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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

RICARDO G. GONZALEZ-GARCIA, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

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BRIEF OF RESPONDENT

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**Table of Contents**

**I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1**

THE RECORD ON APPEAL DOES NOT CONTAIN EVIDENCE OF GONZALEZ-GARCIA’S BEHAVIOR AND Demeanor DURING COURT APPEARANCES, THE NATURE AND EXTENT OF HIS COMMUNICATION WITH COUNSEL, OR THE EXISTENCE OF OTHER EVIDENCE RELEVANT TO HIS MENTAL STATE; NOR DOES IT INDICATE WHETHER EITHER HIS LAWYER OR THE COURT WAS AWARE HIS LETTERS EXISTED. IS THE RECORD SUFFICIENT TO DETERMINE WHETHER CIRCUMSTANCES SHOULD HAVE CAUSED EITHER COUNSEL OR THE COURT TO DOUBT HIS COMPETENCY? (ASSIGNMENTS OF ERROR NOS. 1 AND 2)

**II. STATEMENT OF THE CASE..... 1**

**III. ARGUMENT..... 3**

THE RECORD ON APPEAL DOES NOT CONTAIN EVIDENCE OF GONZALEZ-GARCIA’S BEHAVIOR AND Demeanor DURING COURT APPEARANCES, THE NATURE AND EXTENT OF HIS COMMUNICATION WITH COUNSEL, OR THE EXISTENCE OF OTHER EVIDENCE RELEVANT TO HIS MENTAL STATE; NOR DOES IT INDICATE WHETHER EITHER HIS LAWYER OR THE COURT WAS AWARE HIS LETTERS EXISTED. THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER CIRCUMSTANCES SHOULD HAVE CAUSED EITHER COUNSEL OR THE COURT TO DOUBT HIS COMPETENCY. ....3

1. *Legal principles.* .....3

2. *Defense counsel's performance cannot be assessed on this record.*.....6

3. *Whether “the court” should have ordered a competency hearing sua sponte cannot be determined on this record.* .....9

**V. CONCLUSION .....11**

## Table of Authorities

<i>Allemeier v. UW</i> , 42 Wn. App. 465, 712 P.2d 306 (1985), <i>review denied</i> , 105 Wn.2d 1014 (1986).....	5
<i>Bulzomi v. Dep't of Labor &amp; Indus.</i> , 72 Wn. App. 522, 864 P.2d 996 (1994).....	5, 6
<i>Drope v. Missouri</i> , 420 U.S. 162, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975).....	4, 5
<i>Dusky v. United States</i> , 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960) .....	3, 4
<i>In the Matter of the Personal Restraint of Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	5
<i>Pate v. Robinson</i> , 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966).....	3
<i>Seattle v. Gordon</i> , 39 Wn. App. 437, 693 P.2d 741, <i>review denied</i> , 103 Wn.2d 1031 (1985).....	3, 4
<i>State v. Crenshaw</i> , 27 Wn. App. 326, 617 P.2d 1041 (1980), <i>aff'd</i> , 98 Wn.2d 789, 659 P.2d 488 (1983).....	4
<i>State v. Israel</i> , 19 Wn. App. 773, 577 P.2d 631 (1978).....	4
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	5
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	4, 6
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	5, 6, 9

*State v. O'Neal*,  
23 Wn. App. 899, 600 P.2d 570 (1979).....4

*State v. Vazquez*,  
66 Wn. App. 573, 832 P.2d 883 (1992).....5

**Statutes, Rules, and Constitutional Provisions**

RAP 10.3(b) .....1

RCW 10.77.060 .....4, 6, 10

## **I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

THE RECORD ON APPEAL DOES NOT CONTAIN EVIDENCE OF GONZALEZ-GARCIA'S BEHAVIOR AND Demeanor DURING COURT APPEARANCES, THE NATURE AND EXTENT OF HIS COMMUNICATION WITH COUNSEL, OR THE EXISTENCE OF OTHER EVIDENCE RELEVANT TO HIS MENTAL STATE; NOR DOES IT INDICATE WHETHER EITHER HIS LAWYER OR THE COURT WAS AWARE HIS LETTERS EXISTED. IS THE RECORD SUFFICIENT TO DETERMINE WHETHER CIRCUMSTANCES SHOULD HAVE CAUSED EITHER COUNSEL OR THE COURT TO DOUBT HIS COMPETENCY? (ASSIGNMENT OF ERROR NOS. 1 & 2)

## **II. STATEMENT OF THE CASE<sup>1</sup>**

The State adopts the facts as recited by appellant Ricardo G.

