

67894-9

67894-9

No. 92334-5

No. 67894-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ALEXANDER ORTIZ-ABREGO,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead

BRIEF OF RESPONDENT

GREGORY C. LINK
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
JAN 17 2019
CLERK OF COURT
COURT OF APPEALS
STATE OF WASHINGTON
SEATTLE
GL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PRESENTED 2

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 6

Judge Craighead properly exercised her discretion to conclude Mr. Ortiz-Abrego was not competent at the time of trial and was not competent to be sentenced following trial..... 6

 1. Judge Craighead properly found Mr. Ortiz-Abrego was incompetent at the time of trial..... 7

 2. Judge Craighead applied the correct legal standard for competency 12

 3. Judge Craighead did not inject an ineffective assistance of counsel analysis into her competency determination 19

E. CONCLUSION..... 22

TABLE OF AUTHORITIES

United States Constitution

| | |
|------------------------------|------|
| U.S. Const. amend. XIV | 2, 6 |
|------------------------------|------|

Washington Supreme Court

| | |
|--|---------------|
| <i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992) | 14, 21 |
| <i>State v. Dodd</i> , 70 Wn. 2d 513, 424 P.2d 302 (1967)..... | 10, 15, 17 |
| <i>State v. Ortiz</i> , 104 Wn.2d 479, 706 P.2d 1069 (1985) | 7 |
| <i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)..... | 7, 10 |
| <i>State v. Sisouvanh</i> , 2012 WL 4944801 (Oct. 18, 2012) | 7, 10, 11, 15 |

Washington Court of Appeals

| | |
|--|----|
| <i>State v. Harris</i> , 122 Wn.2d 98, 94 P.3d 379 (2004)..... | 19 |
| <i>State v. Hicks</i> , 41 Wn. App. 303, 704 P.2d 1206 (1985)..... | 19 |

United States Supreme Court

| | |
|---|--------|
| <i>Cooper v. Oklahoma</i> , 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) | 6 |
| <i>Drope v. Missouri</i> , 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)..... | 6 |
| <i>Dusky v. United States</i> , 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)..... | passim |
| <i>Godinez v. Moran</i> , 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)..... | 13 |

Other Courts

| | |
|--|----|
| <i>Lafferty v. Cook</i> , 949 F.2d 1546 (10 th Cir. 1991) | 13 |
|--|----|

A. INTRODUCTION

The Honorable Susan Craighead conducted a lengthy hearing on the question of Alexander Ortiz-Abrego's competency. Judge Craighead considered reports and testimony of four separate experts, the testimony of Mr. Ortiz-Abrego's former attorney, and her own observations. Judge Craighead found the opinion of one of these experts, Dr. Tedd Judd, "the foremost expert in Washington on Spanish-speaking neuropsychological testing and evaluation" particularly compelling and consistent with others' descriptions of Mr. Ortiz-Abrego's demonstrated incapacity. In the end, Judge Craighead concluded Mr. Ortiz-Abrego lacked the capacity to rationally understand the proceedings, and lacked the rational ability to assist his attorney. Consistent with the requirements of *Dusky v. United States*,¹ Judge Craighead thus found Mr. Ortiz-Abrego incompetent.

The State has appealed that finding. While the State attempts to forecast Judge Craighead's ruling as applying an incorrect legal standard, it is clear she did not. At bottom, the State's argument amounts to disagreement with the conclusion Judge Craighead reached.

¹ 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)

But the State cannot demonstrate she abused her discretion in reaching that conclusion.

B. ISSUES PRESENTED

The Due Process Clause of the Fourteenth Amendment prohibits criminal proceedings against an incompetent defendant. A person is competent to stand trial only when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as factual understanding of the proceedings against him. Following a lengthy competency hearing, and after considering all the evidence submitted, Judge Craighead concluded Mr. Ortiz-Abrego lacked the capacity to understand the proceedings and to rationally assist his attorney. Did the court abuse its discretion?

C. STATEMENT OF THE CASE

In October 2008, the State charged Mr. Ortiz-Abrego with two counts of rape of child based upon alleged acts occurring in 2002. CP 1-2.

Prior to trial Mr. Ortiz-Abrego met numerous times with his attorney, Anna Samuel. CP 328-29. Despite spending several hours talking with him regarding the trial process and the perils he faced, Ms.

