicity and the resultant effect upon them.

A number of jurors reported that they had heard about the case and expressly admitted they could not be fair and impartial. RP (Trial) 4. Among the jurors selected, every juror had some exposure to pretrial publicity. CP 196.

f. The challenges exercised by the defendant in selecting the jury, both peremptory and for cause.

Even after exercising peremptory challenges, all of the remaining jurors had learned of the case through pretrial publicity. CP 196. The trial court excused some of the prospective jurors called for individual voir dire for cause, but did not grant a number of Morales's challenges for cause. RP (Trial) 32-175.

g. The connection of government officials with the release of publicity.

The record does not reflect whether any government officials were connected with the publicity.

h. The severity of the charge.

The charge, first degree murder, has a seriousness level of XV under the Sentencing Reform Act, exceeded only in seriousness by aggravated murder in the first degree. RCW 9.94A.515. Thus, the severity of the charge warrants additional prudence in the trial process.

i. The size of the area from which the venire is drawn.

Franklin County is a relatively small county, such that it is not uncommon for changes of venue to be necessitated due to familiarity with the case or the participants. CP 204. By comparison, Franklin County's pool of prospective jurors is less than one quarter the size of the pool in nearby Spokane County. CP 204.

Applying the factors to the totality of the circumstances here, the amount, pervasiveness, and inflammatory nature of the pretrial publicity presented a strong likelihood of contaminating the jury pool. The fact that every single juror ultimately selected to serve had acknowledged some exposure to the case through the media is extraordinarily telling as to the reach of the media's reporting.

Moreover, the very necessity of questioning the jurors about the pretrial publicity has the paradoxical effect of drawing their attention to details that are better forgotten. *State v. Stiltner*, 80 Wn.2d 47, 55, 491 P.2d 1043 (1971) ("He is in a position where he must ask a juror whether or not he remembers a certain thing that he doesn't want him to remember and by doing so he may quicken or refresh that memory as to a newspaper article that may otherwise have been forgotten."). In *Stiltner*, there was substantial pretrial publicity about the investigation that tended to suggest the defendant was guilty. *Id.* at 51. There, the Washington Supreme Court concluded that the probability of prejudice was so high that the proceeding was inherently lacking in due process and it was error not to grant the motion for a change of venue. *Id.* at 54-55.

Similarly here, every single juror had been exposed to substantial, ongoing publicity about the case that included details about Morales's competency evaluations and his mental and physical condition, reports that he was faking mental illness to avoid trial, stories about his lack of hygiene and vomiting in the courtroom, above and beyond the conclusory description of Morales as one of two people who "gunned down" a family in front of their daughters. The environment was such that the probability of prejudice to Morales was exceedingly high, compounded by the fact that Morales had to literally *remind* the jurors of what they had read in

order to try to flush out prejudice. Under the totality of the circumstances, the trial should never have been held in Benton County and there is a substantial likelihood that the jury was so tainted by pretrial publicity as to deprive Morales of due process. Accordingly, the conviction should be reversed and the case remanded for a new trial in a new venue.

**III. The trial court erred in ruling that Morales was competent to stand trial when there was overwhelming evidence that Morales was not functioning sufficiently to render the adversarial process meaningful.**

For nearly three years, the trial court observed Morales's physical condition decline as he became increasingly withdrawn and unresponsive. Counsel repeatedly expressed to the court that Morales would not communicate and was not capable of providing any assistance in defending his case. Despite Morales's obvious lack of functionality, the trial court found that Morales did not suffer from a mental illness, that his lack of cooperation was a volitional act, and that in the absence of a mental disease or defect, Morales was competent to stand trial. The trial court's rulings were both factually and legally erroneous, in that the trial court's findings were not supported by substantial evidence in the record and that Morales was legally incompetent even if he did not suffer from a

mental disease or defect. Consequently, the conviction should be vacated and the cause remanded for further proceedings to determine Morales's competency to stand trial.

