

64536-6

64536-6

NO. 64536-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LEEMAH CARNEH,

Appellant.

2011 MAR 20 4 10 PM '09
COURT OF APPEALS
CLERK

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The decision whether to call a particular witness is presumed to be a matter of trial tactics and generally cannot support a claim of ineffective assistance of counsel. At the 2009 contested competency hearing, defendant Leemah Carneh's attorneys presented the testimony of a psychiatrist and a psychologist, both of whom had extensive experience with Carneh. Based upon testimony from these same witnesses at an earlier hearing in 2008, the trial court had found that Carneh was not competent. Has Carneh failed to show that it was unreasonable for his attorneys to make the strategic decision to rely upon these experts and not attempt to call one of his attorneys as a witness?

2. Carneh's attorneys' observations about his mental illness consisted of the same information described by Carneh's mental health experts at the competency hearing. Has Carneh failed to show that he was prejudiced by his attorneys' strategic decision to rely upon his expert witnesses at the competency hearing?

3. Under the doctrine of invited error, a party may not set up an error at trial and then claim on appeal that the trial court erred on that basis. At the time of his guilty plea, Carneh's attorneys represented that Carneh's mental condition had not changed in any

significant degree since the trial court had found him competent. At the hearing, they told the court that they were not requesting a new competency evaluation. Has Carneh waived any claim that the trial court should have reconsidered its competency decision at the plea hearing?

4. When a competency hearing has been held and the defendant has been found competent to stand trial, the trial court need not conduct another competency hearing unless it is presented with a substantial change of circumstances or new evidence casting a serious doubt on the validity of the competency finding. When Carneh entered his guilty plea, his attorneys represented that Carneh's mental condition had not changed in any significant degree since the court found him competent. Has Carneh failed to establish that the trial court should have reconsidered its competency decision?

B. STATEMENT OF THE CASE

1. THE CRIME AND INITIAL PROCEEDINGS.

In March of 2001, Carneh murdered Richard and Leola Larson, their 17-year-old grandson Taelor Marks, and his girlfriend Josie Peterson. CP 4, 197. Carneh shot the Larsons at near

point-blank range in the back of their heads. CP 4. He shot Marks once in the back, stabbed him multiple times in the neck and caused blunt force trauma to his head. Id. Carneh stabbed Peterson multiple times in her neck and caused blunt force trauma to her head. Id.

Carneh stole items from the Larsons' home, including Marks' car. CP 5. The police arrested Carneh after discovering that he had sold Marks' car after the murders. CP 5. During a search of Carneh's residence, the police discovered items taken from the Larsons' home, including some with Peterson's blood on them. CP 5-6.

On March 15, 2001, the State charged Carneh with four counts of aggravated murder in the first degree. CP 8. For the next eight and one-half years, Carneh was represented by defense attorneys Louis Frantz and Carl Luer.¹ CP 170, 176.

Carneh is a paranoid schizophrenic and suffers from delusions. CP 405. While criminal charges were pending, Carneh was repeatedly sent to Western State Hospital (WSH) to be evaluated for his competency to stand trial. CP 404-16. Early on,

¹ A third attorney, Edwin Aralica, was later added to the defense team in September of 2008. CP 108. At the 2009 competency hearing, all three attorneys represented Carneh.

Carneh's attorneys retained two mental health experts: psychiatrist George Woods and psychologist Dale Watson. CP 372.

At times, all of the mental health professionals involved, WSH doctors and Carneh's experts, agreed that he was competent; at other times, they all agreed that he was not competent. CP 405-06. The experts generally agreed that Carneh was able to understand the proceedings against him; when there was a contested issue, it was whether he was able to rationally assist his attorneys. CP 405.

In September of 2001, the trial court found that Carneh was not competent to proceed and committed him to WSH for competency restoration. CP 405. At the end of this commitment, WSH doctors and one of Carneh's experts, psychiatrist George Woods, agreed that he was competent. CP 405. Carneh's other expert, psychologist Dale Watson, believed that the issue was a close call. CP 405-06. In February of 2002, the court found Carneh competent. CP 405.

However, by May of 2002, Carneh's attorneys informed the court that his mental status had deteriorated, and requested that he be returned to WSH for a competency evaluation. CP 424-28. Carneh's attorneys acknowledged that his condition had

significantly improved while on risperidone, an antipsychotic medication, but said that his delusions were returning and had become more prominent. Id. After another 90-day commitment, it was undisputed that Carneh was competent to stand trial, and the trial court entered an agreed order finding him competent in September of 2002. CP 406, 429-30.

Over the next year and a half while in King County Jail, Carneh discontinued his medication and decompensated. 2008 Ex. 9.² In May of 2004, WSH doctors opined that he was no longer competent to stand trial. Id. After commitments to WSH for competency restoration for two 90-day periods and one 6-month period, the parties contested whether Carneh was competent to stand trial. CP 253-54, 406. In October of 2005, Judge Michael Spearman found that Carneh was incapable of rationally assisting his attorneys in the presentation of his defense and thus not competent, and he dismissed the criminal charges. CP 415-16. In the ruling, Judge Spearman stated that there was reason to believe

² The State has designated exhibits from both of the contested competency hearings held in King County Cause # 07-1-11071-9. The first hearing occurred in October of 2008 and the second hearing occurred in July of 2009. Because the numbering of the exhibits overlaps, the year of the hearing is identified.

that Carneh's competency could be restored in the future if he continued on his medication. CP 415-16.

2. THE RE-FILING OF CHARGES IN 2007.

Carneh was civilly committed to WSH. CP 230. In October of 2007, WSH gave notice that Carneh was ready to be transferred to a ward where he might be allowed on unsecured grounds. CP 8. The notice further stated that WSH could not offer any opinion about Carneh's competency unless ordered by a court. CP 9.

In November of 2007, the State re-filed the murder charges against Carneh, and he was transferred from WSH to the King County Jail. CP 1-3; 2009 Ex. 33 at 5. The trial court ordered a new competency evaluation. CP 221-23. The case was pre-assigned to Judge Palmer Robinson. CP 431.