Samuel did not believe Mr. Ortiz-Abrego understood the information she was relaying. CP. 329-30, 332.

Mr. Ortiz-Abrego appeared in court on the first day of trial with his five-year-old, because his wife was giving birth to another child. CP 330. When court staff attempted to make alternative arrangements for the care of his son, Mr. Ortiz-Abrego was unable to provide information as to where his son went to school. *Id.*

Before and during trial, defense counsel, the court and the prosecutor had concerns about Mr. Ortiz-Abrego's competency. CP 331. The trial court conducted a colloquy, and while the court remained concerned, the judge concluded Mr. Ortiz-Abrego was competent. CP 331-32.

Although he was facing an indeterminate sentence with a minimum of 20 years, Mr. Ortiz-Abrego declined a plea offer that would have led to a 15 month sentence. CP 332-33.

Because of lingering doubts, in the midst of trial, Ms. Samuel retained Dr. Judd to evaluate Mr. Ortiz-Abrego. CP 333.

Dr. Judd concluded Mr. Ortiz-Abrego was borderline mentally retarded with an IQ of 71 and that he had a cognitive learning disorder particularly affecting his auditory comprehension. CP 334. Dr. Judd

opined that Mr. Ortiz-Abrego exhibited particularly concrete thinking and would thus have difficulty with hypothetical or conditional reasoning. CP 335. This difficulty was evident in Mr. Ortiz-Abrego's interaction with counsel and in subsequent evaluations. *Id.* Dr. Judd recommended a series of accommodations which he believed would enable Mr. Ortiz-Abrego to understand the proceedings. CP 336. Those accommodations were not made during the trial. *Id.*

Even as the end of trial approached, Mr. Ortiz-Abrego did not seem to appreciate the possibility that if he was convicted he would be sent to prison. CP 337. Not until corrections officers attempted to take him into custody following the jury's guilty verdict did Mr. Ortiz-Abrego appear to come to that realization, and then he began crying for his children as they led him from the courtroom. *Id.*

In response to defense counsel's motion for new trial, the trial court ordered a competency evaluation. CP 61-65.

Following an evaluation, staff at Western State Hospital opined that Mr. Ortiz-Abrego was incompetent. CP 339-40. In November 2010, the trial court entered an order finding Mr. Ortiz-Abrego incompetent. CP 93-95.

Beginning in June 2011, the court conducted a lengthy hearing. Ms. Samuel testified to her efforts helping Mr. Ortiz-Abrego gain even a basic understanding of the proceedings. Ms. Samuel testified that despite those efforts, Mr. Ortiz-Abrego did not seem able to understand the proceedings or the potential outcomes. CP 328-29, 332, 336-37.

The State presented the testimony of two psychologists, Dr. George Nelson and Dr. Ray Hendrickson, and one psychiatrist, Dr. Roman Gleyzer, from Western State. Each of the three opined that Mr. Ortiz-Abrego was then presently competent. CP 342. The State's experts also opined that Mr. Ortiz-Abrego was exaggerating his condition in later evaluations. CP 339-40

Judge Craighead also heard testimony from Dr. Judd, whom she found "the most credible" of the experts who testified. CP 345. The court found Dr. Judd's testimony explained why Mr. Ortiz-Abrego was unable to understand the proceedings despite his attorney's efforts. CP 336. Dr. Judd explained that without certain accommodations Mr. Ortiz-Abrego would not be able to understand the proceedings or assist his attorney. CP 335.

Judge Craighead found that while there was evidence Mr. Ortiz-Abrego was malingering at later stages of the lengthy process that did

not “undermine the results of Dr. Judd’s evaluation or the observations of Ms. Samuel and the Court.” CP 364. The court concluded that Mr. Ortiz-Abrego was unable to understand the proceedings and unable to assist his attorney during trial. CP 346-47.

D. ARGUMENT

Judge Craighead properly exercised her discretion to conclude Mr. Ortiz-Abrego was not competent at the time of trial and was not competent to be sentenced following trial.

It is unquestionably a fundamental right not to be tried while incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996); *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (accused person’s competency to stand trial is “fundamental to an adversary system of justice”); U.S. Const. amend. XIV. A person is competent to stand trial only when he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and to assist in his defense with “a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

1. Judge Craighead properly found Mr. Ortiz-Abrego was incompetent at the time of trial.

A trial court's determination of competency is reviewed for an abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). A court abuses its discretion only when

the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.