Gonzalez-Garcia and supplements those facts as follows. RAP 10.3(b).

Gonzalez-Garcia's last four letters filed with the court were written April 14 and April 17, 2017. CP 31–33. Trial started May 10, 21 days after the last letter. 1RP 4. In one of the three letters written April 14, Gonzalez-Garcia wrote that he did not like his lawyer telling him he would be deported. CP 32–33. He asked if his lawyer was “in the just.” *Id.*

Gonzalez-Garcia appeared before three different judges between his February 14, 2017 arraignment and trial on May 10. The February 14 scheduling order was signed by the Honorable John M. Antosz. CP 9. The April 11 order continuing the readiness hearing was signed by someone

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<sup>1</sup> The State cites to the verbatim report of a pretrial motion and first day of trial, May 10, 2017, as 1RP \_\_\_\_; to the verbatim report of the second day of trial, May 11, 2017, as 2RP \_\_\_\_; to the verbatim report of other hearings and sentencing as 3RP \_\_\_\_; and to the clerk's papers, as CP \_\_\_\_.

other than Judge Antosz. CP 22. The record does not contain anything from the April 17 hearing, but a week later, on April 24, readiness was continued to May 8 and trial to May 10. CP 30. That order was signed by the judge who signed the April 11 order. CP 30. The record does not show which judge presided over the hearings on February 27, April 3, or April 17. The Honorable David G. Estudillo presided over the May 8 readiness hearing. 3RP 8.

Gonzalez-Garcia was assisted by a certified interpreter at the May 8 readiness hearing before the Honorable David G. Estudillo. 3RP 8. Counsel told the court Gonzalez-Garcia was ready to proceed to trial two days later. 3RP 9. Gonzalez-Garcia was silent at that hearing. 3RP 8–10. Judge Antosz presided at trial. 1RP 4. Nothing in the record of the hearing held immediately before trial indicates Gonzalez-Garcia's behavior was in any way remarkable or that he expressed dissatisfaction with counsel. 1RP 4–22. There is no record of Gonzalez-Garcia saying anything that day. 1RP 23–101. He said nothing on the record the following day, 2RP 4–97, although he and his attorney spoke off the record at the close of the State's case. 2RP 45–46. At the end of their discussion, defense counsel stated they would call no witnesses, then rested. 2RP 46. Gonzalez-Garcia said nothing when the guilty verdict was taken. 2RP 94. During sentencing, the State told the court a first-offender option was not available because

Gonzalez-Garcia had an immigration warrant. 3RP 13. Gonzalez-Garcia did not say anything. *Id.* Before imposing sentence the court asked whether he had anything to say and Gonzalez-Garcia, through his interpreter, answered: “No, thank you.” 3RP 14.

### III. ARGUMENT

THE RECORD ON APPEAL DOES NOT CONTAIN EVIDENCE OF GONZALEZ-GARCIA’S BEHAVIOR AND Demeanor DURING COURT APPEARANCES, THE NATURE AND EXTENT OF HIS COMMUNICATION WITH COUNSEL, OR THE EXISTENCE OF OTHER EVIDENCE RELEVANT TO HIS MENTAL STATE; NOR DOES IT INDICATE WHETHER EITHER HIS LAWYER OR THE COURT WAS AWARE HIS LETTERS EXISTED. THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER CIRCUMSTANCES SHOULD HAVE CAUSED EITHER COUNSEL OR THE COURT TO DOUBT HIS COMPETENCY.

#### 1. *Legal principles*

“‘Incompetency’ means a person 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.” *Seattle v. Gordon*, 39 Wn. App. 437, 440–41, 693 P.2d 741, *review denied*, 103 Wn.2d 1031 (1985). The well-settled test is whether a defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - - and whether he has a rational as well as factual understanding of the proceedings against him.” *Pate v. Robinson*, 383 U.S. 375, 388, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966) (HARLAN, J., dissenting) (citing *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960)).

“Before a determination of competency is required by RCW 10.77.060, the court must make a threshold determination that there is a reason to doubt competency.” *Gordon, supra*, 39 Wn. App. at 441. If the court determines “there is reason to doubt the defendant’s fitness, the court must hold a competency hearing in accordance with statutory procedures.” *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991) (citing *Gordon*, 39 Wn. App. at 441).

