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No. 92334-5-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Petitioner.

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

The Honorable Susan Craighead

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Judge Susan Craighead conducted a multi-day hearing in 2011 on the question of Mr. Ortiz-Abrego's competency. The court considered reports and testimony of four separate experts. Judge Craighead heard the testimony of Mr. Ortiz-Abrego's former attorney. Judge Craighead considered her own observations of Mr. Ortiz-Abrego and her assessment of the credibility and professionalism of the various experts presented by both parties. Judge Craighead found the opinion of one of these experts, Dr. Tedd Judd,¹ "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.

Applying the familiar requirements of *Dusky v. United States*,² the court found Mr. Ortiz-Abrego incompetent.

The Court of Appeals concluded Judge Craighead's ruling was manifestly unreasonable and reversed.

B. ISSUE PRESENTED

The Due Process Clause of the Fourteenth Amendment prohibits criminal proceedings against an incompetent defendant. A person is

¹ Documents added to the record after this Court granted review include materials from another expert, Dr. Brian Judd. To avoid confusion reference to either individual will include their first names.

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

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. Is that conclusion manifestly unreasonable such as to constitute an abuse of the court's 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 trying to relay to him. CP. 329-30, 332.

Mr. Ortiz-Abrego appeared in court on the first day of trial before Judge Craighead with his five-year-old son, 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 prosecutor expressed his concerns about whether Mr. Ortiz-Abrego really understood what was happening. CP 332. 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.

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

Dr. Tedd Judd concluded Mr. Ortiz-Abrego was intellectually disabled with an IQ of 71 and that he had a cognitive learning disorder particularly affecting his auditory comprehension. CP 334. Dr. Tedd 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. Tedd Judd recommended a series of accommodations which he believed might 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. Tedd Judd, whom she found "the most credible" of the experts who testified. CP 345. The court found Dr. Tedd Judd's testimony explained why Mr. Ortiz-Abrego was unable to understand the proceedings despite his attorney's efforts. CP 336. Dr. Tedd Judd explained that certain accommodations might enable able Mr. Ortiz-Abrego 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 investigating his competence, that did not "undermine the results of Dr. Tedd Judd's evaluation or the observations of Ms. Samuel and the Court." CP 364. The court concluded Mr. Ortiz-Abrego was unable to understand the proceedings and unable to assist his attorney during trial. CP 346-47.

The State appealed the trial court's order. Finding Judge Craighead's decision was an abuse of discretion, the Court of Appeals reversed. Opinion at 9.

D. ARGUMENT

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*, 362 U.S. 402 (internal quotations omitted).

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.

1. Competency determinations lie within the discretion of the trial judge and are reviewed only for a clear abuse of that discretion.

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). “The abuse of discretion standard recognizes the deference owed to the judicial actor who is better positioned than another to decide the issue in question.” *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (Internal quotations omitted. Citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990); *Miller v. Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985)). “Discretionary determination[s] should not be disturbed on appeal except on a clear showing of abuse of discretion.” *Barton v. State Department of Transportation*, 178 Wn.2d 193, 215, 308 P.3d 597 (2013) (Internal quotations and citations omitted.)

Judge Craighead’s decision is fully supported by the record and by controlling case law.

2. Judge Craighead did not abuse her discretion when after conducting a lengthy hearing, considering the opinions of both State and defense experts and considering the observations of numerous witnesses and her own observations of Mr. Ortiz-Abrego she found he lacked the ability to assist counsel with a factual and rational understanding of the proceedings.

This Court has 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, 175 Wn.2d 607, 621, 290 P.3d 942 (2012). Not only do these criteria illustrate why competency determinations are reviewed under the deferential standard, they guide and inform the review of Judge Craighead's ruling.

Judge Craighead had the benefit of having presided over Mr. Ortiz-Abrego's lengthy trial. She was able to rely on her own observations Mr. Ortiz-Abrego's demeanor during trial and his responses to testimony and arguments. Her personal experience makes her uniquely well 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. Judge Craighead also presided over the competency hearing, where she heard Ms. Samuel's testimony and description of her interactions with Mr. Ortiz-Abrego. Judge Craighead was able to compare such testimony to her own observations during trial. No matter what the State's experts said, unlike Judge Craighead they lacked the experience of having sat through Mr. Ortiz-Abrego's trial and thus lacked the ability to rely upon that foundation and the resulting personal observations.

Judge Craighead made clear she intended to consider a wide array of information when assessing Mr. Ortiz-Abrego's competence, stating at the outset "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. True to her word, Judge Craighead conducted a lengthy competency hearing spanning several days and involving numerous experts. Judge Craighead was 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 later 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, which also factored

into Judge Craighead's assessment of his testimony. CP 339-40 (Finding of Fact 42).