A. The trial court's findings were unsupported by substantial evidence because Henry acknowledged that he lacked evidence to determine the existence of a mental disease or defect and that the presence of malingering, even if accurate, did not preclude the existence of a mental disease or defect.

In its finding of fact no. 20 entered on June 28, 2011, the trial court found,

> The defendant does not have a genuine mental illness that would constitute a mental disease or defect. The defendant has the capacity to adequately understand the proceedings against him and aid in his defense. The defendant may choose to present himself as not being competent to proceed, however, this would be under his volitional control and not due to a mental disease or defect.

CP 28. Similarly, in its finding of fact no. 11 entered on May 24, 2011, the trial court found that "the defendant is continuing to malinger competency related impairments and his lack of cooperation with his attorneys is a volitional act, rather than the product of a mental disease or defect." CP 297. These findings are not supported by substantial evidence in the record.

A trial court's finding of competence or incompetence following a contested hearing is the equivalent of a bench trial on the issue.

Accordingly, the reviewing court should consider whether substantial evidence supports the trial court's findings of fact. *State v. Carlson,* 143 Wn. App. 507, 519, 178 P.3d 371 (2008). Substantial evidence is sufficient evidence to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Alternatively, the trial court's determination of competence is reviewable for an abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L.Ed.2d 700 (1986).

There is no dispute that on Henry's first meeting with Morales, Morales did not put forth effort in his responses. CP 515. There is also no dispute that this lack of effort *may* have been attributable to malingering. CP 515. But Henry admitted that there could be a number of reasons why a person might not put effort into the task. RP (Competency Motion) 53. Furthermore, Henry consistently acknowledged that a diagnosis of malingering, in itself, did not preclude the existence of a mental disease or defect. RP (Competency Motion) 60. Indeed, another doctor at Eastern State Hospital diagnosed Morales with adjustment disorder with depressed mood. RP (Competency Motion) 71.

There was also no dispute that Morales's condition deteriorated significantly as the case progressed. RP (Motions) 129. Henry acknowledged that Morales was obviously not feigning his deteriorating physical condition, his inadequate personal care, or his lack of cooperation. RP (Motions) 131. Henry also acknowledged that he lacked sufficient information about Morales's history to determine whether he may have been predisposed to depression. RP (Competency Motion) 92-93. And he admitted that a person could be sufficiently depressed that it affected his or her willingness to aid in the defense, raising a legal question whether it was a lack of capacity or a lack of will. RP (Competency Motion) 106.

Despite the ample evidence of Morales's marginal functioning and peculiar behavior, the trial court elevated what amounted to Henry's decision to administer no further testing beyond the TOMM into a finding that Morales had no mental disease or defect. RP (Competency Motion) 126. Ironically, Henry admitted that he did not make any diagnosis besides malingering because he had no evidence of other genuine psychiatric symptoms or impairments. RP (Competency Motion) 56. Yet it was Henry's own decision not to conduct further testing, based on his assumption that Morales would not put sufficient evidence into the test because he had previously performed poorly on the TOMM, that left

Henry without sufficient information to confirm or deny the presence of substantial cognitive deficits, as reflected in Dr. Judd's findings. RP (Competency Motion) 112-13.

Additionally, trial counsel opined throughout the entire pretrial and trial process that Morales was incompetent to proceed. "[C]ounsel's first hand evaluation of a defendant's ability to consult on his case and to understand the charges against him may be as valuable as expert psychiatric opinions on his competency." *United States v. Davis*, 511 F.2d 355, 360 (D.C. Cir. 1975). There is no indication here that the trial court considered counsel's assessment, let alone that it placed counsel's assessment on par with Henry's opinion.

Finally, the burden of establishing Morales's competency, once called into question, should lie with the State. Which party bears the burden of proving or disproving competence in Washington is an unanswered question. The relevant statute is silent on the issue; RCW 10.77.086(3) identifies the quantum of proof as a preponderance but fails to allocate upon whom the burden of persuasion falls, and the case law has not directly addressed the question. *See State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d 289 (1993) (leaving burden question unanswered); *see also Born v. Thompson*, 154 Wn.2d 749, 754 n.6, 117 P.3d 1098 (2005) (State

has "clear and convincing" burden to prove client competent at misdemeanor competency restoration hearing).

