No. 96355-0

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Petitioner,

v.

Sergey Fedoruk, Respondent.

ANSWER TO PETITION FOR REVIEW

Court Of Appeals No. 49975-4-II

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Table of Contents

TABLE OF AUTHORITIES

INTRODUCTION

The court of appeals held that the trial court abused its discretion by applying the wrong standard when determining whether Fedoruk remained competent during trial. The State argues that the court of appeals applied the wrong standard of review. Pet. at 1. That is not supported by the words and logic of the opinion below.[1]

A trial court abuses its discretion if it reaches its decision by "applying the wrong legal standard . . ." *State v. Ortiz-Abrego*, 187 Wn.2d 394, 402, 387 P.3d 638 (2017) (internal punctuation and citation omitted).

The court of appeals first reviewed the various indications that Fedoruk was no longer competent, including his increasingly erratic behavior and his counsel's concerns about competency. The court of appeals then found that the "the trial court reviewed Fedoruk's behavior under the standard for determining whether Fedoruk waived his right to be present at trial rather than analyzing whether a competency evaluation was necessary." App. 23.

[1] The version of the State's Petition received by counsel attached a 2014 opinion regarding Fedoruk. For the Court's convenience, Fedoruk attaches the 2018 opinion, which was ordered published on September 25, 2018. All citations to the opinion refer to the version attached here.

Since "there were clear signs that Fedoruk's mental condition had significantly deteriorated . . . and because the trial court applied the wrong standard in evaluating Fedoruk's behavior," the court of appeals held that "the court abused its discretion when it failed to order a competency evaluation during trial." App. 23.

Plainly, then, the court of appeals reviewed the case under the correct standard, abuse of discretion.

Indeed, in briefing on a motion to publish before the court of appeals, the State admitted that the court of appeals "merely . . . appl[ied] an abuse of discretion standard." App. 25-26. As the State explained below, the court of appeals applied "a simple and well-settled standard to a complex and unique set of facts. The standard, abuse of discretion, bears no repeating . . ." App. 27.

This case stands for the important but uncontroversial proposition that a trial court should apply the correct legal standard when determining whether a defendant has maintained competency during trial. The petition for review should be denied and the case remanded to the trial court.

I. The trial court had new information that Fedoruk's mental condition had deteriorated

Fedoruk's counsel raised competency and Fedoruk stopped communicating with counsel and began to speak gibberish. App. 11, 13-14. The court was informed by a relative that every time Fedoruk starts "losing it, that's how he behaves." App. 14. This information, and other actions, occurred against a backdrop of a forced medication order, prior findings that Fedoruk was not competent, and a prior Not Guilty by Reason of Insanity. App. 2, 3-6. Fedoruk's actions and counsel's concerns were new information that required the trial court to revisit Fedoruk's competency. *State v. Ortiz*, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

The opinion below accurately rehearses the lengthy factual background of this case. Here, Fedoruk emphasizes five facts that required the trial court to revisit competency:

1. Fedoruk was refusing medication during trial, RP 9/30/16 at 112, although a *Sell* order had been entered, requiring that Fedoruk be medicated if he refused his medication. App. 20.
2. The trial court stated that Fedoruk's behavior prior to the verdict prevented him from being "able to consult with his attorneys . . ." RP 9/30/16 at 107.

3. Fedoruk's counsel raised competency, in part because Fedoruk was "chanting stuff in some indecipherable Russian." App. 21.

4. The trial court admitted it was uncertain whether Fedoruk's erratic behavior was within his control. App. 22.

5. Immediately after the verdict, the court found Fedoruk lacked competency. There was no significant change in Fedoruk's behavior from Thursday, before closing argument when the Court admitted it was concerned about Fedoruk's competency; Friday, before the verdict was read; and Friday, immediately after the verdict was read, at which point the trial court finally admitted that Fedoruk was likely not competent. RP 9/30/16 at 107.

All of Fedoruk's actions at trial took place against a background of severe mental illness, noncompliance with medication, rapid cycling between competence and lack of competence, a prior NGRI, and findings that Fedoruk was not competent to be retried on the charges here. *See, generally,* App. 2-17.

II. The court of appeals reviewed for abuse of discretion

The State argues that the court of appeals applied the wrong standard of review. Pet. at 11-12. But, in opposing a motion to publish, the

State acknowledged that the court of appeals was "applying an abuse of discretion standard." App. 26. The answer to the motion to publish was signed on July 23 (App. 27); the same attorney signed the petition for review on July 26.

The State's contention in its Petition is not supported by the words and logic of the opinion below. The court of appeals stated that it reviews "a trial court's decision on whether to order a competency examination for an abuse of discretion. [*In re*] *Fleming*, 142 Wn.2d [853] at 863 [2001]. The trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." App. 19. The court of appeals then held that "the court abused its discretion when it failed to order a competency evaluation during trial." App. 23. The plain words of the court of appeals, as well as its analysis, demonstrates that the State is wrong and the court of appeals reviewed for an abuse of discretion.

The State's argument here turns on a single sentence, when the court wrote that, in reviewing whether there were signs that Fedoruk's condition had changed, the court would "examine the same factors the trial court considers when initially determining if it has reason to doubt a defendant's capacity." App. 19; Pet. at 11-12.

The State's position on the standard of review not only contradicts the opinion's plain language, if taken seriously it would make appellate review impossible. If a court of appeals is going to review whether the trial court applied the correct legal standard, it must examine what the court did. In reviewing the trial court's actions, it must look to see if the factors that should be considered were considered. Appellate review must be cabined by looking at the factors the trial court should have considered so that trial courts have guidance as to how to make their decisions. And appellate review must be cabined or "abuse of discretion" would be meaningless (because no factors would be examined) or unpredictable (because courts of appeal would simply choose factors as it pleases).

In short, in examining the trial court's actions, the court of appeals must be guided by something, and case law shows that courts of appeal are guided by the factors that the trial court (should have) considered. Here, after looking at the factors that trial courts should consider when determining whether a defendant may have lost competency, the court of appeals held that the trial court mistakenly considered whether Fedoruk's changed behavior waived his presence at trial, not whether his competency was possibly lost. The trial court abused its discretion by applying the wrong legal standard.

