89659-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30036-6-III

STATE OF WASHINGTON, Respondent,

v.

RAMON GARCIA MORALES, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Ramon Garcia Morales requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on November 5, 2013, affirming the Franklin County Superior Court's finding of competency and Morales's subsequent conviction. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

RCW 10.77.010(15) requires evidence of a mental disease or defect in order to find a defendant incompetent to stand trial. This requirement transforms the functional competency standard established in *Dusky v. U.S.*, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960), into a medical standard, and cannot be reconciled with the due process principles that underlie the requirement that a defendant must be competent to be subjected to a trial. Does RCW 10.77.010(15) violate the Fourteenth Amendment to the U.S. Constitution?

Was Morales legally competent in spite of physical and mental deterioration, non-communicativeness with counsel, and inability to

participate in the judicial process, solely because he lacked a formal diagnosis of a mental disease or defect?

IV. STATEMENT OF THE CASE

Ramon Garcia Morales was arrested and charged with first degree murder, attempted first degree murder, and second degree assault arising from a shooting in a Pasco home in December 2008. CP 370-73. He was held in a single room in the Franklin County jail, where inmates are ordinarily housed for disciplinary reasons or to keep them in protective custody, and was let out for one hour each day. CP 512. As the proceedings progressed, he became withdrawn and unresponsive, refusing to communicate with counsel. CP 506. A competency evaluation was ordered on May 18, 2009, and the proceedings were stayed. CP 524-30.

Nathan Henry, a licensed psychologist from Eastern State Hospital, evaluated Morales on July 10, 2009. CP 510-21. During his initial mental status interview, he observed that Morales presented as "grossly impaired with regard to his cognitive functioning and orientation." CP 513. Morales refused to answer several questions and identified the year as 2008, the country he was currently in as Europe, and the building he was in as a school. CP 513-14. Henry administered only one test, the Test of Memory Malingering ("TOMM"), which was administered in two trials.

During the first trial, Morales's score was consistent with randomly guessing the answers. After being told whether his answers were correct and being shown the images again, Morales's score did not improve. Based on the TOMM test results, Henry concluded that Morales "was not putting forth adequate effort on the task and may have been malingering."[1] 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.

Henry declined to conduct a formal assessment of competency due to Morales's lack of cooperation. CP 516. In conclusion, he stated:

> There is no known evidence to indicate that Mr. Garcia-Morales has a genuine psychiatric illness that would constitute a mental disease or defect. It is my understanding that competency to stand trial is assumed in the absence of a mental disease or defect that would be expected to impair Mr. Garcia-Morales' ability to aid in his defense or understand the legal proceedings.
>
> Opinion as to competency:
>
> It is my opinion that Mr. Garcia-Morales has the capacity to adequately understand the proceedings against him and aid in his defense. Mr. Garcia-Morales may choose to present himself as not being competent to proceed. It is my opinion that such would be under his volitional control and not due to a mental disease or defect.

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

CP 516.

Morales was also evaluated by Dr. Tedd Judd, who submitted a report indicating that Morales had mild mental retardation and was not competent to stand trial.[2] CP 523, 497. However, Morales refused to respond verbally and the extent of the evaluation Dr. Judd was able to perform is unclear. CP 469. He did apparently complete a test of Morales's IQ and determined it was 51. CP 566. In the meantime, Morales's physical condition deteriorated; he became more withdrawn, his speech became slower and nonresponsive, and his hygiene declined to the point he had to be instructed to go to the bathroom. CP 469.

After new counsel was appointed to represent Morales in November 2009, counsel expressed concerns that Morales was not responsive to counsel's visits and was unable to take care of his basic hygiene. CP 470. He attested that he met with Morales in the jail and Morales was non-responsive, detached, and non-interactive. CP 506.

Henry conducted a second interview in January 2010, at which point Morales was slow to respond but was able to provide accurate

[2] 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. His findings and opinions are available primarily through the testimony of Dr. Henry at the competency hearings and through Dr. Henry's written reports.

responses to questions such as identifying the year and the month, as well as his location. RP (Competency Motion)[3] 63-65; CP 567-68. He responded "I think so" when asked if he was charged with a crime, but could not answer what he was charged with. He did not respond to questions about the participants in the courtroom. CP 568. Henry again concluded that Morales was not putting forth adequate effort into answering the questions. CP 568-69.

Counsel requested a continuance of the competency proceedings so that the defense could evaluate the possibility of a brain injury or possible retardation, as well as further evaluation at Eastern State Hospital. RP (Motions) 52-53, 56-57. A third evaluation was performed at Eastern State Hospital in May 2010. RP (Competency Motion) 68-69; CP 569. 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

[3] The Verbatim Reports of Proceedings in this case consist of 15 separate volumes, which are not consecutively paginated and which contain a variety of non-consecutive hearings. For purposes of identifying the volume cited in this petition, the name of the volume assigned by the transcriptionist will be used when available; when unavailable, the dates of the hearings contained in the volume will be referenced instead.

(Competency Motion) 69-70, 116. He asked one of the evaluators, Dr. Avery Nelson, MD, if he was going to die, and repeatedly asked where his wife and children were. He reported having auditory hallucinations but did not elaborate. He presented with "catatonic withdrawal" with slow psychomotor movement, but responded to instructions. Nelson opined that psychosis, not otherwise specified, needed to be ruled out as a diagnosis. CP 569.

Nurses noted that Morales was disorganized and had cognitive deficits. RP (Competency Motion) 116; CP 569. During the course of his fifteen-day confinement at Eastern State Hospital, Morales was largely non-communicative with staff and other patients, required prompts to eat and perform hygiene, and isolated himself in his room. CP 569-71. Despite the absence of a formal diagnosis, Nelson prescribed lithium and anti-psychotic medication in an effort to treat his symptoms. CP 571. At an interview held at the end of his commitment, Morales was fidgety and was unresponsive to questions, sitting in the chair with his head down. CP 571. Henry and Nelson ultimately reiterated the earlier opinion that Morales did not have a genuine mental illness, and therefore his competency is presumed. CP 572.

A competency hearing was held on August 10, 2010. CP 486-88. A detective testified that at the time he interviewed Morales in December 2008, shortly after his arrest, he did not have any difficulty communicating with Morales, Morales appeared to read and understand his *Miranda* rights, agreed to make a statement and explained the reason for the shooting. RP (Competency Motion) 6-10. Henry also testified and renewed his opinion that Morales was malingering, which he explained as "faking some sort of disorder for the purpose of secondary gain." RP (Competency Motion) 50. According to Henry, Morales scored within the range of chance for the test, which indicated he was not putting forth adequate effort. RP (Competency Motion) 52-53. Henry ruled out a diagnosis of mental retardation based upon the report of Morales's interview with the detective, in which Morales appeared to speak clearly and articulately. RP (Competency Motion) 58-59. However, he admitted that mental retardation was possible. RP (Competency Motion) 60. He also conceded that Morales had to take a driver's test 11 times before he could pass. RP (Competency Motion) 125.