In a report dated January 14, 2008, WSH psychologist Julie Gallagher and psychiatrist Margaret Dean opined that Carneh was not competent to stand trial. 2009 Ex. 33. The State moved to have Carneh committed for competency restoration, and Carneh stipulated that there was "medically appropriate treatment available to doctors at WSH that is reasonably likely to restore [Carneh's] competency within a reasonable period of time." CP 23, 225-39.

However, Carneh asked the trial court to dismiss the murder charges, claiming that the court lacked jurisdiction over him. CP 251-62. The trial court denied his motion and ordered Carneh committed for competency restoration.³ CP 22-25, 242-44.

From this point, WSH psychologist Ray Hendrickson served as the forensic evaluator and WSH psychiatrist Glenn Morrison acted as Carneh's treating psychiatrist. 1RP 4-8; 5RP 6-9; 2008 Ex. 3.⁴ In May of 2008, Dr. Hendrickson opined that Carneh was not currently competent. Dr. Hendrickson reported that Carneh appeared to understand the nature of the charges and court procedures, but due to his delusions, it was unlikely that he had the ability to consult with his attorney with a reasonable degree of rational understanding. 2008 Ex. 3 at 12. Dr. Hendrickson noted that Carneh had demonstrated some modest improvement while at WSH, that he was receiving a low dose of antipsychotic medication, and that, if Carneh returned to WSH, the plan would be to slowly increase the dosage. Id. at 12-13.

³ Carneh sought discretionary review of this order. CP 29-30. This Court granted review, rejected Carneh's claims, and held that the trial court had jurisdiction over the re-filed charges. State v. Carneh, 149 Wn. App. 402, 203 P.3d 1073 (2009).

⁴ The State adopts the abbreviations for the report of proceedings used by Carneh.

The court ordered further commitment for competency restoration. CP 303-04. In August of 2008, WSH doctors reported that Carneh had exhibited substantial and significant improvement and opined that he was competent to stand trial. CP 304; 2009 Ex. 2. A hearing was delayed for several months while Carneh's attorneys arranged to have his experts, Dr. Watson and Dr. Woods, conduct competency evaluations. CP 272-73, 304-05. In the meantime, Carneh's mental condition deteriorated while he was held in the King County Jail. CP 304-05.

In October of 2008, the court held an eight-day contested competency hearing.⁵ CP 279-90. After hearing testimony from Dr. Hendrickson, Dr. Morrison, Dr. Woods and Dr. Watson, the court found that Carneh was not competent and committed him for further competency restoration. CP 302-09. In its order, the court noted that Carneh's expert, Dr. Woods, agreed that "there is medically appropriate treatment available to the doctors at WSH that is reasonably likely to restore the defendant's competency and there is a substantial probability that the defendant will regain competency within a reasonable period of time." CP 306.

⁵ Carneh incorrectly states that this hearing occurred in September 2008 and lasted three days. Brief of Appellant at 1.

While at WSH, Carneh received intramuscular injections of risperidone every ten days. CP 331. In January of 2009, WSH increased Carneh's dosage of the medication. 5RP 12.

In early March of 2009, WSH doctors proposed that Carneh receive individual psychotherapy and a neuropsychological assessment. CP 64, 76. Carneh's attorneys insisted that they be present during any assessment or psychotherapy. CP 77. WSH objected and submitted declarations from the lead program psychologist and the staff neuropsychologist explaining that the presence of third parties would impair their ability to perform the therapy and testing. Supp. CP ____ (Sub No. 63A).⁶ On May 19, 2009, the court ordered that Carneh was not entitled to have his attorneys present for psychotherapy, although he had a right to their presence during the neuropsychological assessment. CP 320-21. Ultimately, psychotherapy was not attempted because of the passage of time and the short period remaining before the final competency hearing. CP 130.

⁶ WSH was represented by the Attorney General on this issue. In his opening brief, Carneh asserts that the Attorney General "lacked standing to intervene." Brief of Appellant at 11. In fact, the trial court rejected Carneh's challenge to standing. CP 316.

As the end of the six-month period approached, Carneh's attorneys arranged to have their expert, Dr. Watson, sit in on the last evaluation conducted by the WSH doctors. 2009 Ex. 34 at 1.

In June of 2009, after Carneh had been at WSH for five and one-half months, psychiatrist Morrison and psychologist Hendrickson reported to the court that Carneh was competent to proceed to trial. CP 329-43. In his written report to the court, Dr. Hendrickson explained:

[Carneh] engaged in numerous dialogues with his attorneys, and asked relevant and thoughtful questions. He demonstrated as he has in the past an understanding of the charges and court procedures he faces. He exhibited an understanding of the amount of evidence against him, and the problems he and his attorneys have in trying to persuasively argue for his innocence....

He on numerous occasions during the three extensive interviews during this hospitalization period was able to formulate relevant questions for his attorneys based upon evidentiary or legal matters that were being discussed. He addressed in a rational manner the evidence relevant to the crimes with which he is charged, and exhibited frequent interaction with his attorneys....

He addressed appropriate questions to his attorneys regarding possibilities for him relating to proceeding to trial, being found incompetent and civilly committed, and if he were found NGRI and committed to the hospital....

... I conclude that Mr. Carneh currently possesses both a factual and a rational understanding of the charges and court proceedings he faces. He exhibits the capacity to communicate with his attorneys with a reasonable degree of rational understanding. He has beyond that *capacity*, demonstrated *actual* communicating skills, awareness and understanding when discussing with his attorneys matters that are relevant to his defenses and defense strategies.

CP 342-43 (emphasis in original).

Carneh's attorneys disagreed that he was competent. Their experts conducted separate evaluations of Carneh. 2009 Ex. 30 and 34.