The vast majority of cases on appeal uphold the trial court's discretion not to order a competency evaluation, but, contrary to the State's position, they do so only after evaluating the record and determining whether the court ignored factors that should have alerted it to the need for a competency evaluation. *See, e.g.*, *State v. Hicks*, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985) (holding that the trial court did not abuse its discretion in denying the competency hearing request). The *Hicks* court noted that counsel at first just found Hicks difficult, not lacking competency, and the judge questioned Hicks "at length to determine whether a competency question existed." *Id.* Then, after Hicks' counsel indicated that Hicks was not communicating with counsel, the trial court put on the record that it observed Hicks "talking to the jail guard a minute before . . ." *Id.*

Here, of course, the trial court conducted no colloquy and failed to even ask if Fedoruk was taking his medication, despite the *Sell* order. App. 7; *Sell v. United States*, 539 U.S. 166 (2003) (describing circumstances where court may forcibly medicate defendant to render defendant competent for trial). The trial court ignored counsel's statement that Fedoruk was no longer coherent. App. 21. Rather than talking to a jail guard, here "a corrections officer informed the court that when Fedoruk

was transported to the jail, smelling salts were needed to 'wake' Fedoruk up and to get him out of the vehicle." App. 15. The next day, the "jail advised that Fedoruk spent the night without sleeping and 'mostly practicing boxing moves.'" App. 16. Looking at the same factors that the *Hicks* court used to uphold discretion, the court of appeals found that the trial court abused its discretion here. The trial court abused its discretion because, rather than looking at these factors to determine if Fedoruk was still competent, the trial court instead analyzed whether Fedoruk's behavior waived his presence. That application of the wrong legal standard was an abuse of discretion.

The court of appeals here did what the Supreme Court did in *Drope*: it determined that there was abuse of discretion because the trial court ignored clear signs that competency may have been lost. In the course of making that holding, the Supreme Court did what the court of appeals did here: it examined how the trial court weighed the signs of loss of competence. Despite "the difficulty of making evaluations of the kind required in these circumstances, we conclude that the record reveals a failure to give proper weight to the information suggesting incompetence which came to light during trial." *Drope v. Missouri*, 420 U.S. 162, 179 (1975).

Finally, even if the State were right and the court had done a de novo review, there still would be no error. Since a defendant has a constitutional right not be tried unless he or she is competent, that constitutional claim would be subject to de novo review because "a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. . . . And we review de novo a claim of a denial of constitutional rights." *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (internal citation and punctuation omitted). It is unnecessary to reach this alternate reason for upholding the court of appeals, however, since the State is wrong and the court of appeals reviewed for abuse of discretion.

III. The State's second issue is unclear, but appears to be without merit

The State raises a second issue, but it appears to be simply the obverse of its first issue. In the State's words, it asks whether the trial court, "having once determined the defendant competent and never having changed its mind, went on to rule that the defendant, having voluntarily misbehaved in court, had waived his presence . . ." Pet. at 1-2.

The premise of this issue is doubly flawed because it is factually inaccurate as well as a misstatement of the law.

As a factual matter, the trial court admitted it did know whether or not Fedoruk could control his behavior. App. 22. If the court was uncertain as to whether Fedoruk was in control of his behavior, it could not have found that he "voluntarily misbehaved."

As a legal matter, the trial court applied the wrong standard. Competency involves whether Fedoruk could assist in his defense and understand proceedings, not, as the trial court ruled, whether he was "calm." App. 11, 15, 22. That is the abuse of discretion here: applying the standard for waiving presence at trial when the signs of a loss of competency required an inquiry into Fedoruk's ability to communicate with counsel and understand the proceedings.

The State argues that the trial court was an "eyewitness" with the best view of what happened. Pet. at 12, 14. But this eyewitness did not know whether Fedoruk could control his behavior. App. 22. This eyewitness ordered a competency evaluation immediately after the verdict on Friday. RP 9/30/16. It is not plausible that Fedoruk was competent before the verdict but lost his competency in the moments during which the verdict was read. The courts as eyewitness described Fedoruk's behavior during trial as "very concerning to all," App. 10, but failed to

heed what necessarily follows, that the question of competency must be revisited.

While the State is correct that deference must be given to the trial court, the record plainly indicates that the trial court had reason to doubt Fedoruk's continued competency, and, in fact, doubted his continued competency during trial. Despite the trial court's own doubts as to Fedoruk's competency, the court did nothing to ensure that Fedoruk was competent. The trial court has a constitutional obligation, under the due process clause, to undertake an independent judicial inquiry when the court has reason to doubt competency. *Pate v. Robinson*, 383 U.S. 375 (1966). The court of appeals was merely enforcing this Constitutional requirement. Failure to act when the court itself questions competency is an abuse of discretion that requires reversal.

CONCLUSION

There was no error in the opinion of the court of appeals, and this Court should deny the petition for review and remand for a new trial.

Certificate of Service

On October 8, 2018, I filed with the Court's E-filing portal, which served all parties by electronic service, and served a paper copy by U.S. mail to

Sergey Fedoruk, 317936
Washington State Penitentiary
1313 North 13th Avenue
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated October 8, 2018 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

Filed
Washington State
Court of Appeals
Division Two

September 25, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SERGEY FEDORUK, Appellant.	No. 49975-4-II ORDER GRANTING MOTION TO PUBLISH

Appellant, Sergey Fedoruk, filed a motion to publish this court's opinion filed on June 26, 2018. After consideration, the court grants the motion. It is now

ORDERED that the final paragraph in the opinion which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

FOR THE COURT

PANEL: Jj. Worswick, Bjorgen, Sutton

Worswick, J.

We concur:

Bjorgen, J.

Sutton, J.

Filed
Washington State
Court of Appeals
Division Two

June 26, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SERGEY V. FEDORUK, Appellant.	No. 49975-4-II UNPUBLISHED OPINION

WORSWICK, J. — Sergey Fedoruk, who has a long history of serious mental illness, appeals his second degree murder conviction. Although prior to trial Fedoruk was deemed competent, he claims his mental health destabilized during the course of the trial. He argues that the trial court erred when it proceeded with his trial after it became apparent that his mental state had deteriorated to the point where he was no longer competent. We agree, and we reverse and remand for a new trial.[1]

FACTS

I. Background

In 2002, Fedoruk moved to the United States from Ukraine. While living in Ukraine, Fedoruk suffered a head injury in a motorcycle accident, was diagnosed with schizophrenia, and

[1] Fedoruk also argues his right to be present was violated, the trial court improperly denied his request for a mistrial, and the trial court erred by ordering Fedoruk to be placed in restraints and by allowing his interpreters to move away from him. Fedoruk also filed a statement of additional grounds (SAG) for review. Because the first two issues are dispositive in this case and because we reverse Fedoruk's conviction and remand for trial, we do not consider these arguments or the issues in Fedoruk's SAG.

was twice admitted to a psychiatric hospital. After arriving in the United States, Fedoruk lived with his family. Over the course of years, doctors have prescribed numerous psychotropic and antipsychotic medications, but Fedoruk has a history of poor compliance with the medication regimens. He also has a known history of rapid decompensation.