Henry also acknowledged that he 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 from July 2009, "so no additional testing after that." RP (Competency

Motion) 126. He also stated that a number of factors present could contribute to depression in Morales, but distinguished experiencing depression from experiencing a depressive disorder. RP (Competency Motion) 94-95. He acknowledged that depression could impair a person's willingness to aid in the defense, which could call competency into question. RP (Competency Motion) 106.

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, 129; CP 516. Counsel for Morales pointed out his slow and non-responsive behavior during the hearing and expressed concern that he did not know how to proceed with the case due to the inability to discuss pleas and the lack of assistance from Morales. RP (Competency Motion) 138.

Following the hearing, 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. Counsel expressed concerns about complying with omnibus in light of Morales's lack of cooperation. RP (Motions) 61. Eventually, it became necessary that Morales's 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 (Motions) 66; RP (10/12/10, 2/8/11, 4/8/11) 3-5. Counsel related that a plea offer was discussed with the State, and in efforts to discuss Morales's decision to plead guilty or proceed to trial, Morales would not respond or acknowledge anybody. RP (Motions) 67. Counsel also expressed concerns about the conflict between the need to adequately investigate the case for trial and Morales's right to a speedy trial. RP (Motions) 68. The trial court attempted a colloquy with Morales, and Morales did not respond. RP (Motions) 72. 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. RP (Motions) 97; CP 392. Despite a plea offer that would have saved Morales approximately thirty years' imprisonment, Morales would not take direction from his attorneys, failed to sit, and ultimately curled into a fetal position against the wall for the duration of the meeting. RP (Motions) 92-93. The jail had been feeding him intravenously for several months and had found it necessary to place him on intravenous fluids. RP (Motions) 93.

Henry evaluated Morales again in March 2011 and at the April 2011 hearing, testified that Morales continued to be withdrawn; he did not make eye contact or acknowledge Henry's presence or the presence of his attorneys. RP (Motions) 128. Despite giving a qualified affirmance of his prior opinion that Morales was malingering, 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. He pointed out that Morales's conduct could potentially be fatal. RP (Motions) 131. However, he testified that there was still no evidence of a mental disease or defect. RP (Motions) 129. In concluding that Morales was competent to stand trial, Henry stated:

> In my opinion it comes back to the issue of whether or not there is a presence of mental disease or defect. My opinion

> is we don't have evidence of that, significant evidence of that in taking in account all available information. So my opinion continues to be that he has adequate capacity. Whether or not he chooses to act on that capacity is not known.

RP (Motions) 132.

Once again, the trial court found Morales competent to stand trial, stating, "In terms of competency [Henry's] opinion is competency is there. I'm finding the defendant to be competent for trial and we are going to keep the trial date." RP (Motions) 146; CP 378. The trial court entered findings of fact and conclusions of law in support of its decision, which largely re-stated Henry's testimony. The trial court found,

> The defendant does not have a genuine disease or 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.

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.

Morales was convicted as charged by a jury and sentenced to 67 years. *State v. Morales*, No. 30036-6-III, slip op. at 7 (copy attached as

Appendix A). The Court of Appeals held that the trial court did not abuse its discretion in finding Morales competent, but declined to consider Morales' challenge to the constitutionality of RCW 10.77.010(15) on the grounds that "it would have no apparent effect on this case." *Morales*, slip op. at 14, n. 10. Morales now petitions for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Due process principles dictate that an accused may not be subjected to a trial if the accused lacks (1) a rational and factual understanding of the proceedings against him, and (2) a sufficient present ability to rationally consult with his attorney. *Dusky v. U.S.*, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960). Washington's competency statute narrows this standard by requiring, in addition, proof of a mental disease or defect. RCW 10.77.010(15) (copy attached as Appendix B). "Mental disease or defect" is generally synonymous with "mental disorder," of which the generally accepted consensus is set forth in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *State v. Klein*, 156 Wn.2d 103, 116-17, 124 P.3d 644 (2005). Accordingly, under Washington law and as applied in Morales's case, a defendant's competence is evaluated first as a medical question; only if a diagnosable condition is identified does the question of the

defendant's ability to meaningfully function in the adversarial process arise. Because RCW 10.77.010(15) narrows the competency standard beyond the constitutional minimum set forth in *Dusky*, it fails to adequately safeguard the fairness of the trial process guaranteed under the Fourteenth Amendment.

Under RAP 13.4(b)(3) and (4), review will be accepted if a significant question of law under the Constitution of the State of Washington or of the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Here, the question presented raises a substantial issue of procedural due process under the Fourteenth Amendment. In reaffirming that only the competent may be subjected to trial, the U.S. Supreme Court has observed,

> For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other "rights deemed essential to a fair trial." After making the "profound" choice whether to plead guilty, the defendant who proceeds to trial "will ordinarily have to decide whether to waive his 'privilege against compulsory self-incrimination,' by taking the witness stand; if the option is available, he may have to decide whether to waive his 'right to trial by jury,'; and, in consultation with counsel, he may have to decide whether to waive his 'right to confront [his] accusers,' by declining to cross-examine witnesses for the prosecution." With the assistance of counsel, the defendant also is called upon to

> make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a "fundamental component of our criminal justice system" - the basic fairness of the trial itself.

Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S. Ct. 1373, 1381-82, 134 L.Ed.2d 498 (1996) (internal citations omitted). In *Cooper*, the U.S. Supreme Court held that a heightened standard of proof of clear and convincing evidence of incompetence was "incompatible with the dictates of due process." 517 U.S. at 369. Competence is a prerequisite for the defendant to exercise the rights essential to a fair trial, such as effective assistance of counsel, summoning, confronting, and cross-examining witnesses, and choosing to testify or remain silent. *Id.* at 354 (quoting *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975)).

The standard set forth in *Dusky* and reiterated in its progeny is a functional standard that considers the defendant's ability to subject the State's case to adversarial testing and meaningfully decide whether to waive or exercise fundamental rights. By contrast, the Washington standard renders functionality secondary to pathology. This is problematic not only in light of the DSM's ongoing evolution and revision, *see Klein*, 156 Wn.2d at 117-18, but in light of the role cultural and environmental

factors may play in allowing a full and fair opportunity to navigate the trial process.

In the present case, subjecting Morales to a trial when he was non-communicative and non-responsive to his attorney and other participants in the trial process; when he failed to care for basic needs such as eating and showering, causing physical deterioration; and when he neither exercised nor waived fundamental rights in any way that would reflect a rational consideration for his self-interest, rendered the adversarial process fundamentally unfair. Despite the acknowledgment that he was not feigning his deterioration or uncooperativeness, Henry repeatedly opined that Morales was competent simply because there was no evidence from which a diagnosable mental disorder could be identified. As set forth in *Dusky*, the competency standard presents a legal question, not a medical one. Accordingly, whether trial of a functionally limited person is justifiable without proof of a medical fact presents a serious question of the nature and scope of the Fourteenth Amendment's due process requirement.

Further, review should be accepted because the case presents an issue of substantial public interest concerning the standard for finding an accused incompetent to stand trial. Competency questions are ubiquitous

in criminal cases; in 2011, Western State Hospital and Eastern State Hospital received referrals for 3,035 initial competency evaluations of adult criminal defendants. Senate Bill Report, SB 6492, 2011-12 Reg. Sess., at 2 (copy attached as Appendix C). Thus, the outcome of thousands of cases each year are affected by the interpretation and application of RCW 10.77.010(15). Review of the constitutionality of the statute's requirement of a diagnosable medical condition as a prerequisite to a finding of incompetency would clarify the appropriate balance between the roles of medical fact and evidence of impaired functionality in ensuring a fair trial.