Here, the silence in the statute renders it ambiguous as to which party bears the burden of proof. The rule of lenity requires ambiguous criminal statutes to be construed in favor of the accused. *See, e.g., State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996). Applying that rule to this case places the burden on the State.

This result would best guard against an erroneous determination of competency, which, as the United States Supreme Court has noted, would be much more prejudicial to the defendant than to the State:

> [A]n erroneous determination of competence threatens a "fundamental component of our criminal justice system"—the basic fairness of the trial itself [because it would essentially remove the defendant from the process]. By comparison to the defendant's interest, the injury to the State of the opposite error—a conclusion that the defendant is incompetent when he is in fact malingering is modest. To be sure, such an error imposes an expense to the state treasury and frustrates the State's interest in the prompt disposition of criminal charges. But the error is subject to correction in a subsequent proceeding and the State may detain the incompetent defendant for the "reasonable period of time necessary to determine whether there is a substantial probability that he will attain competence in the foreseeable future."

*Cooper v. Oklahoma*, 517 U.S. 348, 365, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) (footnotes and citations omitted).

Under the circumstances, the trial court's findings that Morales did not suffer from a mental disease or defect and that his lack of cooperation was volitional are unsupported by substantial evidence. There was evidence that he had an IQ that placed him in the moderately retarded range. RP (Competency Motion) 112-13. He was diagnosed with adjustment disorder with depressed mood. RP (Competency Motion) 71. Henry simply chose not to perform additional testing based on his suspicion of malingering, while at the same time acknowledging that malingering and mental illness were not mutually exclusive. RP (Competency Motion) 60. This is insufficient to convince a reasonable, fair-minded person that Morales did not suffer from a mental disease or defect, or that his lack of communication with his attorneys was a product of his voluntary choice. Simply put, the evidence was insufficiently developed to reach a conclusion one way or the other. Because the burden of proving competency should fall on the State, in this case, the burden was not met.

B. RCW 10.77.010(16) violates a defendant's due process rights to the extent it requires the existence of a mental disease or defect to find a defendant incompetent to stand trial.

The requirement that a defendant be competent to stand trial is of constitutional magnitude, deriving from the Fourteenth Amendment's due process guarantee. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 43

L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 386, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Consequently, states are required to implement procedures adequate to protect defendants from being subject to trial while incompetent. *Pate*, 383 U.S. at 385.

Competence to stand trial requires that a defendant have (1) "a rational as well as factual understanding of the proceedings against him," and (2) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960). "Where the evidence before the trial court raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must conduct a competency hearing." *Maxwell v. Roe*, 606 F.3d 561, 568 (9th Cir. 2010) (*citing Pate*, 383 U.S. at 385. A defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, and one factor standing alone may, in some circumstances, be sufficient. *Drope*, 420 U.S. at 180.

Notably, under *Drope*, medical opinion is simply one factor for the trial court to consider in evaluating a defendant's competency. But under RCW 10.77.010(15), a defendant is not incompetent unless he or she

suffers from a mental disease or defect. This effectively creates an standard of incompetency that may permit the trial of individuals who are not capable of understanding the proceedings against them, or consulting with counsel, or assisting with their defense, yet lack a psychiatric diagnosis. Nothing in the due process requirement justifies that a defendant's impairment must be codified in the DSM-IV before it rises to the level of a legally cognizable incapacity. To the contrary, a person may appear to be perfectly functional and still lack the requisite ability to "make decisions on the basis of realistic evaluations of his own best interests." *Lafferty v. Cook*, 949 F.2d 1546, 1555 (10th Cir. 1991), *cert. denied*, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 548 (1992).