3. THE JULY 2009 COMPETENCY HEARING.

In July of 2009, Judge Robinson presided over a seven-day contested competency hearing. Once again, Dr. Hendrickson, Dr. Morrison, Dr. Watson and Dr. Woods testified.

Dr. Hendrickson testified that over time, Carneh's delusions had become less intrusive and pervasive. 1RP 33. In the last mental status evaluation, Carneh seldom became sidetracked by his delusional beliefs. 2RP 141. Dr. Hendrickson theorized that the medication, combined with supportive therapy on the hospital ward, contributed to Carneh's improved condition. 2RP 149-50.

Carneh could talk about the charges, the role of the parties, the pleas available to him, and the legal criteria for competency. 1RP 36, 43-45, 59. Carneh was able to discuss the evidence against him and acknowledged that it was overwhelming. 1RP 45-53; 2RP 164-73. During one interview, he coherently discussed with his attorneys the difference between dismissal with prejudice and dismissal without prejudice. 2RP 183. Carneh stated that his objective was to be found not competent, have his criminal case dismissed with prejudice and be civilly committed. 1RP 60.

In the past, Carneh had claimed that the evidence against him had been fabricated due to his heritage and religion. 1RP 49-50. However, more recently, when he discussed the victims' luggage found in his attic, Carneh explained that he had denied possessing the luggage because he did not "feel comfortable admitting to murder." 2RP 192. He further admitted that he had denied that he had a victim's car because he was facing life imprisonment if he admitted to the murder. 2RP 192-93.

Carneh had previously expressed a belief that he would be released even if convicted. 1RP 64. Now Carneh acknowledged that if he were found guilty he would go to prison for life without the possibility of parole. 1RP 64.

Dr. Hendrickson explained that Carneh would never be completely free of delusions and explained:

[L]et me make it very clear that someone who has a delusional belief, for example as a part of their schizophrenia diagnosis is most likely going to continue to have some delusional beliefs. It's often said in the treatment of schizophrenia that the last thing to treat, to abate is a person's delusional belief, they're most difficult to treat, I think that's unquestionable. Having said that, however, what you do find is that the delusional beliefs become less apparent, less intrusive, less interfering with their ability to think in a rational manner and to look at facts and evidence in a manner which is reasonable or rational.

1RP 37-38.⁷

Dr. Hendrickson concluded that "[Carneh] hasn't abandoned delusions and in fact he articulates delusions which I think we all agree are not normal beliefs about some things like the hypnosis, empathy words and so forth but they don't impact his ability to have a rational understanding of the procedures and to be able to communicate with a rational understanding with his attorneys."

1RP 82; see also 2RP 175.

Dr. Morrison confirmed that, as of May 2009, Carneh was able to stay on topic during a lengthy interview, could put delusional

⁷ In the past, Carneh's expert, Dr. Dale Watson, had opined that Carneh was competent though he continued to express delusions about the evidence in the case. 4RP 182-83.

material aside, and could remain engaged in a reality-oriented conversation for a significant period of time. 5RP 82-84. When Carneh launched into a discussion of delusional material, he could be redirected. 5RP 85. Dr. Morrison observed that Carneh was able to have a rational conversation with his attorneys about the evidence, and that Carneh expressed confidence that they were working on his behalf. 5RP 73-77, 87-88.

Dr. Morrison explained: "The thought disorder is always there, but the degree to which it interferes is different at different points in time and the degree to which it causes a disability in a person has something to do with the environment that the person is in as well as the medication they are taking, the therapeutic relationship with their treatment providers and such...." 5RP 191.

At the hearing, Carneh's expert, psychologist Dale Watson, testified that he had attended the WSH competency evaluation on June 4, 2009, and acknowledged that Carneh "seemed to be approaching competency at that point, he was much better able to deal with the actual evidence, [and] he gave a rational account of the criminal behavior...." 4RP 41. "There were things that made me think he's probably not quite there, but there were other things that really supported him being competent." 4RP 41.

During Dr. Watson's interview on June 4, 2009, Carneh admitted to committing the murders and stated that he did it for money. 4RP 74. He gave a detailed description of how he committed the murders. 4RP 193-205. He indicated that he expected to be found guilty. 4RP 208.

Dr. Watson admitted that during one of his last meetings, Carneh "certainly demonstrated the ability to rationally assist counsel in this interview." 4RP 219. While Carneh still claimed to hear voices, Carneh acknowledged that there was a realistic possibility that what the voices were saying was not going to happen. 4RP 219-20.

Psychiatrist George Woods testified that Carneh was not competent to stand trial. 3RP 71. Dr. Woods acknowledged that most schizophrenics are competent to stand trial; in 2002, he thought Carneh was competent, even though he was delusional. 3RP 13, 23, 73-76; 4RP 104. He agreed that Carneh had the ability to look at a series of options and reason through them in a structured setting. 3RP 80. He further believed that Carneh had the capacity and ability to keep his delusions under greater control. 3RP 89. However, he opined that Carneh's continued delusions impaired his ability to rationally assist his attorneys. 3RP 69-71.

During the course of the hearing, attorney Frantz filed a declaration with the court recounting statements Carneh made to him during the hearing. CP 344-45.

After hearing testimony for six days, the trial court found that Carneh was competent to proceed to trial. 6RP 152-57. The trial court subsequently entered the following written findings:

1. Mr. Carneh suffers from paranoid schizophrenia. He continues to exhibit symptoms of psychosis including delusional beliefs.
2. Despite these symptoms, all the mental health experts who have evaluated Mr. Carneh agree th[at] he has a factual understanding of the nature of the proceedings against him.
3. Doctors at WSH have treated Mr. Carneh's symptoms with long acting injections of Risperidone. While this treatment has not brought all of Mr. Carneh's symptoms of his mental illness into remission, there has been a steady improvement in his symptoms over time resulting in at least a partial remission of Mr. Carneh's symptoms.
4. Because of the partial remission of Mr. Carneh's symptoms his understanding of his case and his ability to discuss his case is no longer framed by nor controlled by his psychotic symptoms of his mental illness.
5. Despite the remaining symptoms of Mr. Carneh's mental illness, he has demonstrated that he has the ability to rationally assist his counsel in his defense. He has demonstrated that he has a rational understanding of the evidence in this case and can suggest rational ways to confront that evidence.