VI. CONCLUSION

Whether RCW 10.77.010(15)'s requirement that a defendant suffer from a mental defect or disease comports with the Fourteenth Amendment's prohibition against trying those incompetent to participate is an issue of first impression that raises a substantial question of constitutional interpretation and presents an issue of substantial public interest concerning the appropriate standard to apply to determinations of legal incompetency. Petitioner respectfully requests that the Petition be granted.

RESPECTFULLY SUBMITTED this 5th day of December, 2013.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

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

Terry Bloor and Amy Harris
Benton County Prosecutor's Office
7122 W. Okanogan Place
Kennewick, WA 99336-2359

Ramon Garcia Morales
DOC #350535
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

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

Signed this 5th day of December, 2013 in Walla Walla, Washington.

Andrea Burkhart

APPENDIX A

FILED
NOV 5, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 30036-6-III
Respondent,	)	
	)	
v.	)	
	)	
RAMON GARCIA MORALES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, C.J. — Idaho authorities arrested Ramon Garcia Morales on a valid Washington first degree murder warrant after allegedly illegally determining where he was located. We conclude that Mr. Morales's subsequent confession to Washington authorities was too attenuated to be the fruit of an illegal search. We also conclude that the trial court did not abuse its discretion in determining that Mr. Morales was competent to stand trial despite his refusal to assist counsel, nor did it do so by denying a motion to change venue. The convictions for first degree murder, attempted first degree murder, and two counts of second degree assault are affirmed.

FACTS

Mr. Morales and his brother, Jose Garcia Morales, went to the home of Alfredo Garcia, the reputed "onion kingpin" of an area farm on December 10, 2008. Mr. Morales was upset that Mr. Garcia was not allowing him to work in the onion fields. Armed with

handguns, the two Morales brothers contacted Garcia with the hope of either gaining work for Ramon Morales or money. An argument ensued and Ramon Morales shot Alfredo Garcia six times, killing him. Mr. Garcia's wife, Maria Beatris Ramirez-deGarcia, was shot four times, including once in her head, when she attempted to place a telephone call for aid. She survived her wounds and identified Ramon Morales at trial as the shooter.

Attracted by the noise, the two Garcia daughters came to their parents' aid. Mr. Morales pointed his gun at both of them before he and his brother fled. The daughters told responding officers who the assailants were. Charges of first degree murder and attempted first degree murder were filed the next day.[1] Arrest warrants were issued for both brothers at that time.

Detective William Parramore of the Pasco Police Department knew the cell phone numbers for the Morales brothers; he contacted Sprint to obtain the current location of the phones. Sprint sent the detective an "exigency form," which he filled out and returned to the company. Sprint attempted to locate the telephones, but initially they were turned off. Sprint later determined that the phones were in Idaho and provided latitude and longitude coordinates to the detective. Thereafter, the detective regularly contacted Sprint (roughly every 15 minutes) for the current location of the telephone. Sprint would "ping" the

[1] Prior to trial, the charges were amended to add two counts of second degree assault of the two daughters and firearm enhancements for each of the four counts.

phones by sending a signal that the phone would return to the nearest cell tower. Eventually the detective was able to direct authorities in Elmore County, Idaho, to the location of the car containing the two brothers. Both were arrested and placed in a local jail. Ramon declined to talk to the arresting officer.

Detective Kirk Nebeker traveled to Elmore County with another detective and took custody of the two brothers. He interviewed Ramon Morales in Spanish after obtaining a waiver of his *Miranda*[2] rights. Mr. Morales told the detective that Mr. Garcia had excluded him from work and that he went to the house with the intention of obtaining money that he should have received or killing Mr. Garcia. However, after a long conversation, Mr. and Mrs. Garcia started striking the two Morales men, causing Ramon Morales to shoot both of the Garcias in self-defense. He denied pointing his gun at the daughters. He and his brother left and headed for California. After telling this story to the detective, Mr. Morales then wrote it out in his own words.

After returning to Franklin County, Mr. Morales entered not guilty pleas and the matter very slowly progressed toward trial. Defense counsel became concerned over lack of cooperation and called Mr. Morales's competency to stand trial into question. The trial court on May 18, 2009, ordered a competency evaluation. Dr. Nathan Henry of Eastern State Hospital travelled to the Franklin County Jail to evaluate Mr. Morales. An

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

interpreter was used for the evaluation. Dr. Henry did not believe Mr. Morales was putting forth much effort and diagnosed him as a malingerer. The doctor could not assess Mr. Morales for competency or mental illness in light of the malingering.

Dr. Tedd Judd, a neuropsychologist, performed the defense evaluation on August 3. He determined that Mr. Morales, who cooperated with the evaluation, had mild mental retardation and was not competent to stand trial. Dr. Judd also thought there was possible psychosis and traumatic brain injury. Dr. Judd opined that the behavior Dr. Henry considered malingering was common among Mexicans suffering from mental illness.

Dr. Henry attempted a second evaluation on January 7, 2010. He again terminated the evaluation early because of malingering. Mr. Morales was withdrawn and uncooperative. Dr. Henry noted Dr. Judd's diagnoses but discounted the conditions as potential causes for Mr. Morales's withdrawn state.

The court ordered an inpatient evaluation as well as a developmental disability examination. These evaluations were conducted at Eastern State Hospital by Dr. Henry and Dr. Avery Nelson, a psychiatrist. Staff at the hospital observed that Mr. Morales did not speak, slept through meals, attempted to eat a salad dressing packet, required assistance with personal hygiene, did not interact with staff or patients, and appeared depressed and withdrawn. Dr. Nelson provided a rule out diagnosis of psychosis NOS and prescribed lithium to treat the symptoms of depression and catatonic withdrawal. In his interview with Dr. Henry, Mr. Morales was quieter and less responsive than ever,

causing Dr. Henry to again terminate the evaluation early. Without a firm diagnosis of mental illness and without an opportunity to perform a full evaluation, Dr. Henry deferred to his previous findings of malingering and incompetency.

The trial court conducted a competency hearing on August 18, 2010 and determined that Mr. Morales was competent to stand trial. The following month defense counsel twice filed motions for appointment of a guardian ad litem due to Mr. Morales's inability to assist in his own defense. The motions were denied October 12, 2010. Counsel subsequently was twice denied permission to withdraw from representation due to lack of communication with Mr. Morales.

Dr. Henry reevaluated Mr. Morales on March 9, 2011. Mr. Morales presented even less responsive and more disheveled than ever. Again, Dr. Henry deferred to his initial August 3, 2009 report and its findings of malingering and incompetency because he believed that Mr. Morales's "lack of communication is best attributed to elective mutism (choosing not to speak)." However, Dr. Henry did recommend a nonforensic mental health evaluation under chapter 71.05 RCW because of "concerns regarding possible suicidality."