In 2007, prior to the incidents in this case, Fedoruk was charged with robbery, theft, trespass, and four counts of assault. He underwent competency evaluations in both 2007 and 2008. In 2007, an evaluator diagnosed Fedoruk with "Bipolar 1 Disorder . . . with psychotic features" but determined that he was competent to stand trial. Clerk's Papers (CP) at 89. However in 2008, prior to his trial, Fedoruk was again admitted to the hospital for covering himself in feces while in jail. He underwent another competency evaluation and an evaluator found him to be competent but also opined that Fedoruk was likely insane at the time he committed the crimes in 2007. The jury found Fedoruk not guilty by reason of insanity for most of the charges; he pled guilty to other amended charges.

In September 2010, Fedoruk's family requested that the police take him to the hospital because he appeared "disheveled, disorganized and had pressured speech," and had been eating dirt and dog food and licking water, which he claimed was holy water, off of the floor. CP at 89. Fedoruk had not slept and had not taken his psychotropic medication. Fedoruk was then involuntarily detained and found to be "gravely disabled." CP at 89. Fedoruk was admitted to Western State Hospital (WSH). WSH discharged Fedoruk three months later and provided him with a discharge plan that included medication and supervision by the Department of Corrections.

In 2011, Fedoruk severely bit his own finger and, while in the hospital for that injury, he "was screaming in Ukrainian and not making sense." CP at 89. A doctor opined that Fedoruk was psychotic and prescribed him psychotropic medications.

In August, 2011, police found Serhiy Ischenko's body down an embankment behind the property where Fedoruk lived.[2] After an investigation, the State charged Fedoruk with second degree murder. The case went to trial and a jury found Fedoruk guilty. Fedoruk appealed, and this court reversed Fedoruk's conviction because his defense counsel failed to timely retain a mental health expert and failed to investigate a mental health defense.

II. PRETRIAL

In May 2015, while Fedoruk was in jail awaiting his second trial for Ischenko's murder, a psychiatrist evaluated Fedoruk and diagnosed him with schizoaffective disorder. During the evaluation, Fedoruk described many occasions of manic episodes all of which included "high energy, little sleep, and delusional thought content." CP at 91.

In September 2015, the jail reported that Fedoruk was no longer taking his mood stabilizing medication. The court ordered Fedoruk to undergo another mental health evaluation. Fedoruk revealed to the evaluator that he had stopped taking his mood stabilizing medication, because he was currently in jail and could not "hurt anybody." CP at 87. Fedoruk also reported that he becomes "sick" when he has not slept and that he experienced episodes of mania after his earlier murder trial. CP 87. He stated that the prison had refused his request for sleeping pills. The evaluator noted that Fedoruk's "inability to sleep was known to him as a precursor for a manic episode including paranoid delusions." CP at 88. Fedoruk reported that during a manic

[2] Ischenko was Fedoruk's relative by marriage.

episode he is "[n]ot in control—brain isn't working right." CP at 88. Fedoruk also stated that during his manic episodes he believed that he had special powers and has paranoid delusions of harming him and his family. The evaluation also included a report on Fedoruk's judgment and insight of his disorder:

> Insight/Judgment: Mr. Fedoruk showed fair insight into the nature of his episodic mood disorder and claimed he had the ability to accurately judge when he required medication in the jail environment based on a change in his sleeping pattern—i.e. when he began not sleeping. He also stated in the community he would have to remain consistently medication adherent. However, by his own description, onset of sleep disturbance also brings with it a level of lost control of his brain and behaviors.

CP at 94. Ultimately, the evaluator determined that Fedoruk was competent to stand trial, but also noted that because he was not compliant with his medication, he was at a "higher risk" of having returning symptoms and being susceptible to "other factors that can destabilize symptoms of his major mood disorder including increased stress one would expect during a court trial." CP at 95. The evaluator stated that a forced medication order may be required.

Three days after the competency evaluation Fedoruk had a psychiatric episode that led to an emergency hearing where the court found Fedoruk incompetent. The court ordered that Fedoruk be admitted to WSH and receive forced medication. During a delay in transferring Fedoruk to WSH, he displayed unstable behavior. The jail notes state:

> Fedoruk at times was showing improvement, and at other times exhibited deteriorated conditions, which included manic-like symptoms, with yelling and pounding on his cell door, throwing liquid all over floor, pacing in his cell . . . . He would occasionally refuse his prescribed medication . . . .

CP at 148.

In December 2015, Fedoruk was finally admitted to WSH where he displayed more vacillating behavior. At one point, Fedoruk was being loud and "extremely bossy" toward others and a psychiatrist described him as "disinhibited" and not taking medication. CP at 148. A few days later, Fedoruk's behavior and mood began to "escalate" and he began washing himself and his clothing in a toilet bowl and sink. CP at 148. That same day he was physically and verbally assaultive which resulted in Fedoruk being restrained. Fedoruk was also "agitated, loud, touching other patients, and instigating altercations." CP at 149.

During the next weeks, Fedoruk continued to have "manic-like behavior" and he was "hard to redirect." CP at 149. Staff reported that Fedoruk was "[u]pset about various things . . . constantly handwashing clothing . . . taking bath in sink" and required extra medication and emergency response for de-escalation. CP at 149.

Fedoruk began to stabilize by January 2016 and his medications were adjusted. However, a week later Fedoruk denied needing medication and again became noncompliant. Doctors placed Fedoruk on medication watch to ensure Fedoruk's compliance, and thereafter his mood and behavior improved entering into February.

In February, Fedoruk underwent another competency evaluation and the evaluator determined that Fedoruk had the ability to understand the charges against him and court proceedings and that he had the capacity to assist his attorney. In March, Fedoruk had a forensic mental health evaluation addressing his capacity at the time of the murder. An evaluator noted that at the time of the evaluation Fedoruk had "a moderate to high risk for reoffending and dangerous behavior" and that his dangerous behavior would "increase should he discontinue his medications." CP at 180.

In April, the court held a hearing regarding the need for another forced medication order. The trial court noted Fedoruk's "past history of rapid decompensation," and ruled that the earlier forced medication order was still in effect. Report of Proceedings (RP) (April 12, 2016) at 77. At that hearing, the court and counsel discussed trial scheduling and both the State and defense counsel agreed that the trial would last two weeks.

In early September, the trial court held a pretrial hearing. During the hearing, defense counsel stated:

> And at the same time, we do not want to continue this trial. There are all sorts of problems with that. The Court's aware of—you know, we've had competency issues that have delayed things. My client's competent; I think witnesses are available, and it's our desire to go to trial as scheduled.

RP (Sept. 9, 2016) at 87.