Mr. Carneh has demonstrated that he can understand the state's theory of the case and rationally discuss trial strategies with his counsel. Mr. Carneh has demonstrated that he can accurately and factually relate information to his counsel about the crimes with which he is charged and that he can rationally understand likely outcomes based upon that information and possible plea options based upon that information.

CP 141.

4. CARNEH'S GUILTY PLEA.

After the court found Carneh competent, the State moved for an order allowing him to be transported to WSH for medical reviews in order to maintain his competency to stand trial. CP 432-42. The State noted that Carneh had previously decompensated while at the King County Jail and that WSH doctors were in the best position to monitor whether the dosage of antipsychotic medication was appropriate. Id. Over Carneh's attorneys' objections, the trial court ordered Carneh to be transported to WSH once every two weeks.⁸ CP 131-39, 142-43.

On August 28, 2009, Carneh waived his right to a jury trial. CP 146; 7RP 30, 67-70. At the omnibus hearing in October of

⁸ Carneh unsuccessfully sought discretionary review of this ruling. CP 211-20.

2009, he indicated to his attorneys that he wished to plead guilty as charged. CP 170.

Prior to the entry of the plea on November 17, 2009, the State submitted a declaration from WSH psychiatrist William Richie, who had conducted the medical reviews of Carneh since the competency finding. CP 360. Dr. Richie indicated that Carneh had been appropriately metabolizing the antipsychotic medication and that Carneh's psychological functioning was unchanged or improved since July of 2009. CP 361. Dr. Richie further represented that "Carneh has not manifested any medical or psychological functional decline which would cause me to call into question the court's competency determination." Id.

Carneh's attorneys also submitted declarations to the court, stating that they disagreed with the court's competency decision, that they were unwilling to represent to the court that Carneh's plea was competently made, and that Carneh's condition had not changed since the court's competency ruling in July of 2009. CP 170-78.

Attorney Frantz's declaration stated, in part, as follows:

In July, 2009 the court found Mr. Carneh competent to stand trial. Despite the court's ruling I continue to

believe that Mr. Carneh is not competent to stand trial.

In recent conversations with Mr. Carneh he has expressed the desire to plead guilty. Given the court's ruling, and my obligations as defense counsel, I am required to assist my client in entering a plea of guilty should he decide to enter that plea. However, I cannot represent that I believe my client is making a knowing, intelligent and voluntary decision.

I do not believe that Mr. Carneh's condition has changed in any significant degree since the competency hearing.

CP 176-77. Frantz proceeded to discuss some of the various delusions that Carneh had expressed, and asserted that "[t]he delusions that were detailed by defense witnesses, and largely ignored by the state's witnesses, are still prominent." CP 177-78.

Similarly, attorney Luer represented to the court:

Given the court's ruling on competency, and my obligations as defense counsel, I am required to assist Mr. Carneh in entering a plea of guilty should he decide to enter that plea. However, I cannot represent to the court that I believe Mr. Carneh is making a knowing, intelligent and voluntary decision.

I do not believe that Mr. Carneh's condition has changed to any significant degree since the court found him competent.

CP 171. After describing some of Carneh's delusional thoughts,

Luer concluded:

The delusions, auditory hallucinations and other psychotic symptoms described here were, for the most part, all present at the time of the most recent contested competency hearing. While Mr. Carneh has endorsed some new delusional material, it appears to be a variation on past themes and appears to impair his reasoning and influences his decision making to approximately the same degree as it did when the court found him competent. It does not appear to me that Mr. Carneh's mental condition as it relates to competence to stand trial or plead guilty has changed to an appreciable degree since that hearing.

CP 173.⁹

At the plea hearing on November 17, 2009, Judge Robinson indicated that she had reviewed and considered the attorneys' declarations. 7RP 76, 87. The prosecutor conducted a lengthy colloquy with Carneh and asked the court to accept his plea of guilty. 7RP 76-85. Defense counsel Frantz responded:

I have indicated in my affidavit I don't believe this plea is knowing, intelligent and voluntary. I don't believe that is the case because I believe he is still incompetent, Your Honor. I don't believe that the circumstances of his mental condition has changed to a significant degree. While there are minor differences, newer delusions, I think his condition remains roughly the same. We are not requesting a new evaluation at this point, Your Honor, but as I indicated in the hearing in July, he was not competent then, it is my position he remains incompetent.

⁹ Attorney Aralica also filed a short declaration in which he recounted his opinion that the court erred in finding Carneh competent, described a few of Carneh's delusions and concluded that he could not represent that Carneh's guilty plea would be knowing, intelligent and voluntary. CP 174-75.

7RP 86-87. Defense attorney Luer also represented that he did not think Carneh was competent, but acknowledged, "I don't think Mr. Carneh's condition has deteriorated in any significant degree since the court found him competent several months ago." 7RP 87.

Judge Robinson responded, "As I indicated earlier I had read the declarations of Mssrs. Aralica, Luer and Frantz and considered them this morning while clearly I accepted their representations and opinions are made in good faith. They are candid in acknowledging that this is the opinions that they had in July and that there is not anything material and different now." 7RP 87. The court accepted Carneh's plea, finding that he was competent to enter the plea and that it was made knowingly, intelligently and voluntarily. 7RP 88. The trial court then imposed life sentences on the four counts of aggravated murder in the first degree. 7RP 113.