“There are no fixed signs which invariably require a hearing, but the factors to be considered include evidence of a defendant’s irrational behavior, his demeanor, medical opinions on competence and the opinion of defense counsel.” *State v. O’Neal*, 23 Wn. App. 899, 901–02, 600 P.2d 570 (1979) (citing *Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975); *State v. Israel*, 19 Wn. App. 773, 577 P.2d 631 (1978)).

“In exercising its discretion in determining the threshold question, the court should give considerable weight to the attorney’s opinion regarding a client’s competency and ability to assist in the defense.” *Gordon*, 39 Wn. App. at 442 (citing *State v. Crenshaw*, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980), *aff’d*, 98 Wn.2d 789, 659 P.2d 488 (1983)). The United States Supreme Court has commented that while courts need not always accept counsel’s competency representations at face value, they should always consider expressed concern by the person with the

closest contact with the defendant. *Drope v. Missouri. supra*, 420 U.S. at 177 n.13. Washington courts, likewise, give considerable weight to defense counsel's opinion. *In the Matter of the Personal Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001).

A claim for ineffective assistance of counsel presents a mixed question of law and fact, which the appellate court reviews de novo. *State v. Jones*, 183 Wn.2d 327, 338–39, 352 P.3d 776 (2015). “Competency of counsel is determined based upon the entire record below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). “The party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence.” *Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (citing *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992)). “An insufficient record on appeal precludes review of the alleged errors.” *Id.* (citing *Allemeier v. UW*, 42 Wn. App. 465, 472–73, 712 P.2d 306 (1985), *review denied*, 105 Wn.2d 1014 (1986)).

The record is insufficient to determine whether either counsel or the court was derelict in protecting Gonzalez-Garcia's right not to be tried, convicted, or sentenced while incompetent. There is scant evidence of Gonzalez-Garcia's mental abilities and none whatsoever of his demeanor,

his courtroom behavior, his communication with counsel, or whether the court or counsel knew his letters existed.

2. *Defense counsel's performance cannot be assessed on this record.*

The record is insufficient to determine whether defense counsel was ineffective for not having requested a competency hearing under RCW 10.77.060(1)(a). Counsel's performance is assessed in light of all the circumstances. *Lord, supra*, 117 Wn.2d at 883. Reviewing courts start with the presumption that counsel was effective. *McFarland, supra*, 127 Wn.2d at 335. There is no evidence supporting an opposite conclusion here. "The party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence." *Bulzomi, supra*, 72 Wn. App. at 525. Nothing can be determined one way or the other on the record before this Court.

First, nothing in the record supports Gonzalez-Garcia's primary assumption that his lawyer was aware of the letters filed with the clerk's office. The record does not include transcripts of the majority of his pre-trial hearings. He did not designate as clerk's papers the minutes summarizing events at any of these hearings. He did not designate any documents or other records from hearings held February 27, April 3,<sup>2</sup> or

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<sup>2</sup> The State only assumes a hearing was held April 3, 2017 as ordered in the February 14, 2017 scheduling order. CP 9.

April 17. All of Gonzalez-Garcia's letters to the court were written during that time. Three letters were dated April 14. CP 31–33. His last letter was dated April 17. CP 33. Trial was 21 days later, May 10. 1RP 4. There is no record of whether a judge mentioned any of the letters in court, either before or during trial, or whether the court or the clerk's office forwarded copies of the letters to counsel.

There is evidence, from one of his April 14 letters, that Gonzalez-Garcia did not like being told by his lawyer he was going to be deported. CP 32–33. It appears he was seeking a second opinion when he asked the judge if his lawyer was “in the just”<sup>3</sup> on that fact. *Id.* He wondered whether he could get a different lawyer. *Id.* While this record indicates Gonzalez-Garcia and his lawyer had at least one out-of-court discussion well in advance of trial in which they disagreed about his immigration consequences, it is impossible to determine whether Gonzalez-Garcia gave his lawyer any reason to doubt his competency. This is true regardless of whether the lawyer reviewed his letters. It is possible the lawyer discussed the letters with his client and the two of them resolved their issues to

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<sup>3</sup> None of the translations accompanying Gonzalez-Garcia's letters appear to have been done by a court certified interpreter and the identity of the translator is not provided. There is some cause to doubt the accuracy of these translations. For example, “¿Esta en lo justo?”, the phrase used by Gonzalez-Garcia when asking the court about his attorney's statement on deportation, CP 37, means colloquially, “Is he right?” It is translated: “Is my attorney in the just?” CP 33.

everyone's satisfaction. It is also possible the lawyer knew nothing of the letters, yet developed a working relationship with a competent client.