III. TRIAL

Trial began on September 20. During trial, Russian interpreters assisted Fedoruk through electronic headsets. On Wednesday, September 28, defense counsel informed the court that Fedoruk was experiencing significant back pain. Defense counsel stated that Fedoruk was in so much pain that he was having a hard time focusing. Fedoruk requested a continuance until Tuesday of the following week. The State objected based on witness availability. The court then denied Fedoruk's request and stated:

> Well, I already know that we have witness—or pardon me, jurors, who had commitments in the first week of October and beyond that would mean that any continuance would mean that we'd be starting over, and I'm just not in a position to grant that request.
>
> Mr. Fedoruk needs to talk to jail medical staff when he goes back over at the lunch hour, and if they have any concerns then we can re-address the matter.

RP (Sept. 28, 2016) at 8.

Later that day, during a short recess, corrections officers placed Fedoruk in restraints.[3] The court noted that Fedoruk had "been getting more concerned about his physical situation and has been insistent that he be taken to the hospital." RP (Sept. 28, 2016) at 57. Defense counsel told the court that Fedoruk's pain was "unbearable" and that his biggest concern was getting to a doctor. RP (Sept. 28, 2016) at 57. The court stated that "[g]iven witnesses, jurors who are going to be gone, we don't have any choice but to go forward with your trial." RP (Sept. 28, 2016) at 58. The court also informed Fedoruk that he needed to maintain his composure in the courtroom and told Fedoruk that during the lunch recess the medical staff at the jail would be able to help him with his pain.

The court took an extended lunch recess so that Fedoruk could seek medical attention. After the recess, Fedoruk again requested a continuance, but this time only until the following morning, stating that "sleep and rest for a good chunk of the rest of the day and overnight, that will go a long way toward making tomorrow more tolerable." RP (Sept. 28, 2016) at 59-60. The court denied Fedoruk's request citing concerns over juror availability. The court stated that if it extended the recess, the court would lose jurors, resulting in a mistrial.

Fedoruk then requested to waive his presence at trial. The court engaged Fedoruk in a colloquy to confirm that he wished to waive his presence:

> THE COURT: All right, Mr. Fedoruk, I just want to confirm—and you can stay seated if you wish, that's fine.
>
> I want to confirm: It's your desire that you not be present for the balance of trial today; is that right?
>
> THE DEFENDANT: I agree.
>
> THE COURT: All right.
>
> And you understand you have an absolute right to be here today?
>
> THE DEFENDANT: Yes. I believe my attorney.

[3] The exact nature of the restraints is not apparent from the record on appeal.

> THE COURT: Okay. You have discussed this with your attorney and this is how you wish to proceed; is that right?
> THE DEFENDANT: Yeah. Thank you.
> THE COURT: All right.
> Then we'll allow Mr. Fedoruk to return to the jail for the balance of the day. We will have you brought over tomorrow morning. I assume that's [sic] your wish is to be back here tomorrow morning?
> THE DEFENDANT: Yeah, thank you, yeah, yeah.
> THE COURT: All right.
> You're comfortable with the trial proceeding without you this afternoon and your attorney acting on your behalf without you here?
> THE DEFENDANT: Correct, correct.

RP (Sept. 28, 2016) at 62-63. The court then allowed Fedoruk to return to jail for the rest of the afternoon and continued the trial in his absence. The court instructed the jury that it should not consider Fedoruk's absence as "evidence of anything" and that Fedoruk had a right to not be present. RP (Sept. 28, 2016) at 66.

The next morning, on September 29, Fedoruk returned to the courtroom. During a witness's testimony, Fedoruk exclaimed, "Totally wrong. He's lying." RP (Sept. 29, 2016) at 8. As the witness continued, Fedoruk made other verbal but unintelligible outbursts and again claimed the witness was lying. The State then rested and defense counsel asked to address the court. Outside the presence of the jury, defense counsel stated:

> Your Honor, I'm concerned about Mr. Fedoruk and very—he's just very animated this morning, and some reactions to this last witness that the testimony really has been—well, reactions that I haven't seen, up to this point.
>
> I believe he understands me; but, I'm concerned about his—his mood, at this point. I know we are very close to the end of the trial and I'm hoping he can keep it together.

RP (Sept. 29, 2016) at 9. Fedoruk himself then stated, "Because this is not truth. Not truth. I never said my [inaudible] I kill somebody; I never tell my wife; my sister over there is saying things." RP (Sept. 29, 2016) at 9 (alteration in original). The State asserted that it appeared that

Fedoruk was upset about the witness testimony, which was the reason for his disruptive behavior, "not that he's having any difficulty understanding or following the proceedings, or any difficulty assisting Counsel at this time." RP (Sept. 29, 2016) at 10.

After a brief recess and outside the presence of the jury, the court noted that Fedoruk was having a "difficult time" and that at the request of the corrections officers, Fedoruk was placed in leg shackles and a belly chain. RP (Sept. 29, 2016) at 11. Defense counsel told the court that he was concerned about Fedoruk's ability to maintain composure in the courtroom and that he attempted to have a discussion with Fedoruk but was unsuccessful.

Fedoruk then raised concerns about the jury being able to see the restraints. The court then stated that if Fedoruk could maintain his composure, the court would have Fedoruk's belly chains removed. Fedoruk affirmed that he would be able to maintain his composure.

Defense counsel objected to the restraints and stated that any rearranging of the courtroom to accommodate the restraints would be very prejudicial to Fedoruk. Fedoruk added, "[Inaudible] me. Yeah, maybe I'd [inaudible] stark crazy; but, if nobody touch me, I never touch somebody back," and he then apologized. RP (Sept. 29, 2016) at 14 (alteration in original). The court responded that it was going to keep Fedoruk in the leg shackles because his behavior was "very concerning to all." RP (Sept. 29, 2016) at 14.

Defense counsel also informed the court that the interpreters wanted to move away from Fedoruk. The court, over Fedoruk's objection, allowed the interpreters to move.

Before the jury was brought in, Fedoruk asked to use the restroom, and the court instructed the corrections officers to escort Fedoruk to the restroom. The court reported that while using the restroom Fedoruk was "very loud in the back hall and was having some difficulty

controlling himself." RP (Sept. 29, 2016) at 16. The court again asked Fedoruk if he would be able to maintain his composure and Fedoruk responded in the affirmative.

At this time, defense counsel informed the court that he was concerned about Fedoruk's competency and his ability to assist in his defense. Counsel stated that before the last break Fedoruk was "chanting stuff that is some indecipherable Russian" and that when discussing the testimony of the last witness, Fedoruk's reaction was "pure anger." RP (Sept. 29, 2016) at 16. Defense counsel then said he was "concerned about [Fedoruk's] competence, at this point. I hate to do that, but I think that that's—I think we're—I'm very concerned that I've known him for two years, I'm very concerned about his behavior." RP (Sept. 29, 2016) at 17.