State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal citations omitted). Judge Craighead's decision is fully supported by the record and by controlling caselaw.

The Supreme Court has recently described the circumstances which warrant the abuse of discretion standard to include those where:

1) the trial court is generally in a better position than the appellate court to make a given determination, (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which no rule of general applicability could be effectively constructed; and/or (5) there is a strong interest in finality and avoiding appeals,

State v. Sisouvanh, 2012 WL 4944801, 6 (Oct. 18, 2012) (Internal citations and quotations omitted). But beyond simply identifying the

circumstances in which an appellate court should apply a deferential standard of review, this list is useful in informing the nature of that review in cases such as this as well.

Judge Craighead presided over the lengthy trial in this case. She was able to observe Mr. Ortiz-Abrego's demeanor and responses. With that experience she was uniquely positioned to assess the experts' opinions in light of her observations and reach conclusions as to whether those opinions squared with the person she saw during trial. So too, Judge Craighead was able to hear Ms. Samuel's testimony and description of her interaction with Mr. Ortiz-Abrego and compare that to her own observations during trial to reach a conclusion. No matter what the State's experts said, unlike Judge Craighead they lacked the luxury of having sat through Mr. Ortiz-Abrego's trial and thus lacked the ability to rely upon that experience and those observations.

Judge Craighead expressed the view that "the goal here is going to be that each [party] gives me the information you think I need to hear, and then I will make a decision." 4/22/11 RP 20. Consistent with that goal, Judge Craighead conducted a multi-day competency hearing. Judge Craighead was then able to view the hostility exhibited by Dr. Hendrickson towards defense counsel during a video-taped evaluation

of Mr. Ortiz-Abrego. CP 343 (Finding of Fact 51.) The court also heard Dr. Hendrickson's efforts to minimize his actions, and from that conclude his account was less credible. *Id.* The court was able to observe the anger exhibited by Dr. Nelson on the witness stand with regard to his change of opinion of Mr. Ortiz-Abrego's competency. CP 339-40 (Finding of Fact 42).

Judge Craighead heard the State's experts describe Dr. Judd as the most-qualified individual to conduct an evaluation in a case such as this as he was the lone Spanish-speaking neuropsychologist in the region and Judge Craighead made a finding in that respect. CP 334, 342 (Findings of Fact 24 and 49). Dr. Judd's report contained suggested accommodations to ensure effective interaction with Mr. Ortiz-Abrego and to ensure he could absorb information being provided to him. CP 342 (Findings of Fact 48 and 49). But those accommodations were not made during restorative classes or in subsequent evaluations. *Id.*

Competency determinations are fact specific inquiries.

The appointed expert[s]' competency evaluation[s] and report [are] only one consideration among many in a trial court's determination of the defendant's competency to stand trial. The expert's examination and report may be of relatively little importance to the trial court in making its competency determination in a given case, regardless of whether the examination and report are accepted as adequate

Sisouvanh, at 7 (Internal citations omitted) (citing *inter alia State v. Dodd*, 70 Wn. 2d 513, 514, 424 P.2d 302 (1967)). In affirming a competency determination, *Dodd* noted the

trial court heard the defendant and his attorney, listened to a recital of his personal history, and considered a medical report signed by the Superintendent of Eastern State Hospital and two other doctors. These proceedings, combined with defendant's appearance and his comments and answers to extensive inquiries by the judge, all supplied the judge with a basis upon which to exercise a judicial discretion that the defendant was mentally competent to stand trial or to enter a plea of guilty

70 Wn. 2d at 520.

The State devotes much space in its brief to a discussion of cases in which appellate courts found a trial court had not abused its discretion in finding a person competent. Brief of Appellant at 34-36. The abuse of discretion standard recognizes that on certain issues a trial court must be permitted to choose from a “range of acceptable choices.” *Rohrich*, 149 Wn.2d at 654. Unless the choice is one that no reasonable person could make it falls within the accepted range and is not an abuse of discretion. *Id.* Thus, past cases which have affirmed competency determinations recognize nothing more than that a reasonable person could reach that decision on those facts and thus the decision is within the range of reasonable choices. Those decision do not require every

reasonable person to reach that decision nor suggest that is the only reasonable decision.