The trial court held another competency hearing on April 26, 2011. Dr. Henry testified at that hearing and explained that his opinion that Mr. Morales was feigning competency related impairment was "a qualified, yes." Dr. Henry explained that Mr. Morales was not actively feigning during the interview nor was he feigning his

deteriorating physical condition. However, Dr. Henry stood by his original competency opinion in light of the only evidence he had. The trial court again found Mr. Morales competent to stand trial.

Defense counsel filed a CrR 3.6 motion to suppress the defendant's statements on the grounds that the arrest was the result of illegal cell phone tracking. After hearing testimony, the court eventually denied the motion, reasoning that there was no reasonable expectation of privacy in the cell tower "pings" off of the cell phone.[3]

Jury selection began with 72 potential jurors called for service. The parties jointly challenged 27 jurors for cause; the court granted the challenges. The defense brought a motion for change of venue due to pretrial publicity. The court heard argument and denied the motion. By the time jury selection ended, the prosecution had used six of its peremptory challenges and successfully excluded one juror for cause. The defense used eight peremptory challenges and was able to excuse two more jurors for cause. Ultimately, 14 of the remaining 27 members of the venire were selected to serve. None of those jurors was challenged for cause.

The three surviving victims identified Mr. Morales as their assailant. The defense argued the case on a self-defense theory that rested on the contents of Mr. Morales's

[3] Inexplicably, the findings required by CrR 3.6 were not entered until 14 months after the hearing and one month after the brief of appellant was filed.

statement to Detective Nebeker. The jury rejected the self-defense argument and returned guilty verdicts on all four counts and also found all four firearm enhancements.

The defense again sought another competency evaluation prior to sentencing due to continued physical deterioration. The court denied the motion and ultimately imposed standard range sentences totaling 67 years. Mr. Morales then timely appealed to this court.

ANALYSIS

This appeal presents challenges to the rulings on the suppression motion, the competency determinations, and the change of venue motion. We will address those issues in the noted order.

Suppression Ruling

Mr. Morales challenges the court's decision that there was no reasonable expectation of privacy in the cell tower "pings" on several bases. In particular, he contends that the action constituted an illegal search in violation of article I, section 7 of our constitution. The prosecutor replies that Mr. Morales had no standing to challenge Sprint's actions and that the statement given to police was too attenuated from any constitutional violation to be suppressed. We agree that the attenuation doctrine applies and conclude that the statement was not the product of an illegal search.

Prudential doctrines drive our approach. The parties have not briefed the extra-territorial application of article I, section 7 to the actions of Sprint, the "pinging" in

Idaho, and the arrest by Idaho authorities.[4] We also note that the Fourth Amendment, which is not argued by the parties, might apply to this case, particularly the activities that occurred in Idaho. Although no federal appellate courts have addressed the Fourth Amendment[5] in this circumstance, the federal trial courts have unanimously decided that a reasonable expectation of privacy exists in the real-time pings, and almost all have found that the same exists in historical ping data.[6] In the absence of comprehensive briefing of these topics, we will not address the validity of the search.

Instead, we will presume for purposes of this opinion that Mr. Morales's privacy was invaded by the tracking. There was no direct connection between the location of the

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[4] The parties also have not addressed what privacy rights, if any, someone fleeing an arrest warrant may have. *See State v. Vy Thang*, 145 Wn.2d 630, 637, 41 P.3d 1159 (2002) (discussing privacy rights of escaped prisoner). An arrest warrant allows police to enter the suspect's home to effectuate an arrest. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. Williams*, 142 Wn.2d 17, 11 P.3d 714 (2000). An arrest warrant is also a valid basis for stopping a motor vehicle to effectuate service of the arrest warrant. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009). It would be curious that Mr. Morales might have more privacy interest in the cell phone pinging than he would have in the car in which he was arrested.

[5] For an excellent discussion of modern cell phone technology while considering the tracking issue on state constitutional grounds, see *State v. Earls*, 214 N.J. 564, 70 A.3d 630 (2013).

[6] *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526 (D. Md. 2011) (finding that suspects have a Fourth Amendment reasonable expectation of privacy in their cell phone "pings"); *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F. Supp. 2d 113 (E.D.N.Y. 2011) (same); *In re Application of U.S. for an Order Authorizing Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578 (E.D.N.Y. 2010) (same); *In re Application of U.S. for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification Sys.*, 402 F. Supp. 2d 597 (D. Md. 2005) (same).

fleeing men by the illegal means and the subsequent interrogation the following day by Washington authorities following the arrest on a valid warrant and the advice and waiver of *Miranda* rights. Thus, there was no direct exploitation of the illegality leading to the statement.

The United States Supreme Court applies the exclusionary rule to deter police misconduct rather than protect individual privacy rights. *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). When illegal police behavior directly leads to evidence of a crime, the evidence will be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). However, when the evidence is not directly the fruit of the police illegality, but merely follows after it in time, the evidence need not be excluded. *Id.* at 491-92. This is known as the attenuation doctrine. *Id.* at 491 (citing *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)).

Washington applies its exclusionary rule for the purposes of both deterring misconduct and vindicating the right of privacy guaranteed by article I, section 7. *State v. Bonds*, 98 Wn.2d 1, 11-12, 653 P.2d 1024 (1982). Like the federal government, Washington will exclude evidence where it is directly discovered as a result of the police violation of article I, section 7.[7] *Id.* at 9. Washington also has repeatedly rejected a "but

[7] Washington first applied the exclusionary rule in *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922). The United States Supreme Court did not require states to apply

for" test of causation that would require the suppression of any evidence discovered subsequent to an illegality. *E.g.*, *State v. Mierz*, 127 Wn.2d 460, 474-75, 901 P.2d 286 (1995); *Bonds*, 98 Wn.2d at 10-14 (declining to suppress confession following illegal arrest and return from Oregon where officers had probable cause to make arrest); *State v. Vangen*, 72 Wn.2d 548, 554-55, 433 P.2d 691 (1967) (declining to suppress confession following allegedly improper arrest).

It is against this background that we must consider the effect of the illegal pinging on the subsequent confession.[8] This case is controlled by the decision in *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011). There police, having probable cause to arrest the defendant for burglary, but no arrest warrant, were invited into the entryway of a house where the defendant was living with his parents. *Id.* at 910. After a delay, officers entered further into the house and arrested two men. Both were taken to separate police cars, advised of their *Miranda* rights, and subsequently transported to the sheriff's office. *Id.* at 910-11. At the office Mr. Eserjose was again advised of his *Miranda* rights

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the exclusionary rule in search cases until *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[8] In light of our conclusion, we do not assess whether or not error in admitting the statement was harmless. The defense did not present a case and was able to obtain self-defense instructions and argue the case on that theory due to the statement Mr. Morales gave the police. In light of his subsequent lack of cooperation with counsel and the usefulness of the statement to the defense, it is doubtful that the evidence harmed Mr. Morales.

and questioned. After initially denying involvement in the burglary, Mr. Eserjose admitted his involvement when told that the codefendant had confessed. *Id.* at 911.