The court then responded:

> At this point, based on my observations, Mr. Fedoruk is certainly responsive to what he is hearing in the courtroom and can converse with his attorney; but, he's also emotionally upset. But I—at least at this point I don't see this rising to the level of a competency concern.
>
> In addition, we are now at the point where Counsel advises me we are very close to completion of all the testimony after almost two weeks of trial. Mr. Fedoruk is currently calm, and I think we can continue to proceed.
>
> I'll leave it to Counsel and his client whether he wishes to proceed with his presence in the courtroom or not in the courtroom. If he is in the courtroom, he does need to maintain his composure, and if you can't do that, I won't have any choice but to have him removed from the courtroom; complete the balance of the testimony; preparation of jury instructions.
>
> After that, we'd be providing those instructions to the jury and closing arguments. I know Mr. Fedoruk wants to be present for those parts of the proceedings, but it's contingent on his behavior.

RP (Sept. 29, 2016) at 17-18. Fedoruk then removed his interpretive device from his head.

The proceedings continued and after one more witness, the defense then rested and the court inquired whether Fedoruk wanted to be present while the jury instructions were being

finalized. Fedoruk began to cry and defense counsel stated that Fedoruk would take the opportunity to get some rest. The court then engaged in a colloquy with Fedoruk:

> THE COURT: Mr. Fedoruk, do you understand you can be here while we go over these instructions. It's my understanding that you would prefer not to be; allow your attorneys to handle that; and you'll take a chance to give your back a break; is that right?
> [Fedoruk]: No more witnesses?
> [DEFENSE COUNSEL]: No more witnesses.
> [Fedoruk]: No, no.
> Today and tomorrow; done?
> [DEFENSE COUNSEL]: Done.
> [Fedoruk]: Today, done?
> [DEFENSE COUNSEL]: Yes.
> [Fedoruk]: [lnaudible].
> [DEFENSE COUNSEL]: Yes
> [Fedoruk]: You're sure? They told me tomorrow.
> [DEFENSE COUNSEL]: No, I'm sure we're going to be done today.
> [Fedoruk]: Okay, if it's done, then I like stay.
> [DEFENSE COUNSEL]: You'd like to stay? Okay.
> THE COURT: All right.

RP (Sept. 29, 2016) at 27-28 (alteration in original).

Fedoruk began speaking in Russian and the following exchange took place:

> THE COURT: All right.
> (Defendant speaking in Russian.)
> THE INTERPRETER: (After translation communication with the Defendant:) He says that everybody knows [inaudible].
> THE COURT: I'm sorry, I couldn't hear the interpreter?
> THE INTERPRETER: He just said—
> (Defendant continues speaking in Russian.)
> THE INTERPRETER:—the relatives they were testifying if they will come to the courtroom [inaudible].
> THE COURT: Okay, so, Mr. Fedoruk—
> (Defendant speaking in Russian.)
> THE COURT: Mr. Fedoruk, I need you to be quiet while we're doing this; you understand?

RP (Sept. 29, 2016) at 28-29 (alterations in original). The court ordered that Fedoruk be placed back in restraints at a corrections officer's request.

While the court and counsel were discussing jury instructions, Fedoruk requested to use the restroom and said that he had a strain in his back. The court informed Fedoruk that he would need to stay until the court had finished with jury instructions but that Fedoruk would soon be able to go back to the jail for lunch. Fedoruk then said "I—actually, I refuse to go to lunch" but then said he understood and was just "confused." RP (Sept. 29, 2016) at 32-33. After preparing the jury instructions, the court took a lunch recess.

After the recess, the court continued to finalize the instructions and Fedoruk continued speaking in Russian and also saying unintelligible things. The corrections officers restrained Fedoruk again, chaining him to the table. The court then reported that Fedoruk had some problems over the lunch hour in that he had taken his cell apart, but that he had received medication and appeared to be doing "somewhat better." RP (Sept. 29, 2016) at 38. Fedoruk stated the name of the medication he took. Fedoruk then pointed to his head and stated "I've got this beeping . . . instead." RP (Sept. 29, 2016) at 38.

With the jury present, the court began to read the instructions to the jury. Soon thereafter, Fedoruk collapsed onto the floor. The court removed the jury from the courtroom. Fedoruk began speaking unintelligibly, crying, and not responding. Defense counsel informed the court that Fedoruk slid down his chair and hit his head on the table. Fedoruk then stated that he wanted to go to sleep and then began shouting in Russian. He stated that he lost consciousness and stated that he could not get up and that he was "done." RP (Sept. 29, 2016) at 49.

The court stated that it was "willing to give Mr. Fedoruk one more opportunity to sit through the balance of the trial." RP (Sept. 29, 2016) at 50. Fedoruk then began singing and

chanting in an unintelligible language. The trial court ordered Fedoruk's removal from the courtroom and ordered the officers to hold him in an area outside the courtroom to see if he improved. Fedoruk continued to speak and chant, at one point stopping to apologize. Fedoruk asked for a wheelchair and stated that he could not walk and then began to yell unintelligibly.

As corrections officers were attempting to get Fedoruk off the floor, a spectator began speaking to Fedoruk in Russian and Fedoruk began yelling in Russian. Fedoruk continued yelling until he was removed from the courtroom. The interpreter then informed the court of what Fedoruk had been saying:

> Well, first he was praying in poems, so it's not any language, it's just a made-up language which he prays in, and that's according to his sisters. We couldn't make sense of it.
>
> And then he was saying I'm going to call FBI [(Federal Bureau of Investigation)]you were not getting to help me, you broke my back, it hurts. That's pretty much the gist of it.

RP (Sept. 29, 2016) at 53. The spectator, identified by the interpreter as Fedoruk's sister, stated that every time Fedoruk starts "losing it, that's how he behaves." RP (Sept. 29, 2016) at 53.

The State then asserted that Fedoruk, through his behavior, had "effectively waived his presence" at trial for the remainder of day. RP (Sept. 29, 2016) at 53. Defense counsel responded that Fedoruk was not competent and that Fedoruk's behavior was not something the "Court should base exclusion on" and stated that the attorney was unable to "redirect" Fedoruk's behavior. RP (Sept. 29, 2016) at 54. The court then stated:

> Well, obviously we were at a point a little more than halfway through the giving of instructions and closing argument. It's a point where the Defendant's participation, if any, obviously is minimal.
>
> Mr. Fedoruk has demonstrated that at this point he's either won't *or can't,* and I don't say that in any pejorative fashion I just don't know which, maintain his

> composure sufficient to allow the case to go forward with him still in the room. So, I would find that he's waived his presence at this time; and that there's no meaningful participation from him going forward.
>
> Given those two facts, I'll allow the case to proceed without Mr. Fedoruk present. After I complete instructions, I'd ask that the officer advise us if he's improved or not, or advise me and if at any point you think he's calmed down sufficiently to come back into court please let me know.