Neither is there anything indicating Gonzalez-Garcia exhibited abnormal behavior at any time. Gonzalez-Garcia was assisted by a certified interpreter at the May 8 readiness hearing before Judge Estudillo. 3RP 8. Counsel told the court Gonzalez-Garcia was ready to proceed to trial two days later. 3RP 9. Gonzalez-Garcia was silent at that hearing. 3RP 8–10. The Honorable John M. Antosz presided at trial on May 10. 1RP 4. Nothing in the record of the hearing held immediately before trial indicates Gonzalez-Garcia's behavior was in any way remarkable or that he expressed dissatisfaction with counsel. 1RP 4–22. There is no record of Gonzalez-Garcia saying anything that day. 1RP 23–101. He said nothing on the record the following day, 2RP 4–97, although he and his attorney spoke off the record at the close of the State's case. 2RP 45–46. At the end of their discussion, defense counsel stated they would call no witnesses, then rested. 2RP 46. Gonzalez-Garcia said nothing when the guilty verdict was taken. 2RP 94. During sentencing, the State told the court a first-offender option was not available because Gonzalez-Garcia had an immigration warrant. 3RP 13. Gonzalez-Garcia did not say anything. *Id.* Before imposing sentence the court asked whether he had anything to say and Gonzalez-Garcia, through his interpreter, answered only: "No, thank

you.” 3RP 14. The fact that Gonzalez-Garcia tried repeatedly to communicate with the court up to April 17, then stopped communicating entirely, seems to indicate he and counsel had established some sort of trusting relationship. Whether that is true cannot be determined on this record. Gonzalez-Garcia’s abrupt silence during the time between his last letter and the end of trial may be relevant, but of what, this record provides no clue.

It is possible that facts or evidence outside the record would illuminate the merits of Gonzalez-Garcia’s claim of ineffective assistance. If so, he must raise these issues in a personal restraint petition. *McFarland, supra*, 127 Wn.2d at 335. Without such a petition, this Court must decide the issue on the trial records Gonzalez-Garcia identified on direct appeal. *Id.* That cannot be done.

This Court should reject Gonzalez-Garcia’s claim of ineffective assistance of counsel.

2. *Whether “the court” should have ordered a competency hearing sua sponte cannot be determined on this record.*

Gonzalez-Garcia makes two additional unsupported assumptions on critical facts. First, he assumes “the trial court” was a single judge, and second, that that judge read his letters. Gonzalez may have appeared before three different judges between his February 14, 2017 arraignment

and trial on May 10. The February 14 scheduling order was signed by Judge Antosz. CP 9. The April 11 order was signed by a different judge. CP 22. The record does not contain anything from the April 17 hearing, but a week later, on April 24, readiness was continued to May 8 and trial to May 10. CP 30. That order was signed by the judge who signed the April 11 order. CP 30. The record does not show which judge presided over the hearings on February 27, April 3, or April 17. Judge Estudillo presided over the May 8 readiness hearing. 3RP 8. Judge Antosz presided at trial. 1RP 4. The record does not support Gonzalez-Garcia's cornerstone assumption that a single judge was in charge of his case.

Worse, Gonzalez-Garcia provides no corroboration of his claim that "the trial court had been placed on notice that Mr. Gonzalez-Garcia was not attuned to the gravity of the proceedings." Br. of Appellant at 9. Nothing in the record indicates any of the judges read any of the letters in the court's file or were even aware they existed. One might assume that each of these experienced trial judges would have made some comment on the record had they read even one of Gonzalez-Garcia's letters, but assumptions are not evidence.

This Court should find the record insufficient to determine whether one of the three judges who participated in this case should have, sua sponte, ordered a competency hearing under RCW 10.77.060(1)(a).

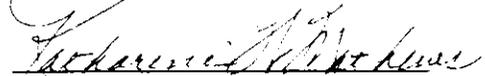
**IV. CONCLUSION**

This Court should reject Gonzalez-Garcia's contentions without prejudice to his right to file a timely personal restraint petition, and affirm his conviction.

DATED this 18<sup>th</sup> day of December, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Dennis W. Morgan  
nodblspk@rcabletv.com

Dated: December 18, 2017.

  
\_\_\_\_\_  
Kaye Burns

# GRANT COUNTY PROSECUTOR'S OFFICE

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## Transmittal Information

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