The sole issue on appeal to the Washington Supreme Court involved the admission of the confession. *Id.* at 912. The lead opinion for three justices concluded that the confession was attenuated from the unlawful arrest; a fourth justice concurred only in the result. *Id.* at 919-25, 929. The fifth vote came from the concurring opinion of Chief Justice Madsen. She concluded that the confession was not the direct result of the police illegality. *Id.* at 934. The four dissenting justices argued that attenuation was not a proper consideration under our state constitution. *Id.* at 934-40 (C. Johnson, J., dissenting).

In light of the outcome of *Eserjose*, Mr. Morales's statement was admissible in this case. The facts here are similar to, and even stronger than, those in *Eserjose*. Here not only did the officer have probable cause to arrest Mr. Morales for murder and attempted murder, a judicial officer had already reached that same determination and issued an arrest warrant. Mr. Morales made no statement to the Idaho officers, but gave his statement the following day to Washington officers who conversed with him in Spanish. The *Eserjose* facts were sufficient to establish either attenuation (lead opinion) or lack of direct causation (concurrence); the same result must occur here. Throw in the fact that the arrest warrant would have authorized officers to stop and arrest Mr. Morales in his car as he fled through Idaho, we do not believe that the lesser intrusion into his

privacy by the cell tower pinging could have justified suppression where the vehicle stop itself would not have.

On its facts, the statement in this case is even less deserving of suppression than that in *Everjose*. Accordingly, the trial court correctly denied the motion to suppress.[9]

We do note that just as Washington applied a suppression rule long before the United States Supreme Court required states to do so in Fourth Amendment cases, Washington also applied attenuation before *Wong Sun*. *State v. Rosseau*, 40 Wn.2d 92, 241 P.2d 447 (1952), *overruled on other grounds by State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997).

In *Rosseau*, an officer arrested a defendant after watching him attempt to pawn a watch using a false name, leading the officer to believe the watch was stolen property. 40 Wn.2d at 93. He searched the suspect and found additional watches, which the officer left in the custody of the defendant. As the officer was walking the defendant from the pawn shop to the jail, the suspect threw the officer into an oncoming car and fled. *Id.*

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[9] A recent case in a somewhat similar vein is *State v. Smith*, 177 Wn.2d 533, 303 P.3d 1047 (2013). There police conducting an illegal search responded to a motel room and then entered to assist a bloodied assault victim. The four judge lead opinion found the entry into the room (and subsequently discovered evidence) was justified to provide aid, applying the search exception without regard to the prior illegality. *Id.* at 542 n.2. The three judge concurrence would have applied the attenuation doctrine to admit the testimony of the victims found in the room. *Id.* at 553-54 (Gonzales, J., concurring). Similarly, we do not think the unlawful discovery of Mr. Morales's whereabouts in Idaho tainted the execution of the arrest warrant.

The officer pursued and again arrested the suspect for assault. *Id.* at 93-94. A second search of the defendant again uncovered the stolen watches, one of which was tied to a burglary. *Id.* at 94. The defendant then confessed to the burglary that netted the stolen watch. *Id.* On appeal from a burglary conviction, the court assumed that the first arrest and search were illegal because the officer did not then know that the watch was stolen. *Id.* at 93-94. The court then turned to the question of whether "the second arrest and the search incidental thereto [were] lawful?" *Id.* at 94.

The court determined that Mr. Rousseau used "unnecessary force" in resisting the original arrest. *Id.* at 96. The court then stated its conclusion.

> Appellant was, therefore, lawfully arrested following the assault, and the Swiss watch found on him by the search that was an incident of that arrest was admissible in evidence against him on the present charge of burglary in the second degree. We therefore conclude that the judge who heard the motion to suppress the evidence did not err in denying that motion, and that the trial judge did not err in admitting the Swiss watch taken from the appellant as an exhibit in his trial on that charge.

Id.

Just as the second arrest in *Rousseau* was not tainted by the first arrest, even though it led to the discovery of the same evidence previously uncovered by the first arrest, we do not believe that the arrest on the warrant in this case was tainted by the improper method used to locate Mr. Morales to serve the warrant. There is even less argument for claiming that the statement given to different police officers the following day was the result of exploiting the cell tower pinging.

Accordingly, we believe the trial court properly denied the motion to suppress the statement given by Mr. Morales. There was no error.

Competency

Mr. Morales next argues that the trial court erred in finding that he was competent to stand trial in light of his deterioration over time.[10] While Mr. Morales's bizarre behavior certainly would have justified a finding of incompetence, the trial court was not required to enter such a finding. The court had tenable grounds to believe Mr. Morales was malingering.

We review a trial court's competency determination for abuse of discretion. *State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d 289 (1993). Under that standard, "so long as the underlying adequacy of a given competency evaluation is 'fairly debatable,' the trial court has discretion to accept or reject that evaluation in satisfaction of RCW 10.77.060." *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (citations and quotations omitted). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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[10] Mr. Morales also argues that current RCW 10.77.010(15) is unconstitutional by requiring that incompetency result from mental illness. Although the argument is interesting, we need not address it here as it would have no apparent effect on this case. There has been no argument or evidence presented suggesting that incompetence can arise from some other cause than mental illness or that Mr. Morales was incompetent but not mentally ill. Similarly, the question of which party bears the burden of proof under the statute is not one we need decide as the court did not rely on a burden in making its competency determination.

Here, the trial court accepted the view of Dr. Henry that Mr. Morales was faking his condition. There was contrary evidence from Dr. Judd, and there was substantial evidence that Mr. Morales was not cooperating with counsel (or anyone else) and was behaving in a bizarre manner. This court, of course, does not weigh evidence, but only reviews to determine if the trial court had evidence to support its findings. *E.g.*, *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Stated another way, an appellate court is not in a position to find persuasive evidence that the trier of fact found unpersuasive. *Id.*

Dr. Henry determined that Mr. Morales was malingering and was thus unable to fully evaluate him. In the absence of history of mental illness or incompetency, Dr. Henry concluded Mr. Morales was competent. Although the trial judge was free to conclude otherwise, the court accepted Dr. Henry's opinion over that of Dr. Judd. It was an understandable decision. The onset of behavioral problems after the arrest was a suspicious coincidence that soon was followed by the apparently conscious decision to cooperate with Dr. Judd but not with Dr. Henry. Dr. Henry's theory of feigned illness was supported by the evidence just as Dr. Judd's theory of mental illness induced incompetency was. The trial court's decision was supported by evidence and, thus, had tenable grounds.

Mr. Morales's refusal to cooperate with counsel did not render him unable to stand trial. There was no abuse of discretion in permitting the case to go to trial.

Change of Venue

The final issue is a contention that the trial court erred in denying the motion for change of venue. Once again we conclude that the trial court did not abuse its discretion.

Decisions on motions to change venue are reviewed for abuse of discretion. *State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479 (1974). Where a probability of prejudice in a given venue is shown, a venue change must be granted; actual prejudice is not required. *Id.* at 586. Criteria which courts examine in deciding venue change based on prejudicial pretrial publicity 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 587.

Mr. Morales did not argue these factors to the trial court, although he does in this appeal, and thus we have no analysis from the trial court of its weighing of these considerations. Nonetheless, our task here is different than that which the trial court faced. "The question is not whether this court would have decided otherwise in the first

instance, but whether the trial judge was justified in reaching his conclusion." *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962).