Judge Craighead heard the State's experts describe Dr. Tedd Judd as the most-qualified individual to conduct an evaluation in a case such as this, because 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. Tedd Judd's report contained suggested accommodations to afford more effective interaction with Mr. Ortiz-Abrego and to seek 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, 175 Wn.2d at 622 (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.

Like the trial judges in *Dodd* and *Sisouvanh*, Judge Craighead had a wealth of information from a variety of sources from which to draw on to reach her conclusion. Judge Craighead plainly credited the opinion of Dr. Tedd Judd. She found he was "by far the most qualified expert." CP 334 (Finding of Fact 24). The court considered the difficulties Dr. Tedd Judd believed Mr. Ortiz-Abrego would have and saw concrete examples of those in her observations during the trial. CP 329 (Finding of Fact 9); CP 335 (Finding of Fact 28).

Judge Craighead heard the testimony of Ms. Samuel, Mr. Ortiz-Abrego's trial attorney. Ms. Samuel described the great efforts she went to assist Mr. Ortiz-Abrego in understanding the process. CP 329-30 (Findings of Fact 8-10). The court heard Ms. Samuel describe Mr. Ortiz-Abrego's persistent inability to understand and assist her despite her efforts. CP 332 (Finding of Fact 18.); CP 336 (Findings of Fact 31-32.

In assessing a defendant's ability to rationally and reasonably assist counsel, a factfinder 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); *accord*, *Sisouvanh*, 175 Wn.2d at 623; *State v. Harris*, 122 Wn. App. 498, 505, 94 P.3d 379 (2004). This deference occurs because:

[t]he role of counsel in a determination of competency of his client is unique. The lawyer is a representative of his client and is also an officer of the court. The importance of the lawyer's role, as the one who has the closest contact with the defendant was recognized by the United States Supreme Court in *Drope*[, 420 U.S. at 177 n.13].

State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). *Drope* explained:

Although we do not ... 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. It is certainly well within Judge Craighead's discretion to consider and give great weight to the doubts expressed by Ms. Samuel.

Further, Judge Craighead considered that even the trial prosecutor had doubts as to whether Mr. Ortiz-Abrego “really understood what was happening.” CP 332 (Finding at Fact 18).

Tellingly, Judge Craighead’s findings do not only include facts and opinions which support her conclusion. Instead, her findings painstakingly set out in detail contrary facts and opinions. Then, just as carefully, those findings explain why Judge Craighead chose not to rely on those facts. For example, her findings note the contrary opinion of Dr. Ray Hendrickson, CP 341 (Finding of 46), but also note his use of a “two hour interrogation,” CP 341 (Finding of Fact 45) and his lack of credibility regarding his description of certain events, CP 343 (Finding of Fact 51).

Judge Craighead diligently considered a wealth of information provided by both parties. CP 346 (Finding of Fact 55). From this information, Judge Craighead concluded Mr. Ortiz-Abrego was incompetent. That determination was not an abuse of discretion and is entitled to great deference on review.

3. The Court of Appeals erroneously supplanted its discretion in place of Judge Craighead’s.

It is not enough that the State or a reviewing court believes the evidence would permit alternative conclusions.

The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh

evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.

Bale v. Allison, 173 Wn. App. 435, 458, 294 P.3d 789 (2013). When a reviewing court substitutes its own discretion for that of the trial court, it fails to afford the considerable deference required by the abuse of discretion standard. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 590, 220 P.3d 191 (2009). 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.

The Court of Appeals opinion treats prior cases as requiring an outcome rather than simply placing those decisions on the spectrum of reasonable choices. Opinion at 7-8. For example, citing this Court's opinion in *Ortiz*, the Court of Appeals concludes "low intellectual functioning" cannot establish incompetency. Opinion at 8. *Ortiz* did not hold that low intellectual function **could not** establish incompetency. *Ortiz* did not hold the trial judge in that case was required to find the defendant competent. Instead, this Court held that it was not unreasonable for the trial court in that case to have concluded that the defendant's low intellectual functioning did not establish his incompetency. 104 Wn.2d at 484.

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 those decisions are within the range of reasonable choices.

Competency determinations are not made in the abstract nor based simply upon benchmarks from other cases. That is precisely why the abuse of discretion standard applies. As *Sisouvanh* 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.

175 Wn.2d at 622. Simply comparing Mr. Ortiz-Abrego’s case to others cannot define the limits of Judge Craighead’s discretion. Yet that is what the Court of Appeals did.