RP (Sept. 29, 2016) at 54-55 (emphasis added). A corrections officer informed the court that Fedoruk was lying down in the holding cell not saying anything.

Defense counsel then stated that "under the circumstances" he was moving for a mistrial. RP (Sept. 29, 2016) at 55. The court denied the motion and reasoned that "to the extent there's been any error or problem, it's certainly has come from the behavior of the Defendant, whether he can or can't control that, whichever situation it is, I don't think it can form the basis for a mistrial." RP (Sept. 29, 2016) at 55.

After closing arguments, the court provided an update on Fedoruk and stated that Fedoruk "was lying down on the floor in the holding cell, refusing to get up; speaking in a very loud voice, indicating that he wished to return to the jail." RP (Sept. 29, 2016) at 94. The court then discussed whether Fedoruk could be present during the presentation of the verdict. The court stated that once the jury reached a verdict, a corrections officer would check on Fedoruk and advise the court of Fedoruk's situation and the court would then make a "decision based on that whether or not to bring him over." RP (Sept. 29, 2016) at 95-96. Before the recessing for the day, a corrections officer informed the court that when Fedoruk was transported to the jail, smelling salts were needed to "wake" Fedoruk up and to get him out of the vehicle. RP (Sept. 29, 2016) at 96.

The next morning, the jury reached a verdict. The court asked the jail to bring Fedoruk back to the courthouse and the jail advised that Fedoruk spent the night without sleeping and "mostly practicing boxing moves." RP (Sept. 30, 2016) at 99. The court then took testimony from an officer who testified that, "[w]e had officers go to his cell, let him know that there was a verdict we needed to bring him over for court. He's basically refusing to come over and he's not following directions at all this morning." RP (Sept. 30, 2016) at 98. The officer also informed that force would need to be used to bring Fedoruk to the courtroom.

The court then took the verdict in Fedoruk's absence. The State again asserted that Fedoruk "waived his presence by his inability to follow directions; his unwillingness to follow directions; and unwillingness to maintain behavior as appropriate." RP (Sept. 30, 2016) at 100. Defense counsel disagreed and asserted that he did not think Fedoruk was competent and that he was concerned for Fedoruk's safety. The court explained that there was no purpose in bringing Fedoruk back to the courtroom and that "he wouldn't otherwise have any active participation in this process and would have no basis or opportunity to assist in his own defense in the course of accepting the verdict, in any event." RP (Sept. 30, 2016) at 100-101.

The jury found Fedoruk guilty of second degree murder. After the jury exited the courtroom, the court questioned counsel as to the next steps. Defense counsel stated, "[W]e're still questioning competency. I think sentencing is a critical proceeding. I'm asking that he be evaluated." RP (Sept. 30, 2016) at 106-107. The court responded:

> As kind of a recap, while Mr. Fedoruk was having difficulties over the course of the last couple days of the trial, it ultimately led to putting the leg shackles on him as kind of a last resort, and making sure the jury couldn't see those.
>
> Conduct that might have caused me to question his competency at all really didn't occur until we were reading jury instructions. At that point, I didn't have a

> basis to think that he was not competent. Based on his behavior subsequent, including his behavior overnight in the jail and given the need for him to be able to consult with his attorneys pending sentencing, I think we have enough information, at this point, to question competence.
>
> And I don't think it's in the Defendant's or the State's or the County's best interest to delay until another hearing starting that process. So, at this point in time I am going to order an evaluation to determine the Defendant's competence to continue to stand trial and to be sentenced.

RP (Sept. 30, 2016) at 107. Thereafter the court ordered that Fedoruk undergo a competency evaluation and entered a forced medication order.

During the week immediately following trial, a psychologist evaluated Fedoruk at the jail. The psychologist noted that he saw Fedoruk through his cell because he was too, "acutely impaired and mentally ill." CP at 381. The psychologist reported that Fedoruk had not slept and not taken medication. During the evaluation Fedoruk muttered with pressured speech and stated that he had seen Jesus. The psychologist concluded that Fedoruk was, "in an acute psychotic, agitated and confused state, and at that point not competent to proceed with his sentencing." CP at 381.

After another competency evaluation in January 2017, an evaluator stated that nothing impaired Fedoruk's capacity to consult with his attorney or his understanding and recommended that Fedoruk return to court for sentencing. The court then entered an order of competency and conducted a sentencing hearing. The court sentenced Fedoruk to 216 months of confinement. Fedoruk appeals.

ANALYSIS

Fedoruk argues that the trial court failed to order a competency evaluation when there was reason to doubt his competency. Fedoruk argues that he was not competent and could not

assist in his own defense and asserts that the trial court failed to consider his mental health history and failed to give deference to his counsel's concerns about his competence. Fedoruk also argues that the trial court applied the wrong standard in determining whether he needed to be evaluated for competency. We agree and hold that the trial court abused its discretion when it failed to order a competency evaluation.

I. COMPETENCY

A. *Legal Principles*

Criminal defendants have a constitutional right not to be tried while incompetent. *In re Fleming*, 142 Wn.2d 853, 861, 16 P.3d 610 (2001). RCW 10.77.050 codifies this right by preventing an incompetent person from being tried, convicted, or sentenced so long as the incapacity continues. A defendant is "incompetent" if he or she "lacks the capacity to understand the nature of the proceedings against him . . . or to assist in his . . . own defense as a result of mental disease or defect." RCW 10.77.010(15). The test for competency to stand trial has two parts: (1) whether the defendant understands the nature of the charges and (2) whether he is capable of assisting in his defense. *Fleming*, 142 Wn.2d at 861-62. The mere existence of a mental disorder or the existence of delusions does not prevent a defendant from being competent. *See State v. Smith*, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994).

The trial court is required to order a competency evaluation when there is reason to doubt a defendant's competency. RCW 10.77.060(1)(a). We differentiate the determination of a reason to doubt competency from an actual determination of competency. *City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). The court must make the threshold

determination that there is a reason to doubt competency before a hearing to determine competency is required. *Gordon*, 39 Wn. App. at 441.