We think that the trial court had very tenable reasons for denying the motion. The primary reason was that the petit jury consisted of jurors who had no preconceived notions about the case and none of them were challenged for cause. While a large number of jurors knew about the case, that is not the standard for jury service. Even when trying the most severe of charges, the defendant is not entitled to an ignorant jury. *State v. Coe*, 109 Wn.2d 832, 842, 750 P.2d 208 (1988). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* (quoting *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)).

We also do not believe that the press coverage of the case was particularly inflammatory. Much of it was not flattering to Mr. Morales, but that largely was the result of his behavior rather than the way the press reported it. Bizarre actions will attract attention, but the fact that the press reports the behavior is not itself a prejudicial fact. The reporting was factual. We have upheld denial of venue change motions in the face of much more inflammatory coverage than that seen here. *See, e.g., State v. Jackson*, 111 Wn. App. 660, 671, 46 P.3d 257 (2002) (holding no abuse of discretion to deny venue change where, during jury selection, a headline in the local paper read, "Would Father Kill Daughter for Love?"), *aff'd*, 150 Wn.2d 251, 76 P.3d 217 (2003).

Given all, the trial court did not abuse its discretion here. The fact that a case is newsworthy is insufficient to support a change of venue. A party must show that the press coverage has had an unfavorable impact on the jurors who served on the case. That did not happen here. The trial court generously granted challenges for cause and the parties freely used their peremptory challenges. None of the jurors who sat on the case were shown to have been impacted by any exposure to the pretrial publicity. In these circumstances, the trial court had very tenable grounds for denying the motion.

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, C.J.

WE CONCUR:

Brown, J.

Kulik, J.

APPENDIX B

RCW 10.77.010
Definitions.

As used in this chapter:

(1) "Admission" means acceptance based on medical necessity, of a person as a patient.

(2) "Commitment" means the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less-restrictive setting.

(3) "Conditional release" means modification of a court-ordered commitment, which may be revoked upon violation of any of its terms.

(4) A "criminally insane" person means any person who has been acquitted of a crime charged by reason of insanity, and thereupon found to be a substantial danger to other persons or to present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions.

(5) "Department" means the state department of social and health services.

(6) "Designated mental health professional" has the same meaning as provided in RCW 71.05.020.

(7) "Detention" or "detain" means the lawful confinement of a person, under the provisions of this chapter, pending evaluation.

(8) "Developmental disabilities professional" means a person who has specialized training and three years of experience in directly treating or working with persons with developmental disabilities and is a psychiatrist or psychologist, or a social worker, and such other developmental disabilities professionals as may be defined by rules adopted by the secretary.

(9) "Developmental disability" means the condition as defined in *RCW 71A.10.020(3).

(10) "Discharge" means the termination of hospital medical authority. The commitment may remain in place, be terminated, or be amended by court order.

(11) "Furlough" means an authorized leave of absence for a resident of a state institution operated by the department designated for the custody, care, and treatment of the criminally insane, consistent with an order of conditional release from the court under this chapter, without any requirement that the resident be accompanied by, or be in the custody of, any law enforcement or institutional staff, while on such unescorted leave.

(12) "Habilitative services" means those services provided by program personnel to assist persons in acquiring and maintaining life skills and in raising their levels of physical, mental, social, and vocational functioning. Habilitative services include education, training for employment, and therapy. The habilitative process shall be undertaken with recognition of the risk to the public safety presented by the person being assisted as manifested by prior charged criminal conduct.

(13) "History of one or more violent acts" means violent acts committed during: (a) The ten-year period of time prior to the filing of criminal charges; plus (b) the amount of time equal to time spent during the ten-year period in a mental health facility or in confinement as a result of a criminal conviction.

(14) "Immediate family member" means a spouse, child, stepchild, parent, stepparent, grandparent, sibling, or domestic partner.

(15) "Incompetency" means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.

(16) "Indigent" means any person who is financially unable to obtain counsel or other necessary expert or professional services without causing substantial hardship to the person or his or her family.

(17) "Individualized service plan" means a plan prepared by a developmental disabilities professional with other professionals as a team, for an individual with developmental disabilities, which shall state:

(a) The nature of the person's specific problems, prior charged criminal behavior, and habilitation needs;

(b) The conditions and strategies necessary to achieve the purposes of habilitation;

(c) The intermediate and long-range goals of the habilitation program, with a projected timetable for the attainment;

(d) The rationale for using this plan of habilitation to achieve those intermediate and long-range goals;

(e) The staff responsible for carrying out the plan;

(f) Where relevant in light of past criminal behavior and due consideration for public safety, the criteria for proposed movement to less-restrictive settings, criteria for proposed eventual release, and a projected possible date for release; and

(g) The type of residence immediately anticipated for the person and possible future types of residences.

(18) "Professional person" means:

(a) A psychiatrist licensed as a physician and surgeon in this state who has, in addition, completed three years of graduate training in psychiatry in a program approved by the American medical association or the American osteopathic association and is certified or eligible to be certified by the American board of psychiatry and neurology or the American osteopathic board of neurology and psychiatry;

(b) A psychologist licensed as a psychologist pursuant to chapter 18.83 RCW; or

(c) A social worker with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010.

(19) "Registration records" include all the records of the department, regional support networks, treatment facilities, and other persons providing services to the department, county departments, or facilities which identify persons who are receiving or who at any time have received services for mental illness.

(20) "Release" means legal termination of the court-ordered commitment under the provisions of this chapter.

(21) "Secretary" means the secretary of the department of social and health services or his or her designee.

(22) "Treatment" means any currently standardized medical or mental health procedure including medication.

(23) "Treatment records" include registration and all other records concerning persons who are receiving or who at any time have received services for mental illness, which are maintained by the department, by regional support networks and their staffs, and by treatment facilities. Treatment records do not include notes or records maintained for personal use by a person providing treatment services for the department, regional support networks, or a treatment facility if the notes or records are not available to others.

(24) "Violent act" means behavior that: (a)(i) Resulted in; (ii) if completed as intended would have resulted in; or (iii) was threatened to be carried out by a person who had the intent and opportunity to carry out the threat and would have resulted in, homicide, nonfatal injuries, or substantial damage to property; or (b) recklessly creates an immediate risk of serious physical injury to another person. As used in this subsection, "nonfatal injuries" means physical pain or injury, illness, or an impairment of physical condition. "Nonfatal injuries" shall be construed to be consistent with the definition of "bodily injury," as defined in RCW 9A.04.110.

[2011 c 89 § 4; 2010 c 262 § 2; 2005 c 504 § 106; 2004 c 157 § 2; 2000 c 94 § 12. Prior: 1999 c 143 § 49; 1999 c 13 § 2; 1998 c 297 § 29; 1993 c 31 § 4; 1989 c 420 § 3; 1983 c 122 § 1; 1974 ex.s. c 198 § 1; 1973 1st ex.s. c 117 § 1.]

Notes:

***Reviser's note:** RCW 71A.10.020 was amended by 2011 1st sp.s. c 30 § 3, changing subsection (3) to subsection (4).

Effective date -- 2011 c 89: See note following RCW 18.320.005.

