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NO. 64229-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JODY SANDS,

Appellant.

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2010 SEP 20 PM 4:21  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Linda C. Krese, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

SANDS WAS NOT COMPETENT TO STAND TRIAL.

“No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. “A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of *rationaly assisting in his own defense*.” State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001) (citing State v. Harris, 114 Wn.2d 419, 427-28, 789 P.2d 60 (1990)); RCW 10.77.010(15) (emphasis added).

Sands argues the trial court erred in finding him competent to stand trial despite unanimous agreement that Sands’ is mentally ill, likely delusional, unable to distinguish reality from fantasy, or rationally consider matter such as mental defenses. Brief of Appellant (BOA) at 3-10, 14, 20-22. The State suggests Sands was competent to stand trial, claiming Sands’ inability to rationally choose among alternative defenses or view the evidence the same as others, is insufficient to render him incompetent. Brief of Respondent (BOR) at 11-16. While neither the ability to strategize nor the ability to choose between alternative defenses is necessarily determinative of competency, this record shows Sands’ incompetence is based on far more than the reasons the State suggests.

The trial court found Sands was mentally ill, delusional, and not able to assist rationally in his defense. 1RP 107, 111-20. The trial court questioned Sands' rationality not only because of his inability to choose wisely among potential defenses or consider the evidence as others did, but also, because Sands' was unable to cooperate with defense counsel or distinguish fantasy from reality. As the court acknowledged, "it is certainly clear to me that his [Sands] mental illness is going to make his attorney's task very difficult in defending him." 1RP 118-19.

The Court's finding of competency turned on the fact that it did not believe "rationality" was the linchpin of competency – "so given, as I said, what appears to be a fairly low bar in how we determine whether someone is competent to stand trial, I think I have to find Mr. Sands competent to stand trial, recognizing how difficult that will be." 1RP 119-20. In other words, although Sands was not rational, and therefore could not assist rationally in his defense, the Court believed he was still competent because only a bare "ability to assist" was required. 1RP 115-17, 119-20.

The state does not address the "rationality" component of an accused's ability to assist. Instead, it contends accused need not be able to "choose among alternative defenses," or "view the evidence in the same way," as if these examples exhausted the parameters of rationality. BOR, at 11-16. The state relies on State v. Hahn, 41 Wn. App. 876, 707 P.2d

699 (1985), rev'd in part, 106 Wn.2d 885, 726 P.2d 25 (1986), and Harris, 114 Wn.2d 419, for this proposition. But, as addressed in the Opening Brief of Appellant, unlike the appellant in Hahn, Sands' attorney, the experts, and the trial court agreed Sands was mentally ill to the point of delusion and irrationality.

This case is also distinguishable from Harris, 114 Wn.2d 419. Harris was committed to Western State Hospital for determination of his competency to stand trial. A short time later, the hospital reported Harris was aware of the nature of the charges against him and able to assist in his defense. The trial court granted defense counsel's motions for a continuance and an independent psychiatric examination. Defense counsel did not obtain an independent evaluation, and no formal evidentiary hearing was held on Harris' mental state prior to trial. Following his conviction on an aggravated murder charge, Harris challenged his competency to be executed and his ability to assist counsel in post conviction proceedings. Harris, 114 Wn.2d at 421-22.

Recognizing "the lessened need for a defendant to assist in post conviction proceedings," the Supreme Court concluded that for an individual to competent to be executed, "the defendants need not be able to think of new issues for counsel to raise, nor must they necessarily be able to recall the events surrounding the crime. What is required is that

they understand they have been sentenced to death for murder and be able to communicate rationally with counsel.” Harris, 114 Wn.2d at 429-30.

Unlike Harris, a formal hearing evidentiary hearing was held to determine Sands’ competency prior to trial. Sands was alleged to be competent only after four competency evaluations, one 15-day, two 90-day, and one 180-day commitments at Western State Hospital. See 1RP; CP 175-215; Supp. CP \_\_\_\_ (sub no. 6, Order of Commitment for 15 days to Western State Hospital and Staying of Proceedings, at 1); Supp. CP \_\_\_\_ (sub no. 22, Department of Social and Health Services Forensic Psychological Report, dated 5/26/09, at 1). Moreover, defense counsel did obtain an independent competency evaluation from Lee Gustafson, who concluded Sands’ mental illness continued to impair his ability to assist his attorney in his defense, including in exploring a mental defense. 1RP 80-82. Where, as here, the issue of competency concerns Sands’ ability to assist in his own defense at trial, rather than in a post conviction proceeding, the “the lessened need for a defendant to assist in post conviction proceedings,” cannot apply.

After having found Sands could not rationally assist in his defense, a finding of incompetence should necessarily have followed. The trial court erred in finding Sands’ competent to stand trial.

B. CONCLUSION

For the reasons discussed above and in the opening brief, Sands' conviction should be reversed and the case remanded for a new trial.

DATED this 20<sup>th</sup> day of September, 2010.

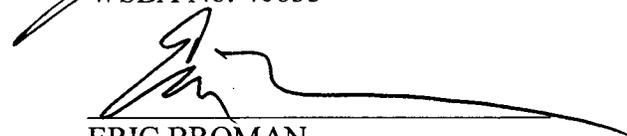
Respectfully submitted,

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20<sup>TH</sup> DAY OF SEPTEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] MARY KATHLEEN WEBBER  
SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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EVERETT, WA 98201
  
- [X] JODY SANDS  
DOC NO. 334236  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2010.

x *Patrick Mayovsky*