Competency determinations are not made in the abstract nor based simply upon benchmarks from other cases. And that is precisely why the abuse of discretion standard applies. Tasked with determining the standard of review of a challenge to the adequacy of a competency evaluation the Supreme Court recognized

no rule of general applicability can be effectively constructed to govern the adequacy of competency evaluations in every case. As we have noted in the past, the mental health field is a discipline fraught with subtleties and nuances, and there is “wide latitude for differing opinions.

Sisouvanh, at 6. Thus, simply comparing Mr. Ortiz-Abrego’s case to others is of limited value.

Judge Craighead plainly put much weight on the opinion of Dr. Judd. She found he was “by far the most qualified expert.” CP 334 (Finding of Fact 24). The court considered the difficulties Dr. Judd believed Mr. Ortiz-Abrego would have and saw concrete examples of those in observations of the trial. CP 329 (Finding of Fact 9); CP 335 (Finding of Fact 28). Judge Craighead considered a wealth of information provided by both parties. CP 346 (Finding of Fact 55). And from this

information, Judge Craighead concluded Mr. Ortiz-Abrego was incompetent.

It is not enough that the State believes the evidence would permit alternative conclusions. Instead, so long as Judge Craighead's conclusion is not manifestly unreasonable it must be affirmed. Judge Craighead's ruling is well within the range of acceptable choices and therefore is not manifestly unreasonable.

2. Judge Craighead applied the correct legal standard for competency.

In apparent recognition of the factual support for Judge Craighead's findings, the State does not argue those findings are untenable. Instead, the State contends Judge Craighead's ruling relied upon an erroneous legal standard. The State opines the trial court "injected . . . a new requirement for the higher level of 'understanding'" Brief of Appellant at 40. However, an examination of the legal standard of competency reveals Judge Craighead added nothing to that standard and instead employed the standard required by *Dusky* and Due Process.

Dusky requires a court find a person incompetent if he lacks either (1) sufficient ability to consult with his attorney "with a reasonable degree of rational understanding," or (2) a rational as well

as factual understanding of the proceedings against him” 362 U.S. at 402. The court has made clear that this standards equates to a requirement that the person have “the capacity for ‘reasoned choice’ among the alternatives available to him.” *Godinez v. Moran*, 509 U.S. 389, 397, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). *Dusky* requires that a person have the ability to “perceive [] accurately, interpret[], and/or, respond [] appropriately to the world around him.” *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1991). At bottom, what is demanded is that a defendant has “sufficient competence to take part in a criminal proceeding and to make the necessary decisions throughout its course.” *Godinez*, 509 U.S. at 403 (Kennedy, J., concurring).

Nothing in Judge Craighead’s ruling deviates from or expands upon that standard. The State erects a strawman when it contends the court erred in equating “capacity” with “understanding.” Brief of Respondent at 42. From this the State contends Judge Craighead used an incorrect legal standard to find Mr. Ortiz-Abrego incompetent. And, thus, the State argues Judge Craighead abused her discretion.

Judge Craighead found:

While Dr. Judd was careful in his report and his testimony to leave the determination of the defendant’s competency to the Court, he raised very serious doubts about the defendant’s competency. “Mr. Ortiz-Abrego’s borderline

intelligence, concrete thinking, and auditory comprehension ability will have a substantial impact on his ability to participate in a trial. Most notably, he will have great difficulty in tracking, understanding, and remembering the proceedings. He will do worst with rapid speech, abstract concepts, and unfamiliar material. He will do somewhat better with slower proceedings, repetition, concrete material, and familiar events. He will have a great deal of difficulty responding to questions and will need repetition and simple questioning.” Exhibit 4. Dr. Judd also testified that if the Court were able to implement certain accommodations, it was possible that the defendant could track court proceedings, including sentencing. In the absence of these accommodations, the defendant would not have the capacity to understand the nature of the proceedings.

CP 335 (Finding of Fact 29.) As the quotations suggest, the bulk of this finding was taken verbatim from Dr. Judd’s report, but was also echoed in his testimony. 6/8/10 RP 124-35. Thus, there is simply no plausible way for the State to contend it is not factually supported.