Instead, what is clear from the history and purpose of the due process prohibition against trying incompetents is that one who cannot *function* properly in the legal system should not be required to participate in it. Here, Morales clearly did not function within the judicial process in the manner contemplated by due process requirements. In *Ortiz*, for example, the defendant was legally competent because the judge could determine that he understood a judge was present in the courtroom, the prosecutor would attempt to convict him of a crime, his lawyer would assist him, and he was further able to recall past facts and communicate them to his attorney. 104 Wn.2d at 482-83. In the present case, the trial

court could not have made any such determination that Morales was capable of participating. To the contrary, counsel repeatedly and continuously advised the court that Morales would not communicate and would not participate in his defense.

In light of Morales's complete lack of function, subjecting him to a trial simply because he lacked a distinct psychiatric diagnosis resulted in a trial that lacked any meaningful participation on his part. This is not the kind of trial that due process requires. Inability to understand and participate does not require evidence of a specific mental illness to rise to the level of a constitutionally significant impairment. The trial court erred in concluding that Morales was competent to stand trial on the grounds that he was not diagnosed with any psychiatric disease.

C. Morales's complete lack of functionality in the case should have precluded him from being brought to trial because his lack of responsiveness caused a complete breakdown in the adversarial process and resulted in a fundamentally unfair trial.

Not only did Morales's lack of functionality preclude him from participating in the trial process, it also precluded his trial counsel from being able to conduct a vigorous defense. While not the dispositive factor, certainly counsel's opinion as to the defendant's ability to understand and assist in the proceedings should carry weight. *Drope*, 420 U.S. at 177 n. 13. Indeed, counsel's inability to maintain a normal attorney-client

relationship with Morales was so pronounced as to cause counsel to move to withdraw from representation.

It is clear that the trial process cannot function properly without true adversarial testing. The U.S. Supreme Court has posited that the common law prohibition against trying the incompetent derives from the inference that one who is incapable of assisting in his defense is likewise unable to test the State's case:

> Thus, Blackstone wrote that one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?' Some have viewed the common-law prohibition 'as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.' For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice.

*Drope*, 420 U.S. at 171-72 (internal citations omitted).

In circumstances where counsel cannot, or does not, function as a proper adversary, the truth-finding function of the trial is impaired. In *U.S. v. Cronic*, the U.S. Supreme Court observed:

> [T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides

> of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

466 U.S. 648, 655-56, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984) (internal citations omitted). When counsel cannot communicate with the defendant, the attorney cannot fulfill the role contemplated by the Sixth Amendment's right to counsel because counsel cannot meaningfully advocate for the defendant's position.

Here, trial counsel was placed in a position of being ethically obligated to defend Morales, while believing Morales to be incapable of understanding his rights and the trial process, and unable to meaningfully admit or deny the allegations against him. Through no fault of their own, Morales's trial attorneys lacked the necessary relationship with Morales to vigorously represent his interests. Sometimes, defense counsel's most important role is in negotiating a plea for the client. *See, e.g., Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1407-08, 182 L.Ed.2d 379 (2012) (observing that 97% of federal cases resolve by plea deal and concluding, "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."). In the present case, counsel observed that due to

Morales's non-responsiveness, he was unable to review the evidence with Morales and unable to advise Morales as to the wisdom of a potential plea bargain. RP (Motions) 67. A defendant who is incapable of entertaining a plea deal cannot, by extension, be capable of proceeding to trial.

The facts of this case present a picture of a prosecution against an individual who may as well not have been present at all. Certainly, Morales made no attempt to counter the State's evidence or to take any step in furtherance of his own best interests. Under the circumstances of this case, the trial was fundamentally unfair because it simply failed to rise to the level of an adversarial proceeding. Morales should have been determined incompetent to proceed.

## VI. CONCLUSION

For the reasons set forth herein, Morales respectfully contends that the trial court erred in denying his motion to dismiss; erred in denying his motion for a change of venue; and erred in subjecting him to a trial in which he did not function in any way as an adversarial participant. Based on these errors, this court should vacate the conviction and sentence and remand the case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 4th day of June, 2012.

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Attorney for Appellant

## CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 4th day of June, 2012 in Walla Walla, Washington.

Andrea Burkhart