We review a trial court's decision on whether to order a competency examination for an abuse of discretion. *Fleming*, 142 Wn.2d at 863. The trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Walker*, 185 Wn. App. 790, 800, 344 P.3d 227 (2015). Once the trial court makes a determination that a defendant is competent, it need not revisit competency unless "new information" exists that shows the defendant's mental condition has changed since being found competent to stand trial. *State v. Ortiz*, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

There are no fixed signs which require a competency hearing, but the factors the court may consider include, medical and psychiatric reports, personal and family history, defendant's appearance, demeanor, conduct, and past behavior. *Fleming*, 142 Wn.2d at 863. The trial court should also give considerable weight to the defense counsel's opinion regarding a defendant's competency. *State v. Harris*, 122 Wn. App. 498, 505, 94 P.3d 379 (2004).

Here, Fedoruk had been found competent to stand trial. Thus, our examination focuses on the signs that his mental condition had so changed since being found competent to stand trial so as to require another competency evaluation. *Ortiz*, 119 Wn.2d at 301. To do so, we examine the same factors the trial court considers when initially determining if it has reason to doubt a defendant's competency.

B. *Medical and Psychiatric Reports*

Fedoruk's medical and psychiatric reports showed that his mental illness spanned years. The reports also showed that Fedoruk had a history of rapid decompensation and medication

noncompliance. The trial court was aware of Fedoruk's lengthy medical history which detailed certain behaviors Fedoruk exhibited during psychotic breaks, such as screaming in another language, not being redirectable, and not making sense. Moreover, Fedoruk's medical reports contained information that Fedoruk's "inability to sleep was known to him as a precursor for a manic episode including paranoid delusions." CP at 88. Fedoruk's available psychiatric reports documented that Fedoruk experienced a manic episode after a period of not sleeping and not taking medication. Fedoruk was under a forced medication order and twice during trial Fedoruk brought the issue of his lack of sleep to the court's attention.

C. *Family History*

In 2002 Fedoruk's family reported him to the police on account of Fedoruk threatening them. After the threats, a doctor evaluated Fedoruk and prescribed him antipsychotic medication. Fedoruk's family again reported him to the police in 2010 and WSH then admitted Fedoruk for psychiatric treatment.

D. *Conduct and Demeanor*

Starting on the second to last day of trial, Fedoruk exhibited extreme behavior that was similar to behavior he displayed in past mental breakdowns. His behavior became increasingly questionable as the trial proceeded and Fedoruk eventually stopped responding to his attorney altogether.

Fedoruk began chanting and screaming in an unintelligible language and had to be physically restrained, in increasing fashion, for him to maintain composure. He slid out of his chair, collapsed onto the floor, screamed at a spectator, and referenced calling the FBI, all the while continuing to chant in a fake language. Fedoruk's sister stated that the type of behavior

Fedoruk displayed was the same type of behavior Fedoruk displayed before "losing it." RP (Sept. 29, 2016) at 53.

Additionally, immediately after trial, Fedoruk underwent an evaluation. The evaluating psychologist was unable to gain access to Fedoruk outside of his jail cell because Fedoruk was "acutely impaired and mentally ill." CP at 381. The psychologist deemed Fedoruk not competent to undergo sentencing.

E. *Counsel's Opinion*

At trial, defense counsel informed the court of his concern with Fedoruk's "mood" and competency multiple times toward the end of the trial. RP (Sept. 29, 2016) at 9. Defense counsel also expressed that he was concerned about Fedoruk's ability to assist in his defense. On September 29, defense counsel voiced his concern about Fedoruk's competence and stated that he had known Fedoruk for two years and was worried about his behavior. Counsel reported that Fedoruk was, "chanting stuff that is some indecipherable Russian." RP (Sept. 29, 2016) at 16. Later that same day, after Fedoruk slid off the chair in the courtroom and began singing in an unintelligible language, counsel again told the court about his concerns and stated that Fedoruk was not competent and that he could not be "redirect[ed]." RP (Sept. 29, 2016) at 54.

Although each of the four factors above may not individually have required the court to order a competency evaluation, taken together, a combination of the above factors create reason to doubt Fedoruk's competency. *Fleming*, 142 Wn.2d at 863. In light of Fedoruk's mental health history, his family history, his conduct at trial, his counsel's opinion and other information properly before the court, it is clear that Fedoruk showed signs of mounting decompensation enough to create doubt as to his competency.

F. *Trial Court Did Not Consider Correct Factors*

In evaluating the need for a competency evaluation, the trial court must consider (1) whether the defendant understands the nature of the charges and (2) whether he is capable of assisting in his defense. *Fleming*, 142 Wn.2d at 861-62. As noted above, in evaluating the need for a competency evaluation, the trial court may consider the statements of counsel, medical and psychiatric reports, personal and family history, defendant's appearance, demeanor, conduct, and past behavior. *Fleming*, 142 Wn.2d at 863.

Here, as Fedoruk's behavior deteriorated, and despite Fedoruk's mental health history, the trial court failed to consider whether Fedoruk was competent. Instead, the trial court focused on whether Fedoruk had waived his presence at trial due to his disruptive behavior. Multiple times throughout trial, the court warned Fedoruk that he needed to maintain his composure to remain in the courtroom. After Fedoruk first started chanting in an indecipherable language the court placed him in restraints, opining that Fedoruk was not having competency issues but was "emotionally" upset. RP (Sept. 29, 2016) at 17. The court also stated that Fedoruk's presence in the courtroom was contingent on his behavior. The court additionally gauged Fedoruk's behavior by whether he was "calm" rather than whether he was exhibiting signs of mental decompensation. RP (Sept. 29, 2016) at 17. Also, after Fedoruk's removal from the courtroom, the court expressly stated that it was unclear as to whether Fedoruk won't "*or can't*" control his behavior. RP (Sept. 29, 2016) at 55 (emphasis added). Rather than address any competency concerns based on that uncertainty, the court decided that it would continue to check on Fedoruk to see if his behavior stabilized such that he would not disrupt the remainder of his trial.

It is apparent that the trial court reviewed Fedoruk's behavior under the standard for determining whether Fedoruk waived his right to be present at trial rather than analyzing whether a competency evaluation was necessary. Because there were clear signs that Fedoruk's mental condition had significantly deteriorated since being found competent to stand trial, and because the trial court applied the wrong standard in evaluating Fedoruk's behavior, the court abused its discretion when it failed to order a competency evaluation during trial.

Because the trial court failed to order a competency evaluation when there was reason to doubt Fedoruk's competency and because the court applied the wrong standard to assess Fedoruk's behavior, the trial court abused its discretion.

We reverse and remand to the trial court for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Bjorgen, J.

