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SUPREME COURT  
STATE OF WASHINGTON  
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No. 100477-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JUSTYN MYLES BUSCH,

Petitioner.

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ANSWER TO  
PETITION FOR REVIEW

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## **I. IDENTITY OF RESPONDENT**

The State of Washington, respondent, asks that review be denied.

## **II. STATEMENT OF THE CASE**

The facts are set out in the Court of Appeals opinion at pages 1-7. A more detailed summary is set out in the Brief of Respondent at 1-8.

The issue raised in the Petition for Review is whether the trial judge abused his discretion in failing to order a new competency evaluation *sua sponte*. Accordingly, the relevant facts are those that were known to that judge at the time. Those facts are essentially limited to the following:

On June 28, 2019, Judge Joseph Wilson signed an order for a competency evaluation. 1 CP 120-26. On July 11, Judge David Kurtz entered an order finding that the defendant was incompetent and ordering competency restoration. 1 CP 115-19. On December 6, Judge Linda

Krese entered an order finding him to be competent. 1 CP 101-02.

On January 13, 2020, a trial commenced before Judge Paul Thompson. On January 16, Judge Thompson declared a mistrial and ordered a new competency evaluation. 1 CP 80-87. On February 10, Judge Krese again entered an order finding the defendant to be competent. 1 CP 71-72.

None of these orders explained the circumstances that gave rise to the court's decision. Although the Department of Social and Health Services submitted evaluation reports, they were not placed in the court file until months after the Notice of Appeal was filed. 2 CP 137-49 (report dated 7/5/2019 but filed 11/2/2020), 162-85 (report dated 11/4/2019 but filed 10/29/2020), 186-96 (report dated 2/6/2020 but filed 10/29/2020).

A second trial began on March 2, 2020, before Judge Richard Okrent. The ensuing proceedings are

summarized in the Court of Appeals opinion. Slip op. at 3-7. Neither counsel sought a new competency evaluation. Defense counsel said that despite the previous finding of competency, he did not believe that the defendant was competent. 3/2 RP 15-16. The judge responded that the defendant had already been found competent and he was "not going to look at that at this point." 3/2 RP 16. The prosecutor said that "unless there are new concerns," he would ask the court to proceed. Defense counsel replied:

Your Honor, just to address the last part, I know the court needs to move forward, I have to told [the prosecutors] that Western State will find him competent. I have believed him to be incompetent from day one, and that maintains my position. Whether I sign an order agreed, approved to form, whatever, we cannot continue to go on the hamster wheel.

If you're asking me if he's competent, absolute not, and that has been my position consistently.

3/2 RP 17. The case proceeded without further incident.

### III. ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT A NEW COMPETENCY DETERMINATION IS NOT REQUIRED ABSENT EVIDENCE OF A SIGNIFICANT CHANGE IN THE DEFENDANT'S MENTAL CONDITION.

The petitioner contends that the trial court was required to order a new competency evaluation. The standard for requiring an evaluation changes during the progress of a case. Initially, a court must order an evaluation if reason exists to doubt the defendant's competency. RCW 10.77.060(1)(a); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). After this initial evaluation, the standard changes:

[O]nce there has been a determination that a defendant is competent to stand trial, a trial court need not revisit the issue of competency unless some objective incident or event occurs where the court is provided with new information that indicates a significant change in the defendant's mental condition.

State v. McCarthy, 193 Wn.2d 792, 803 ¶ 24, 446 P.3d 167 (2019) (footnote omitted).

If this were not the rule, a case could never be brought to trial once doubts arose about the defendant's competency. An evaluation could be ordered, and the defendant could be found competent. But if the same behavior from the defendant triggered the need for a new evaluation, the cycle would never end.

The petitioner claims that his behavior at the commencement of trial constituted "new information." Absent from his analysis, however, is any showing that this information established "a significant *change* in the defendant's mental condition." Defense counsel essentially told the trial court the contrary. Although he believed the defendant to be incompetent, he had held that belief "from day one." He acknowledged that the court could not "continue to go on the hamster wheel." 3/2 RP 17. To order repeated evaluations based on counsel's unchanged beliefs would indeed be a "hamster wheel" —



something that moves in a circle without ever going forward.

The Petition for Review sets out at length information from the competency evaluations and events at the first trial. PRV at 32-8. Very little of this information was available to Judge Okrent. The evaluation reports were not filed until long after trial. 2 CP 137-49, 162-96. Defense counsel provided only a brief summary of events at the prior trial. 3/2 RP 12-14. Nothing in his summary indicated that the defendant's mental status had changed since the last determination of competency.

The defendant cites State v. Fedoruk, 5 Wn. App. 2d 317, 426 P.2d 757 (2018), review denied, 192 Wn.2d 1012 (2019). There, a new competency evaluation was required when the defendant, during trial, "began chanting and screaming in an unintelligible language and had to be physically restrained." Id. at 337 ¶ 52; see McCarthy, 193 Wn.2d at 804-05 ¶ 26 (summarizing dispositive facts in

Fedoruk). Nothing comparable occurred during the trial in the present case.

The Court of Appeals' holding in the present case is consistent with both that court's decision in Fedoruk and this court's decision in McCarthy. No significant issue of constitutional law arises from the application of an established legal standard to the facts of this case. This case therefore does not satisfy any of the considerations for granting review set out in RAP 13.4.

#### **IV. CONCLUSION**

The petition for review should be denied.

This Answer contains 987 words (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature block).

Respectfully submitted on January 21, 2022.

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IN THE SUPREME COURT  
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Petitioner.

No. 100477-0

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SIGNED IN SNOHOMISH, WASHINGTON, THIS 21st DAY OF JANUARY, 2022.



DIANE K. KREMENICH  
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

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