The court subsequently entered the following findings:

2. While counsel for Mr. Carneh continue to disagree with this court's competency finding, they represent that there are no new reasons that would call into question the defendant's competency to stand trial beyond what this court already heard and considered in making its competency finding.
3. This court ordered that Mr. Carneh submit to periodic medical reviews at WSH for the purpose of maintaining his competency to stand trial. Dr. William

Richie at WSH conducted those reviews. These periodic medical reviews have had their intended effect. Mr. Carneh has remained appropriately medicated. His medical, psychological and behavior status has maintained or improved since this court found him competent to stand trial. These medical reviews have not raised any new question regarding the defendant's competency to stand trial and confirm the court's finding that Mr. Carneh is competent to stand trial.

4. During the plea colloquy, Mr. Carneh demonstrated that he understood the essential elements of the charges against him, and he admitted to sufficient facts to support his pleas. During the plea colloquy, Mr. Carneh also demonstrated that he understood the rights that he waived by pleading guilty. Mr. Carneh demonstrated that he has a rational and factual understanding of the consequences of his pleas, including but not limited to, the fact that he will be sentenced to life in prison without the possibility of release, that nothing will intervene to change this sentence, and as a result he will die in prison.

CP 209-10.

This appeal follows.

C. ARGUMENT

On appeal, Carneh makes two related arguments that indirectly challenge the trial court's July 2009 competency decision. He claims that (1) prior to accepting his guilty plea, the trial court failed to consider the declarations filed by his attorneys, and (2) his

attorneys provided ineffective assistance of counsel at the 2009 competency hearing by not offering their personal opinions about his competency. The State addresses these claims in the order in which they allegedly occurred.

**1. CARNEH HAS FAILED TO ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL.**

Carneh claims that his attorneys provided ineffective assistance of counsel because they did not offer their personal opinions and observations about Carneh at the 2009 competency hearing. This claim is without merit. The decision whether to call a particular witness or present certain evidence is a matter of trial tactics and generally cannot support a claim of ineffective assistance of counsel. It was not unreasonable for Carneh's attorneys to rely upon the testimony of their two experts, both of whom had extensive experience with Carneh. Based upon testimony from these experts at the 2008 hearing, the same trial judge had found that Carneh was not competent. Carneh has not shown that his attorneys made an unreasonable strategic decision. In addition, Carneh has failed to establish prejudice. The court heard extensive testimony about Carneh's mental illness, and he

has not identified what materially new information his attorneys would have provided.

To prevail on a claim of ineffective assistance of counsel, Carneh must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

a. Carneh Has Not Shown That His Attorneys Acted Deficiently.

The appellate court engages in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. "Competency of counsel is determined based upon the entire record below." Id. The United States Supreme Court has recently

emphasized that the burden on a defendant in establishing deficient performance is great:

The standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." [Citation omitted]. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011).

A claim of deficient performance cannot be based on matters of legitimate trial strategy or tactics. State v. Grier, ___ Wn.2d ___, 246 P.3d 1260, 1268-69 (2011). The decision whether to call a particular witness or present certain evidence is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics. In re Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996).

Carneh has failed to meet his heavy burden of showing that his attorneys' decisions as to what evidence and testimony to

present at the competency hearing were unreasonable. By 2009, his attorneys had represented him for eight years and had considerable experience with competency issues. They had retained two mental health experts, Dr. Woods and Dr. Watson, who had evaluated Carneh since 2001. The attorneys had represented Carneh in several contested competency hearings and successfully persuaded two different trial judges that Carneh was not competent. Most recently, they had prevailed at the 2008 contested competency hearing, where, after hearing testimony from the same witnesses, Judge Robinson had found that Carneh was not competent.

Prior to the 2009 hearing, the attorneys arranged for one of their experts, Dr. Watson, to observe the June 2009 forensic competency evaluation conducted by WSH doctors, and Dr. Watson then provided a critique of the WSH doctors' evaluation. 2009 Ex. 34. Carneh's attorneys cross-examined the WSH doctors at great length, over several days.¹⁰ The attorneys also arranged for their experts to evaluate Carneh again, shortly before the

¹⁰ Cross-examination of Dr Hendrickson lasted one and one-half days, and cross-examination of Dr. Morrison took a day. 1RP 84-195; 2RP 2-216; 5RP 94-193; 6RP 2-78.

competency hearing. 2009 Ex. 30 and 34. At the competency hearing, they introduced their experts' reports about Carneh's mental condition, and presented lengthy testimony from their experts. 3RP 2-71; 4RP 2-104.

On appeal, Carneh does not articulate in any detail what his attorneys' opinion testimony would have added to the evidence presented. He has not shown that it was an unreasonable strategic decision for his attorneys to rely upon the experts' testimony at the 2009 competency hearing.

Carneh fails to cite a *single* case where a court found that defense counsel acted deficiently by not offering as evidence his or her personal opinion as part of a contested competency hearing. Instead, he cites one case, Hull v. Kyler, 190 F.3d 88, 112 (3rd Cir. 1999), where the defense attorney failed to contest competency, and several law review articles. An examination of these cited authorities reveals that they do not support the ineffective assistance claim.

In Hull, shortly after being charged with murder, Hull was found not competent to stand trial. 190 F.3d at 106. Over the next several years, numerous mental health experts opined that he was incompetent. Id. at 106-07. At the competency hearing at issue,

the Commonwealth presented one expert witness, and Hull's counsel did not cross-examine the witness and did not call any witnesses to testify on Hull's behalf. Id. at 106-10. The entire hearing took one hour. Id. at 108. At the time of this hearing, Hull's counsel was aware that two other psychiatrists had recently diagnosed Hull to be incompetent. Id. Not surprisingly, the Third Circuit found that the failure to contest competency was deficient performance. Id. at 106-08.