Sutton, J.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	
	)	No. 49975-4-II
Plaintiff	)	
	)	ANSWER TO
vs.	)	MOTION TO PUBLISH
	)	
SERGEY V. FEDORUK,	)	
	)	
Defendant	)	

I. Identity of Moving Party

The State of Washington, by and through the Cowlitz County Prosecutor's Office, seeks relief.

II. Statement of Relief Sought

The State is responding to this court's order of July 18, 2018, requesting response to appellant Fedoruk's motion to publish the opinion herein. The State opposes publication.

III. Facts Relevant to Motion

For the purposes of this motion, which concerns whether the case merits publication, the facts as set out in the opinion are the most germane. The opinion is on file herein, and the "facts" section is three-quarters of it. The facts section is a comprehensive list of Fedoruk's disruptive behavior both during and prior to this case, and includes:

Five pages of accounts of Fedoruk's previous history, including inconsistent prior diagnoses (bipolar, 2; schizoaffective disorder, 3), prior criminal charges, prior civil commitments, and behavior like licking water

from the floor (2), refusing his medications while in jail (3), insomnia (3), and starting fights (5).

Ten pages of examination of Fedoruk's behavior at trial and sentencing, which became more disruptive the closer the case approached to its guilty verdict – behavior that included repeated attempts not to have to show up while it was going on (e.g., 7); outbursts in court accusing the witnesses against him of lying (id.); making loud noises in the hall outside the courtroom (10) and weeping inside it (11); verbal disruption of the reading of the jury instructions (12) that included chanting, praying, and singing in languages both real and imaginary (13).

This court then weighed all these facts in determining whether the trial court should have decided to revisit Fedoruk's competency late in the trial. (18).

IV. Grounds for Relief and Argument:

This court determines whether to publish by deciding whether an opinion has "precedential value." RCW 2.06.040. This division guides us further: In determining whether a case has sufficient precedential value to justify publication we are considering the following criteria:

Opinions of the Court of Appeals Should be Published:
(1) Where the decision determines an unsettled or new question of law or constitutional principle.
(2) Where the decision modifies, clarifies or reverses an established principle of law.
(3) Where the decision is of general public interest or importance.
(4) Where the case is in conflict with a prior opinion of the Court of Appeals.
(5) Where the decision is not unanimous.

State v. Fitzpatrick, 5 Wash. App. 661, 668-69, 491 P.2d 262, 267 (1971).

The State does not suggest this case conflicts with prior appellate opinions or that this decision was less than unanimous, but the first three factors have something to tell us about the importance of publication, so the State addresses them in turn.

(1) *Does the decision determine an unsettled or new question of law or constitutional principle*?

This court does not purport to determine a new or unsettled question of law, merely citing State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d

1060 (1992), and applying an abuse of discretion standard. Opinion, 18. Nor does the application of the law to these very specific facts settle any general category of new questions; see argument infra at (3), regarding the public interest in wide dissemination of this case.

(2) *Does the decision modify, clarify or reverse an established principle of law?*

Fedoruk appears to argue that the opinion herein clarifies an established principle of law; but, if anything, it simply illustrates how unclear some principles can be. The court spent three-quarters of its opinion, at least 15 pages out of 22, deeply examining nearly ten years of the defendant's history of litigation through several criminal and civil cases. It used as a basis the five-factor framework derived from In re Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001), but only after acknowledging that this framework is not "fixed" or mandatory. 18. Thus, the only clarity offered is an admittedly ad hoc framework that was used due to its helpfulness in this particular case, and which the opinion does not propound as a useful general measure, much less as a mandatory test.

(3) *Is the decision of general public interest or importance?*

Interest in the case itself and defendant Fedoruk appears to be confined to Cowlitz County. Interest in the issue of when to commence a second competency hearing appears to be almost as small. Both parties had the opportunity to look for cases in which the question came up, and the 1992 Ortiz case, *supra,* is the only relevant case cited. An issue that comes up once every 25 years does not appear to warrant publication on the grounds of importance.

Additionally, the State suggests that this case does not address a major issue of public importance because it was decided on particular facts that limit its application. This court used, as a major component of its reasoning, the fact that the trial court, as this court interprets its words, explicitly failed to exercise its discretion. This court, at 12-13, cited to the record at RP (Sept. 29, 2016) at 54-55, where the trial court said, "Mr. Fedoruk has demonstrated that at this point he's either won't or can't, and I don't say that in any pejorative fashion I just don't know which, maintain his composure..." and stated again that the defendant either "can or can't" control his behavior. RP (Sept. 29, 2016) at 55.

It is the State's position that the trial court's actual motive is best ascertained by the trial court's actions than its statements in court

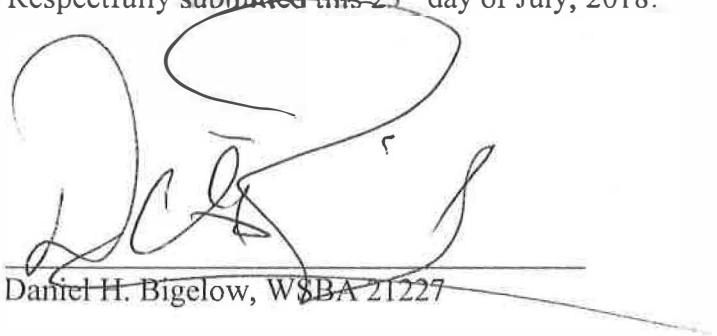
immediately after the defendant had to be dragged, "yelling," out of the courtroom. Opinion, 13. The State maintains its position that the court's failure to reopen the issue of competency can only be because the court believed the defendant remained competent. But insofar as this court relies on the court's statements rather than its actions, this case sets precedent a very limited number of factual situations.

This court's ruling takes the trial court at its literal word and uses the trial judge's "won't or can't" language as the lynchpin of its ruling. RP 21 (this court even adds emphasis on "can't.") That means this ruling applies only where the trial court explicitly acknowledges an issue exists and then refuses to exercise its discretion to settle the issue. It is already well settled that a court abuses its discretion by failing to exercise it when it is called for. E.g., State v. O'Dell, 183 Wash. 2d 680, 697, 358 P.3d 359, 367 (2015) ("...failure to exercise discretion is itself an abuse of discretion subject to reversal"), citing State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The application of that standard to this intricate and unique set of facts gives no new general guidance to the bar, and thus gives minimal service to any interest the public may have.

V. Conclusion

In this case's opinion, this court applies a simple and well-settled standard to a complex and unique set of facts. The standard, abuse of discretion, bears no repeating, and the fact pattern is unlikely to recur. Therefore, publication serves no useful purpose.

Respectfully ~~submitted this~~ 23rd day of July, 2018.



Daniel H. Bigelow, WSBA 21227

LAW OFFICE OF HARRY WILLIAMS LLC

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