Findings -- 2011 c 89: See RCW 18.320.005.

Findings -- Intent--Severability -- Application -- Construction -- Captions, part headings, subheadings not law -- Adoption of rules -- Effective dates -- 2005 c 504: See notes following RCW 71.05.027.

Alphabetization -- Correction of references -- 2005 c 504: See note following RCW 71.05.020.

Findings -- Intent--2004 c 157: "The legislature finds that recent state and federal case law requires clarification of state statutes with regard to competency evaluations and involuntary medication ordered in the context of competency restoration.

The legislature finds that the court in *Born v. Thompson*, 117 Wn. App. 57 (2003) interpreted the term "nonfatal injuries" in a manner that conflicts with the stated intent of the legislature to: "(1) Clarify that it is the nature of a person's current conduct, current mental condition, history, and likelihood of committing future acts that pose a threat to public safety or himself or herself, rather than simple categorization of offenses, that should determine treatment procedures and level; ... and (3) provide additional opportunities for mental health treatment for persons whose conduct threatens himself or herself or threatens public safety and has led to contact with the criminal justice system" as stated in section 1, chapter 297, Laws of 1998. Consequently, the legislature intends to clarify that it intended "nonfatal injuries" to be interpreted in a manner consistent with the purposes of the competency restoration statutes.

The legislature also finds that the decision in *Sell v. United States*, ___U.S. ____ (2003), requires a determination whether a particular criminal offense is "serious" in the context of competency restoration and the state's duty to protect the public. The legislature further finds that, in order to adequately protect the public and in order to provide additional opportunities for mental health treatment for persons whose conduct threatens themselves or threatens public safety and has led to contact with the criminal justice system in the state, the determination of those criminal offenses that are "serious" offenses must be made consistently throughout the state. In order to facilitate this consistency, the legislature intends to determine those offenses that are serious in every case as well as the standards by which other offenses may be determined to be serious. The legislature also intends to clarify that a court may, to the extent permitted by federal law and required by the *Sell* decision, inquire into the civil commitment status of a defendant and may be told, if known." [2004 c 157 § 1.]

Severability -- 2004 c 157: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2004 c 157 § 7.]

Effective date -- 2004 c 157: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 26, 2004]." [2004 c 157 § 8.]

Purpose -- Construction -- 1999 c 13: "The purpose of this act is to make technical nonsubstantive changes to chapters 10.77 and 71.05 RCW. No provision of this act shall be construed as a substantive change in the provisions dealing with persons charged with crimes who are subject to evaluation under chapter 10.77 or 71.05 RCW." [1999 c 13 § 1.]

Alphabetization of section -- 1998 c 297 § 29: "The code reviser shall alphabetize the definitions in RCW 10.77.010 and correct any references." [1998 c 297 § 51.]

Effective dates--Severability -- Intent -- 1998 c 297: See notes following RCW 71.05.010.

APPENDIX C

SENATE BILL REPORT
SB 6492

As Reported by Senate Committee On:
Human Services & Corrections, February 2, 2012
Ways & Means, February 7, 2012

Title: An act relating to improving timeliness, efficiency, and accountability of forensic resource utilization associated with competency to stand trial.

Brief Description: Improving timeliness, efficiency, and accountability of forensic resource utilization associated with competency to stand trial.

Sponsors: Senators Hargrove, Stevens and Regala.

Brief History:
Committee Activity: Human Services & Corrections: 1/27/12, 2/02/12 [DPS].
Ways & Means: 2/06/12, 2/07/12 [DPS(HSC)].

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 6492 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Carrell, Harper, McAuliffe and Padden.

Staff: Kevin Black (786-7747)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 6492 as recommended by Committee on Human Services & Corrections be substituted therefor, and the substitute bill do pass.

Signed by Senators Murray, Chair; Kilmer, Vice Chair, Capital Budget Chair; Zarelli, Ranking Minority Member; Parlette, Ranking Minority Member Capital; Baumgartner, Brown, Conway, Fraser, Harper, Hatfield, Hewitt, Holmquist Newbry, Honeyford, Kastama, Keiser, Kohl-Welles, Padden, Pridemore, Regala, Schoesler and Tom.

Staff: Tim Yowell (786-7435)

Background: A criminal defendant is incompetent to stand trial if the defendant does not have the capacity to understand the proceedings against him or her or does not have sufficient

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

ability to assist in his or her own defense. If competency is raised in the context of a criminal case, the court is required to issue a stay of trial for evaluation of competency to stand trial by forensic staff from a state hospital. If, following the evaluation, the court determines that the defendant is incompetent to stand trial, a period of competency restoration treatment is allowed at a state hospital. If competency cannot be restored within time periods authorized by statute, the court must dismiss charges without prejudice and may transfer the defendant to a state hospital or evaluation and treatment facility for further evaluation for the purpose of filing a petition for civil commitment. Competency evaluations may be performed at the direction of the court in a state hospital, in jail, or in the community for out-of-custody defendants. Western State Hospital and Eastern State Hospital received 3,035 court referrals for initial competency evaluations for adult defendants in 2011.

The competency evaluation and restoration process is a source of delay for the resolution of criminal charges; it extends the time spent in jail for pretrial defendants who are referred for competency evaluations and who have not been released from custody. For these defendants in 2011, based on a weighted average of ten months' data from the Department of Social and Health Services (DSHS) between March and December, the average time spent waiting in jail for admission to a state hospital for a competency evaluation after submission of a referral to a state hospital was 41 days, while the average time spent waiting in jail for completion of an outpatient competency evaluation and report after submission of a referral to a state hospital was 24 days.

Summary of Bill (Recommended Substitute): The following performance targets are established for completion by the state hospital of competency services:

- seven days for admission to a state hospital for evaluation, treatment, or civil conversion;
- seven days for completion of an evaluation and report for a defendant in jail; and
- 21 days for completion of an evaluation and report for a defendant in the community who makes reasonable efforts to cooperate with the evaluation.

These performance targets run from the date the state hospital receives the referral, charging documents, discovery, and criminal history information and do not create any new entitlement or cause of action related to the timeliness of competency services. The bill states the Legislature recognizes that the performance targets may not be able to be achieved in all cases without compromise to the quality of evaluation services, but intends for DSHS to manage, allocate, and request appropriations for resources to meet these targets whenever possible without sacrificing the accuracy of the evaluation.

The court is limited to the appointment of one state forensic evaluator. The evaluator must assess whether commitment to a state hospital for up to 15 days is necessary in order to complete an accurate evaluation. The court may commit the defendant to a state hospital for an inpatient evaluation without an assessment if the defendant is charged with murder in the first or second degree, or if the court finds that it is more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation. The court may not order an inpatient evaluation for any purpose other than a competency evaluation.

The order for evaluation or competency restoration must indicate whether the parties agree to waive the presence of the defendant or agree to the defendant's remote participation in a

future competency hearing if the recommendation states that the defendant is incompetent to stand trial and the hearing is held prior to the expiration of the statutory authority for commitment.