While the Third Circuit referred to a "special role" that defense counsel has to ensure his or her client is competent to stand trial, it was in reference to the fact that Hull's counsel had utterly failed to contest competency despite being aware of evidence that Hull was not competent. The court never suggested that counsel's deficiency was his failure to offer evidence of his personal opinion of Hull's competency.¹¹ Instead, the court held that Hull was "prejudiced by his counsel's failure to 'express[] doubt' regarding his competency by cross-examining the

¹¹ In fact, the Third Circuit would apparently give slight weight to counsel's opinion regarding competency. In a previous opinion in Hull's case, the Third Circuit rejected the argument that counsel's performance was not deficient because he believed Hull was competent, noting "few lawyers possess even a rudimentary understanding of psychiatry. They therefore are wholly unqualified to judge the competency of their clients." Hull v. Freeman, 932 F.2d 159, 168 (3rd Cir. 1991).

government's single witness or presenting any of the large body of evidence in support of Hull's incompetence to stand trial." Id. at 112.

Carneh also cites to a law review article in which the authors encourage defense counsel to consider testifying at the competency hearing. Brief of Appellant at 48-50. However, they acknowledge that this is not the usual practice; instead, they state that defense counsel "typically does not testify in the incompetency hearing." Grant H. Morris et al., Competency to Stand Trial, 4 Hous. J. Health L. & Pol'y, 193, 199 (2004).

Similarly, the American Bar Association's Criminal Justice Mental Health Standard, cited by Carneh, does not support the notion that an attorney acts deficiently by not offering testimony at a competency hearing. Instead, it states that "[d]efense counsel *may* elect to relate to the court personal observations of and conversations with the defendant to the extent that counsel does not disclose confidential communications or violate the attorney-client privilege; counsel so electing may be cross-examined to that extent." ABA Criminal Justice Mental Health Standard 7-4.8(b)(i) (emphasis added). The use of the permissive term "may" indicates that the drafters of this standard appreciated the various strategic

considerations that an attorney must consider before deciding whether to proffer such evidence and be subject to cross-examination.¹²

Carneh repeatedly cites to language from a footnote in Drope v. Missouri, 420 U.S. 162, 177, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) in which the Supreme Court observed that the trial court should consider counsel's opinion when evaluating competency. However, the Court qualified that observation, stating that "we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client."¹³

Drope does not support Carneh's ineffective assistance claim. The issue in Drope was whether the trial court erred in failing to order a competency evaluation after defense counsel raised the issue in a pretrial motion and after some incidents at trial

¹² Even if the ABA Standards could be read as imposing some duty on defense counsel, they do not control the court's analysis of the ineffective assistance claim. State v. Holm, 91 Wn. App. 429, 437, 957 P.2d 1278 (1998).

¹³ The full quote is as follows: "The sentencing judge observed that 'motions for psychiatric examinations have often been made merely for the purpose of delay,' and 'estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent.' Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered." 420 U.S. at 177 n.13 (internal citations omitted).

also indicated there was a competency issue. Here, Carneh's attorneys were persistent in raising and litigating the competency issue at every juncture.

Carneh also cites to several Washington appellate decisions repeating the proposition that the trial court should give "considerable weight" to counsel's opinion regarding competency. Brief of Appellant at 38-39. None of these cases holds that an attorney acts deficiently if he or she does not proffer a personal opinion at a contested competency hearing. If anything, the cases cited by Carneh demonstrate that counsel's opinion, as a practical matter, may not carry much weight with the trial court.

For example, in City of Seattle v. Gordon, 39 Wn. App. 437, 438, 693 P.2d 741 (1985), on the day of trial, defense counsel moved for a competency evaluation, representing that he questioned whether the defendant had the capacity to effectively assist in preparing his defense. After conducting a colloquy with the defendant, the trial court denied the motion. On appeal, this Court affirmed. While noting that the trial court should give "considerable weight" to the attorney's opinion, the court, citing Drope, added that the trial court was not required to "accept without

question a lawyer's representations concerning the competence of his client." Id. at 442.

Similarly, in several other cases cited by Carneh, the appellate court upheld the trial court's decision that a defendant was competent, despite his attorney's representations to the contrary. State v. Hicks, 41 Wn. App. 303, 307-09, 704 P.2d 1206 (1985) (holding that trial court did not abuse its discretion by finding the defendant competent and placing more weight on psychologist's testimony than the testimony of a lawyer); State v. Crenshaw, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980) (holding that the trial court did not abuse its discretion in finding the defendant competent despite his counsel's reservations about his competency), aff'd, 98 Wn.2d 789, 659 P.2d 488 (1983).

Carneh's trial attorneys were well aware of the language in Drope indicating that the court should consider counsel's opinion about competency. They discussed it in numerous briefs filed with the court. CP 118, 376-77. As Carneh notes, on several occasions, they had provided declarations stating some of their opinions. CP 390-96. At the 2009 competency hearing, they cross-examined Dr. Hendrickson about his failure to ask them about their personal opinions as to Carneh's competency.

1RP 111. This Court must presume that these attorneys, aware of the law, made the strategic decision to not offer testimony about their own personal opinions.

There are some difficult strategic and ethical issues that counsel must consider before offering personal testimony about the defendant's competency. The facts of State v. Webbe, 122 Wn. App. 683, 94 P.3d 994 (2004) demonstrate some of these issues. Webbe was represented by two attorneys, and one attorney, Williams, indicated that he intended to testify as to his opinions about Webbe's competency. Id. at 687. The trial court ruled that the State was entitled to interview Williams, and, after an *in camera* review, ordered that Williams turn over his notes from interviews with Webbe. Id. at 688. The defense attorneys then raised concerns over whether Webbe had waived his attorney-client privilege in order for Williams to testify. Id. at 689. Another attorney was appointed to represent Webbe on this issue, and he ultimately represented that Webbe was unwilling to waive the privilege. Id. at 689-90. Williams did not testify, and Webbe was found competent. Id. at 690.

At a minimum, Webbe demonstrates some of the strategic issues counsel had to consider. If Carneh's attorneys sought to

offer their personal opinions as substantive evidence, they could be subject to interviews, discovery requests and cross-examination. They would need to consider what their testimony would actually add to what the court would already hear from their experts. Given the lawyers' long history of aggressive representation of Carneh, they could expect that their testimony could be discounted as self-interested and biased. The attorneys were entitled to make the tactical choice that any information would be best presented through their experts. This choice had worked well in the past. Carneh has failed to show that his attorneys acted deficiently in representing him at the competency hearing.

b. Carneh Has Failed To Show Prejudice.