Judge Craighead’s determination that the testimony and evidence presented established Mr. Ortiz-Abrego was incompetent must be afforded great deference as she was the “judicial actor . . . better positioned . . . to

decide” that factual question. *Fisons*, 122 Wn.2d at 339. The Court of Appeals erred in substituting its discretion for Judge Craighead’s. *Magana*, 167 Wn.2d at 590.

4. *Judge Craighead applied the correct legal standard when she noted her own observations that Mr. Ortiz-Abrego did not have rational and factual understanding of the trial and compared those to the deficits and difficulties Dr. Tedd Judd noted that would stand in the way of Mr. Ortiz-Abrego’s ability to have such an understanding.*

a. Judge Craighead properly included her own observations of Mr. Ortiz-Abrego’s lack of understanding in her discretionary determination that he lack the ability rationally and factually understand the proceedings.

Dusky requires the ability to proceed with a rational and factual understanding of “the proceedings.” *Dusky*, 362 U.S. at 402. This standard 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). As Justice Kennedy noted, a competent person has the ability to “take part” in the proceedings and make the required necessary decisions “throughout its course.” *Moran*, 509 U.S. at 403 (Kennedy, J., concurring) (Emphasis added). This Court similarly requires “competency standards should require an ability to make necessary decisions at trial.” *State v. Jones*, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983).

Judge Craighead applied the standard of *Dusky* and appropriately added the context of her own observations. Her conclusions rest on Mr. Ortiz-Abrego's ability or inability to understand the proceedings. CP 346-47. In Conclusion of Law 2, the judge ruled, "I find he lacked the capacity to assist his attorney in the absence of the accommodations outlined by Dr. Tedd Judd, as set forth in Exhibit 4." CP 347.

Nonetheless, the Court of Appeals believed Judge Craighead employed the incorrect standard because the standard for competency "does not require proof that a defendant has an actual or a 'proper' understanding" of the proceedings. Opinion at 8.

That the competency standard does not require proof of an actual understanding does not mean a court must ignore its observation and conclusion of an actual lack of understanding. As the trial court found

It is apparent to me that the defendant did not understand his trial as I was happening and simply did not appreciate what was going on in the courtroom. It is one thing for someone not to understand a "theoretical" trial, and quite another not to understand an actual trial.

CP 346 (Finding of Fact 55).

Judge Craighead found Mr. Ortiz-Abrego lacked that ability throughout the trial that had already occurred. To be clear, Judge Craighead's ruling did not rest simply upon a conclusion that Mr. Ortiz-Abrego did not understand. Instead, the judge's conclusion that he did not

understand was premised on her observations, as well as those of others, **and** her finding that the deficits identified by Dr. Tedd Judd prevented the necessary understanding. Judge Craighead examined the conduct of the trial to see how Dr. Tedd Judd's opinion squared with what she saw and what Ms. Samuel described. The Court's findings make this clear. *See* CP 329 (Finding of Fact 9 noting the consistency between Ms. Samuel's observations and Dr. Tedd Judd's evaluation); 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 to determine a defendant's competency. 70 Wn.2d at 514. Judge Craighead evaluated what she had observed and considered the deficits identified by Dr. Tedd Judd and his recommended accommodations which were not implemented at trial.

To be competent, an accused person must understand "the proceedings." *Dusky*, 362 U.S. at 402. The capacity to understand and assist means the capacity to understand and assist as the trial unfolds and not in some purely abstract or theoretical way. *Moran*, 509 U.S. at 403 (Kennedy, J., concurring). And it means the capacity to make the necessary decisions throughout the trial. *Jones*, 99 Wn.2d at 746. Here, the proceeding had already occurred, and Judge Craighead found Mr. Ortiz-

Abrego lacked the requisite ability throughout that proceeding, CP 346 (Finding of Fact 55).

Judge Craighead was certainly not required to ignore her own observations of the trial. To suggest a demonstrated lack of understanding cannot support a finding of incompetency is to suggest prediction of ability must trump observed inability; that one cannot look at actual functioning to assess the "capacity to function." Again, *Dodd* explains that an assessment of incompetency may include a host of facts beyond the reports and predictions of experts, 70 Wn.2d at 514. Because a judge may and should rely on observable facts as a part of its determination of incompetency, a court is not restricted to a theoretical or predictive assessment as the State would have it. Instead, a court must be permitted to rely on its own observation of a demonstrated lack of understanding.