Yet the State assigns error to this finding contending the court erred “when it concluded that Dr. Judd’s report was sufficient to find that the defendant was not competent to stand trial.” Brief of Appellant at 2. The State’s does not offer any argument as to why Finding of Fact 29 was incorrect. Where a party does not provide argument as to why a finding is erroneous, supported by citation to the record and legal authority, that assignment of error is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The

State does, however, offer a broad argument, without specific reference to any findings or legal authority for that matter, that the court erred in relying on Dr. Judd's opinion at all because Dr. Judd's report did not say Mr. Ortiz-Abrego was incompetent. Brief of Appellant at 48-49.

First, Judge Craighead did not make a finding that Dr. Judd's report was sufficient to deem Mr. Ortiz-Abrego incompetent. Instead, as *Dodd* instructs, she considered it as one of many pieces leading to her decision that Mr. Ortiz-Abrego was incompetent. *See e.g.* CP 346 (Finding of Fact 55) (listing information court considered in reaching her conclusion). Second, competency is a legal not medical construct. As the Supreme Court has recently said a "competency evaluation and report [are] only one consideration among many in a trial court's determination of the defendant's competency to stand trial." *Sisouvanh*, at 7. There is simply no abuse of discretion in Judge Craighead relying on Dr. Judd's report as one basis of her legal conclusion.

A finding that a person will have "great difficulty in tracking, understanding, and remembering the proceedings" is in all respects equal to a finding that the person will be unable to respond to the world around him. Contrary to the State's contention, the court's findings focus entirely upon Mr. Ortiz-Abrego's ability or capacity to

understand and assist and do not conflate capacity with an actual understanding. Moreover, the necessary understanding is of “the proceedings.” *Dusky*, 362 U.S. at 402. Thus, it is not clear what error the State believes Judge Craighead committed when she found he lacked the ability to understand “the trial process.” *See* Brief of Appellant at 40.

Because the competency determination in this case involved looking backward to a trial which had occurred, Judge Craighead examined the conduct of the trial to see how Dr. Judd’s opinion squared with what she saw and what Ms. Samuel described. The Court’s findings make this clear. For example, Finding of Fact 9 provides in part:

Let me be clear about the relevance of this information: in and of itself, the defendant’s difficulty providing Ms. Samuel with information she was seeking does *not* make the defendant incompetent, what is relevant is the extent to which these observations are consistent with Dr. Judd’s evaluation and the evaluations of the WSH experts.

CP 329 (Emphasis in original); *see also*, CP 346 (Finding of Fact 55) (specifically noting reliance on court’s observations of Mr. Ortiz-Abrego in evaluation of expert testimony).

Cases like *Dodd* instruct that a court should examine the historical facts of the case in reaching a conclusion regarding the defendant's competency. Judge Craighead was able to evaluate what she had observed and consider the deficits identified by Dr. Judd and his recommended accommodations which were not implemented at trial. But that is not the same as saying Mr. Ortiz-Abrego did not understand. Judge Craighead was certainly not required to ignore her own observations of the trial.

At most Judge Craighead applied the standard of *Dusky* and did so with the added context of her own observations. Her conclusions speak in terms of Mr. Ortiz-Abrego's ability or inability to understand the proceedings. CP 346-47. Conclusion of Law 2 concludes "I find he lacked the capacity to assist his attorney in the absence of the accommodations outlined by Dr. Judd, as set forth in Exhibit 4." CP 347. Thus, Judge Craighead concluded Mr. Ortiz-Abrego lacked the ability or capacity to understand. Concluding that he was unable to understand due to the lack of accommodations is no different than concluding an unmedicated client lacked capacity where experts opined medication was necessary to provide him the necessary capacity to understand trial. The State's effort to recast her ruling as premised upon

the “new” requirement of actual understanding is not borne out by the record.

Undeterred the State continues that the problem with equating capacity with understanding is that a person may have the ability to understand but fail to actually understand because he is inattentive or malingering. Brief of Appellant at 42. If one ignored the fact that the court did not conflate actual understanding with capacity the State may be correct. But even then, it is equally possible that a person may fail to understand because his cognitive disorders prevent him from having the capacity to do so. Here, Judge Craighead found the latter to be the case. That conclusion is amply supported by the facts and lies well within the range of reasonable choices.

The State loses track of the command of *Dusky* that a person’s understanding of the proceedings be both rational and factual, and that his ability to assist counsel be equally based upon a rational understanding. Ultimately the State’s argument devolves to a claim that the court should have relied more on the State’s experts and should have reached a different conclusion. The State cannot show Judge Craighead abused her discretion simply because she chose an alternative not preferred by the State or its experts.