The competency evaluation report must include a diagnosis or description of the current mental status of the defendant. An evaluation for criminal insanity or diminished capacity must not be performed unless the evaluator is provided with an evaluation by an expert or professional person finding that criminal insanity or diminished capacity is present. An evaluation of future dangerousness is not required until the end of the second felony competency restoration period unless the evaluation is for criminal insanity or the defendant has a developmental disability or it is determined that competency is not likely to be restored and the defendant has completed the first felony competency restoration period.

The first competency restoration period for a felony defendant whose maximum charge is a class C felony or a nonviolent class B felony is shortened from 90 to 45 days. When a felony defendant is committed to a state hospital for civil conversion after charges are dismissed based on incompetency to stand trial, a civil commitment petition must be filed within 72 hours excluding weekends and holidays following the defendant's admission to the facility. Time for trial on such a petition is extended from five to ten judicial days.

DSHS must develop procedures to monitor the clinical status of defendants admitted to the state hospital to allow for early discharge when the clinical goals of admission have been met, investigate the extent to which defendants overstay time periods authorized by statute and take reasonable steps to prevent this occurrence, and establish written standards for the productivity of forensic evaluators and utilize those standards to internally review performance.

DSHS must report annually starting December 1, 2013, about the timeliness of competency services in a manner that is broken down by county. Following any quarter in which performance targets are not met, DSHS must report the extent of the deviation to the legislative and executive branches and any corrective actions that have been adopted.

The Joint Legislative Audit and Review Committee must independently assess the progress of DSHS with performance measures and monitoring activities both six and eighteen months following the effective date. The Washington State Institute for Public Policy must study effective time periods and protocols for competency restoration treatment.

EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Substitute): The court may commit the defendant to a state hospital for an inpatient evaluation without an assessment if the defendant is charged with murder in the first or second degree, or if the court finds that it is more likely than not that an evaluation in the jail will be inadequate to complete an accurate evaluation. The court may not order an inpatient evaluation for any purpose other than a competency evaluation. The first competency restoration period for a felony defendant whose maximum charge is a nonviolent class B felony is shortened from 90 to 45 days.

Appropriation: None.

Fiscal Note: Requested on January 26, 2012.

Committee/Commission/Task Force Created: No.

Effective Date: The bill contains an emergency clause and takes effect on May 1, 2012.

Staff Summary of Public Testimony on Original Bill (Human Services & Corrections):
PRO: This bill addresses the problem of people backing up in the jails for months waiting for competency evaluations. The longer the defendants are in jail, the greater the chance of decompensation. We want to speed up this process, save money, and get to a just result for the courts and the defendant. Timeliness would be improved by this bill. It modifies parts of the competency laws passed in 1974 which do not make sense today. The dangerousness assessment should be done when it is needed, not in every evaluation. Accuracy is enhanced when the evaluation is completed close to when the court sees the defendant. Out of custody evaluations are taking six to eight months; someone who was initially safe to be out of custody may significantly deteriorate in that time. Decreasing restoration time for class C felons comes closer to matching clinical reality. Defaulting to an evaluation in jail will prevent defendants languishing for months. waiting to be sent to a state hospital. Limited judicial discretion is wise in situations the defendant may be faking a mental illness. This legislation frees up hospital beds for restoration treatment to move cases along faster. Some courts abuse the statute by sending defendants to the state hospital for the purpose of a generalized mental health evaluation, which should be a local expense.

CON: Performance targets are appreciated, but seem worthless without some hammer to ensure they are met. The opt out provision is not workable because the county loses priority for evaluations. The bill doesn't address lack of staff at the state hospital. The courts should retain discretion to commit defendants to a state hospital for evaluation. We do 80 percent of evaluations in the jail but it isn't right for every defendant. We are willing to look at standards for this but we need a safety valve. Backlog is created because we don't have enough forensic bed space. It's okay to default to jail if the court retains discretion to send the defendant to the state hospital. Smaller jails without onsite mental health staff have more difficulties compared to larger counties. The bill does have helpful provisions that we agree with. Assigning a second evaluator should be allowed for good cause. Under the bill the state would be forced to pay for more outside experts to evaluate diminished capacity and insanity. Pressure to evaluate more defendants more quickly leads to substandard work, which will increase costs for contested court hearings and outside experts. Most evaluations can be conducted appropriately in the jail.

OTHER: Thank you for the intent to finish evaluations more quickly. The problem with timeliness is severe and grotesque. Six months is too long a period to phase in improvements. The target dates are good but should be court enforceable. The shorter restoration period for class C felonies is welcome and should be extended to nonviolent B felonies. Some defendants need an observation period at the state hospital for evaluation so the court should retain discretion. Additional resources are needed or there will be an incentive to decrease the accuracy and quality of services. Deferring the dangerousness assessment will be helpful for the state hospitals. Work has already been done to improve problems. It will not always be possible to complete an evaluation in seven days. A defendant who doesn't cooperate with an evaluation in the community should be returned to

court. No significant differences exist between a competency evaluation in a jail versus in a state hospital, other than the ability to consult with treatment staff. Competency delays impact liberty and constitutional rights. Medical histories should be obtained and the report should include a diagnosis. Ability to have a second opinion should be retained. In an ideal world no evaluations would occur in jail. Sanctions should be available if reports are not filed. From the perspective of a defendant, time limits should start from the date the court signs the order and data collection should include that date. Auditing is a good idea and should be expanded to include effects of long stays in jail on persons with mental illness.

Persons Testifying (Human Services & Corrections): PRO: Senator Hargrove, prime sponsor; Honorable Michael Finkle, King County District Court; Honorable Ronald Kessler, King County Superior Court.

CON: Brian Enslow, WA Assn. of Counties; Tom McBride, WA Assn. of Prosecuting Attorneys; Jo Arlow, WA Assn. of Sheriffs and Police Chiefs; Matt Zuvich, Trevor Travers, WA Assn. of State Employees; Judy Snow, Pierce County Corrections.

OTHER: Daron Morris, WA Defender Assn., WA Assn. of Criminal Defense Lawyers; MaryAnne Lindeblad, Aging and Disability Services Administration; Tara Fairfield, Western State Hospital; Seth Dawson, National Alliance for Mental Illness; David Lord, Disability Rights Washington.

Staff Summary of Public Testimony on Substitute (Ways & Means): PRO: Long waiting times for completion of evaluations of competency to stand trial and for admission to the state psychiatric hospitals for competency restoration treatment are significant and long-standing problems. This legislation provides useful tools to address those problems.

CON: The bill shifts the presumption that competency evaluations should occur in the state hospital to a presumption that they should occur in jail. Judges should have more discretion in that regard. There is also concern that the bill could result in closure of a forensic ward at Western State Hospital. Aspects of the bill could actually result in greater costs for the state. The performance standards could cause evaluations being completed too quickly, and in more people being found incompetent and admitted for competency restoration than would otherwise be the case.

Persons Testifying (Ways & Means): PRO: David Lord, Disability Rights of WA; Seth Dawson, National Alliance for the Mentally Ill of WA; Bob Cooper, WA Defenders' Assn.; Dan Murphy, Aging & Adult Services, DSHS.

CON: Brian Enslow, WA Assn. of Counties; Matt Zuvich, Wa Federation of Employees.