When concluding a person did not actually understand the proceedings which have already, begs the question of whether he had the capacity to do so. It does not conflate the two concepts instead the former informs the later. The State has argued the problem with allowing courts to rely on a demonstrated lack of understanding in assessing competency 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. But it is equally possible that a person may fail to understand because

his cognitive disorders prevent him from doing so. Here, Judge Craighead, based upon all the facts before her, found the latter to be the case. That conclusion is amply supported by the facts and lies well within the range of reasonable choices.

b. Judge Craighead was entitled to consider the absence during trial of identified measures which could have assisted Mr. Ortiz-Abrego understand the proceedings as part of her discretionary determination that he lack the ability rationally and factually understand the proceedings.

The opinion of the Court of Appeals holds Judge Craighead “strayed” from the competency standard by “adopting a hybrid standard” which considered possible accommodations at trial that perhaps could have rendered Mr. Ortiz-Abrego competent. Opinion at 9. 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. A person “may still be competent to stand trial if the medication enables him to understand the proceedings and to assist in his own defense.” *In re the Personal Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (citing RCW 10.77.090(7)). In that scenario medication is itself an accommodation. It

defies logic to suggest that no accommodation short of psychotropic medication can be considered in assessing a person's ability to have a factual and rational understanding of the proceedings.

Judge Craighead found first that Mr. Ortiz-Abrego did not understand the proceedings. She then found credible Dr. Tedd Judd's opinion that accommodations could be made to assist him in attaining that factual and rational understanding to assist counsel. The absence of such measures merely insured he never attained that understanding

5. Evidence and opinions gathered in the years following Judge Craighead's 2011 ruling are not germane to the question of whether that ruling was an abuse of discretion.

This Court granted the State's motion to add additional documents to the appellate record, including the report and testimony of Dr. Brian Judd, an expert retained by the State who conducted an evaluation of Mr. Ortiz-Abrego in 2013. Additionally, the record now includes rulings and correspondence from Judge Craighead from 2013. Moreover, the additional record includes a subsequent evaluation and testimony of Dr. Tedd Judd in which he continues to maintain Mr. Ortiz-Abrego lacked the ability to understand the proceedings.

On review, an appellate court "will not consider matters outside the trial record." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). Mr. Ortiz-Abrego continues to maintain there is no basis in law or reason to consider anything that happened after Judge Craighead's 2011 ruling when assessing whether that ruling was an abuse of discretion.

Anything Judge Craighead said following her 2011 ruling cannot lend any understanding to this Court of the contours of that ruling. What Judge Craighead ruled or said in 2013 about this case are the product of the lengthy and drawn out proceedings which took place after her 2011 ruling.

Further, any evidence opinions or other facts gathered in the years following Judge Craighead's ruling, including Dr. Tedd Judd's continued belief that Mr. Ortiz-Abrego lacked the ability to understand, have no bearing on whether her 2011 ruling was an abuse of discretion. Judge Craighead did not have those reports, opinion, and testimony before her. No matter what that evidence provides, it is impossible to conclude her failure to consider evidence which was not presented to her was an abuse of discretion.³

³ Indeed, it is doubtful whether there is any authority permitting the State to obtain an evaluation by Dr. Brian Judd in the first place. The provisions of 10.77 RCW define the mandatory procedures for competency proceedings. *State v. Hedrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Those statutory procedures specify who may conduct evaluations of the defendant. The statutory provisions do not authorize the State to obtain an additional evaluation from a retained expert. Because 10.77 RCW fully defines the procedures for competency evaluations, the authority for additional evaluations cannot come from other

Even if Dr. Brian Judd's evaluation was before Judge Craighead, she still would have been well within her discretion to find Mr. Ortiz-Abrego competent. Again, *Dodd* made clear that an assessment of competency can rest on a myriad of facts beyond the evaluations of experts.

Nothing that occurred in the years following Judge Craighead's ruling informs the reasonableness of her conclusion in 2011.

F. CONCLUSION

Judge Craighead did not abuse her discretion when she found Mr. Ortiz-Abrego incompetent based on a lengthy hearing, after weighing substantial testimony, and applying established law. This Court should reverse the Court of Appeals and reinstate the trial court's order.

Respectfully submitted this 1st day of August, 2016.

s/ Gregory C. Link
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Washington Appellate Project
Attorneys for Petitioner

sources such as CrR 35. *In re the Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 92334-5
v.)	
)	
ALEXANDER ORTIZ-ABREGO,)	
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, ANN JOYCE, STATE THAT ON THE 1ST DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN, DPA	(X)	E=MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF AUGUST, 2016

x *Ann Joyce*

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Please find attached for filing ..

- **Supplemental Brief of Petitioner**
- **Motion for Leave to File Overlength Brief**

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