3. Judge Craighead did not inject an ineffective assistance of counsel analysis into her competency determination.

The second prong of the State's claim that Judge Craighead applied an incorrect standard is the State's contention that the court concluded counsel was ineffective. Brief of Appellant at 44. But the State does not identify or assign error to a single finding of fact or conclusion of law entered by the court in this regard. Indeed, the State could not as the court did not enter one.

Dusky requires a determination that a person have sufficient ability to consult with his attorney "with a reasonable degree of rational understanding" 362 U.S. at 402. In assessing a defendant's ability to rationally assist reasonably assist counsel a court should give weight to defense counsel's assessment.

A lawyer's opinion as to his client's competency and ability to assist in his own defense is a factor to which the trial court must give considerable weight in determining a defendant's competency to stand trial.

State v. Hicks, 41 Wn. App. 303, 307, 704 P.2d 1206 (1985); *see also*, *State v. Harris*, 122 Wn.2d 98, 105, 94 P.3d 379 (2004).

Again, Judge Craighead heard Ms. Samuel's description of the difficulties she had in her interactions with Mr. Ortiz-Abrego and her efforts to impart on him an understanding of the peril he faced. CP 329

(Finding of Fact 8) (Despite fact that he had been attending pretrial proceedings for more than a year, Mr. Ortiz-Abrego did not seem to understand what a trial was or why he had been coming to court); CP 329-30 (Finding of Fact 10) (despite repeated discussion Mr. Ortiz-Abrego did not seem to appreciate his peril) CP 332 (Finding of Fact 19) (even after 10 to 12 hours of consultation Mr. Ortiz-Abrego demonstrated only a minimal understanding of the process). The State does not challenge any of those findings.

Judge Craighead heard Dr. Judd's description of the limitations Mr. Ortiz-Abrego would and will have in his relationship with counsel. Judge Craighead specifically noted that Mr. Ortiz-Abrego's lack of understanding was not the basis for her finding of incompetency but rather "what is relevant is the extent to which these observations are consistent with Dr. Judd's evaluation and the evaluations of the WSH experts." CP 329 (Finding of Fact 9). Indeed, at one point, the deputy prosecutor too had concerns for Mr. Ortiz-Abrego's competency. CP 332 (Finding of Fact 18). Judge Craighead found "Dr. Judd's report explained for Ms. Samuel why her lessons about the court process had

not worked.” CP 336 (Finding of Fact 30).² The court found that Dr. Judd’s opinion that Mr. Ortiz-Abrego’s concrete thinking would stand in the way of his ability to assist “was exactly the problem his attorney identified.” CP 335 (Finding of Fact 28). The State has not assigned error to this finding.

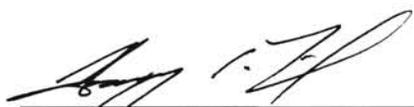
Judge Craighead properly considered that information with the added context of her own observations of the trial and subsequent proceedings. The court had ample evidence to conclude Mr. Ortiz-Abrego’s inability to understand or assist his attorney was due to the condition described by Dr. Judd. Her conclusion that Mr. Ortiz-Abrego lacked the capacity to assist his attorney is a proper application of the *Dusky* standard is supported by the record and is not an abuse of discretion.

² While the State assigns error to this finding, it has offered no argument as to why it is unsupported or improper, and thus it is waived *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

E. CONCLUSION

Judge Craighead did not abuse her discretion when she found Mr. Ortiz-Abrego incompetent. This court should affirm that determination.

Respectfully submitted this 17th day of December, 2012.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

| | | |
|-------------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Appellant, |) | |
| |) | NO. 67894-9-I |
| v. |) | |
| |) | |
| ALEXANDER ORTIZ-ABREGO, |) | |
| |) | |
| Respondent, |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|---------------------------------|-----|---------------|
| [X] JAMES WHISMAN, DPA | (X) | U.S. MAIL |
| KING COUNTY PROSECUTOR'S OFFICE | () | HAND DELIVERY |
| APPELLATE UNIT | () | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2012.

X _____ *gme*

APPELLATE UNIT
647 PM 11 DEC 17 2012

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710