In order to show prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington, 131 S. Ct. at 792. Carneh must establish that, had his attorneys presented their opinions that he was not competent, there is a reasonable probability that the trial court would have found that he was not competent. State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Carneh engages in a brief discussion of this issue with little specifics. Brief of Appellant at 52-53. First, he claims that it was a closely contested case on competency, and, therefore, the weight of his attorneys' opinions would have made the difference. Yet he fails to identify what information his attorneys would have offered that was substantially different than the testimony of his experts. Dr. Woods and Dr. Watson had been examining Carneh since 2001, and they testified at length about his mental illness and how that impacted his ability to rationally assist his attorneys.

Second, in a brief argument, Carneh reasons that this Court can find prejudice because one attorney submitted a declaration at the September 2005 competency hearing, a hearing at which the trial court found that he was not competent. Brief of Appellant at 53. Carneh's assertion that this declaration is responsible for the differing decisions ignores the passage of time, the different witnesses, and the different evidence admitted at the two hearings. At the 2009 hearing, even one of Carneh's experts acknowledged that he was approaching competency. 4RP 41.

Moreover, the notion that the attorney's declaration was a critical factor in the court's 2005 incompetency finding is not supported by the record. The only version in the record is an

unsigned copy of the declaration attached to another pleading. It is not clear that a signed copy was ever offered to the court. In his 13-page letter ruling, Judge Spearman never mentioned this declaration. CP 404-16. Accordingly, Carneh has not shown that, had his attorneys offered their personal opinions and observations at the 2009 contested competency hearing, it is reasonably probable that the court would have found him not competent.

2. THE COURT PROPERLY ACCEPTED CARNEH'S GUILTY PLEA.

Carneh claims that Judge Robinson erred in accepting his guilty plea because she did not consider his attorneys' declarations opining that Carneh was not competent. In fact, the record is clear that the judge reviewed the attorneys' declarations submitted at the time of the plea. In these declarations, Carneh's attorneys candidly acknowledged that Carneh's mental status had not changed since the court had found him competent. The trial court did not err in accepting Carneh's plea.

The level of competency required to stand trial and to plead guilty are the same. Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). A defendant is competent if he

(1) can understand the nature of the charges, and (2) is capable of assisting in his defense. In re Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). A trial court's decision on competency is reviewed under the abuse of discretion standard. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

In July of 2009, Judge Robinson found that Carneh was competent and made detailed findings of fact. CP 141. On appeal, Carneh does not directly challenge this decision. Though he has assigned error to some of the court's findings from that hearing, he does not argue that the trial court abused its discretion in making these findings. The only argument made in his brief relating to that hearing is his ineffective assistance of counsel claim.

Prior to the entry of the guilty plea, the State submitted the declaration of WSH psychiatrist William Richie. Dr. Richie represented that Carneh's psychological functioning was unchanged or improved and that Carneh had not "manifested any medical or psychological functional decline which would cause me to call into question the court's competency determination." CP 361.

In their declarations filed at the time of the plea, Carneh's attorneys also represented that, while they disagreed with the

court's earlier competency ruling, Carneh's condition had not changed "in any significant degree since the court found him competent." CP 171; see also CP 177. At the hearing, Carneh's attorneys again confirmed that his mental condition had not changed, and stated that "[w]e are not requesting a new evaluation at this point." 7RP 86.

Carneh now claims that his attorneys' declarations should have prompted the court to reconsider its July 2009 competency ruling and that the trial court erred by not doing so. Brief of Appellant at 40-43. However, this claim of error is waived because Carneh invited this alleged error. Under the doctrine of invited error, a party may not set up an error at trial and then claim on appeal that the trial court erred on that basis. State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). The appellate court will deem an error waived if the party asserting such error materially contributed thereto. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Barnett, 104 Wn. App. 191, 200, 16 P.3d 74 (2001). The invited error doctrine applies even where the alleged error is of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); Henderson, 114 Wn.2d at 871.

Recently, the doctrine was applied in State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009). Heddrick was found incompetent and committed for restoration. Id. at 901. The trial court found competency was restored, and defense counsel then arranged to have a defense expert evaluate Heddrick. Id. at 901-02. When that expert opined that Heddrick was competent, counsel withdrew the competency motion. Id. at 902. On appeal, Heddrick claimed that the trial court erred by failing to follow the statutory competency procedures even though Heddrick's counsel had withdrawn the competency challenge. Id. at 903. The Washington Supreme Court held that the doctrine of invited error barred this claim: "From the facts at bar, any putative error was invited by the defendant's conduct." Id. at 909.

In this case, Carneh's attorneys candidly represented that Carneh's mental condition had not changed since the court found him competent. They affirmatively stated that they were not requesting a new competency hearing. The trial judge accepted these representations and relied upon them. The judge indicated that she had read the declarations and observed that "[t]hey are candid in acknowledging that this is the opinions that they had in July and that there is not anything material and different now."

7RP 87. Carneh cannot now be heard to claim that these same declarations should have triggered a re-evaluation of his competency.

Even if the claim of error is not waived, Carneh's claim lacks merit. The trial court's decision whether to hold yet another competency hearing is reviewed for an abuse of discretion. Heddrick, 166 Wn.2d at 903; see also State v. Hicks, 41 Wn. App. 303, 308, 704 P.2d 1206 (1985). Once a competency determination is made, the trial court is not required to revisit competency unless the defense produces evidence that the defendant's mental condition has changed since the previous competency determination. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). In the case that Carneh discusses at length, State v. Sanders, 209 W.Va. 367, 378, 549 S.E.2d 40 (2001), the West Virginia Supreme Court summarized the state of the law as to when a trial court should re-visit the issue of a defendant's competency. It appears consistent with Washington caselaw:

[M]ost courts have nevertheless concluded that earlier competency determinations which follow professional evaluation and adequate hearing should not be without consequence. As the Colorado Supreme Court rightly surmised, "[a] final determination of competency entered during the pretrial phase of a case and in accordance with the statutory standards

governing the resolution of that issue is not without legal significance to pending and as yet unresolved proceedings.” People v. Mack, 638 P.2d 257, 263 (Colo.1981); see also State v. Potter, 109 Idaho 967, 969-71, 712 P.2d 668, 670-71 (1985). In accord with this approach, most courts take the position that “when a competency hearing has already been held and defendant has been found competent to stand trial ... a trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of that finding.” People v. Kelly, 1 Cal.4th 495, 3 Cal.Rptr.2d 677, 822 P.2d 385, 412 (citation omitted), cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992).

Id. at 378.

Unlike Carneh's case, in Sanders, there was substantial evidence that the defendant's mental condition had deteriorated between the competency finding and the trial. Sanders suffered from a psychotic disorder, and the sole expert at the competency hearing warned that Sanders' mental health was in danger of disintegration if there was a delay before he went to trial. Id. at 372-75. However, trial took place five months later, and a psychiatric report provided to the trial court a month before trial raised serious questions about Sanders' competency. Id. at 374.

At trial, Sanders then engaged in "irrational and self-defeating behavior"; he insisted on testifying, provided an

incoherent monologue about the crime, and "plead the fifth" in response to some of his attorney's questions. Id. at 374-75. Sanders' attorneys ultimately moved for a mistrial, noting that Sanders' psychosis was evident.

Under these circumstances, the West Virginia Supreme Court held that the trial court erred in failing to undertake further inquiry into Sanders' competence. "In light of the fact that the psychological assessment that informed the trial court's original competency determination was partly contingent upon an immediate trial that did not materialize, we find that this later psychiatric report, particularly when viewed in conjunction with the defendant's aberrant behavior at trial, constituted a sufficient change of circumstance to raise good faith doubt as to Sanders' continued mental fitness for trial." Id. at 380.

At the time of Carneh's plea, it was undisputed that his mental condition had not changed since the July 2009 competency hearing. After Carneh was found competent, the trial court ordered that he be transported to WSH once every two weeks for the purpose of competency maintenance. CP 131-39, 142-43. By the time of the plea in November of 2009, defense counsel and Dr. Richie represented to the court that there had been no change

in Carneh's mental status. The trial court was not required to revisit the issue of Carneh's competence.

Carneh claims that the "three declarations offered substantially more information than simple disagreement [with the trial court's ruling]." Brief of Appellant at 40. However, the relevant legal question is whether they provided materially new information that the trial court was unaware of at the time of the competency hearing and that should have prompted the trial court to reconsider its earlier ruling. The attorneys who submitted the declarations did not so claim and affirmatively represented otherwise. On appeal, Carneh does not attempt to identify what was materially new information in the declarations.

For example, Carneh notes that his attorneys represented that he wanted to plead guilty, rather than NGRI, because he did not want to return to WSH and thought he would be left alone in prison. Brief of Appellant at 32. This issue was set forth in many of the reports provided to the trial court and discussed at the competency hearing. 2009 Ex. 1 at 12; 2009 Ex. 30 at 2; 2009 Ex. 34 at 7; 3RP 89-90, 104. Similarly, his attorneys reported in their declarations that, despite facing mandatory life sentences for aggravated first-degree murder, Carneh represented that he

believed that he would be released from prison. Brief of Appellant at 43. This was not new; both defense experts testified that Carneh believed that there was a chance he would be released from prison. 3RP 95; 4RP 12.¹⁴ In fact, Carneh's experts discussed his various delusions at length in their reports and during the competency hearing. See, e.g., 3RP 26-44; 4RP 12-88; 2009 Ex. 30 and 34. Given the extensive testimony about Carneh, it is not surprising that he does not attempt to show what new information was provided to the trial court in the declarations submitted at the plea hearing.¹⁵

The trial court did not err in accepting Carneh's attorneys' representations that his mental condition had not changed. Carneh has not shown that the trial court erred in accepting his guilty plea.

¹⁴ Dr. Woods also acknowledged that Carneh was capable of understanding that he would spend the rest of his life in prison. 3RP 92, 114. At the plea colloquy, Carneh repeatedly acknowledged that "there is nothing that's going to result in your release from prison if you enter a plea of guilty to these charges." 7RP 81-85.

¹⁵ Moreover, Carneh has not provided a record on appeal that would allow for a full comparison between the attorneys' declarations and information already provided to the court. The 2009 competency hearing was the second contested hearing in the case. Judge Robinson also presided over the 2008 competency hearing, involving testimony from the same witnesses; transcripts from that hearing are not part of the record.

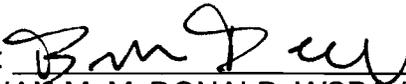
D. CONCLUSION

For the reasons cited above, this Court should affirm
Carneh's convictions and sentence.

DATED this 29th day of March, 2011.

Respectfully submitted,

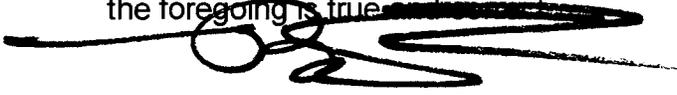
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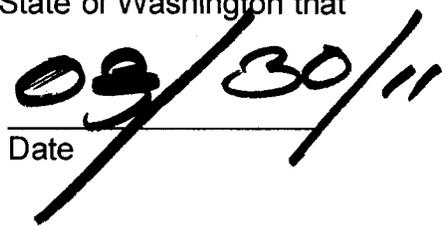
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. LEEMAH CARNEH, Cause No. 64536-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

A handwritten signature in black ink, appearing to be "Eric Broman", written over a horizontal line.

Name
Done in Seattle, Washington

A handwritten date "09/30/11" in black ink, written over a horizontal line.

Date