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No. 70320-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Petitioner.

COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 10 PM 2:27

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead

BRIEF OF PETITIONER

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A. INTRODUCTION

Judge Susan Craighead previously determined Alexander Ortiz-Abrego was incompetent during his trial and vacated his conviction. Judge Craighead did so only after presiding over his trial, affording her the opportunity to observe his demeanor, and after considering expert opinions which validated her observations.

After lengthy restoration efforts, Mr. Ortiz-Abrego was returned to court to again determine whether he was competent. But rather than permit Judge Craighead, with her intimate familiarity with the case, to make that determination the State insisted instead on a jury trial.

Following that trial, at which the evidence largely mirrored that presented at the first hearing, and based on incorrect instructions regarding competency, the jury concluded Mr. Ortiz-Abrego was competent.

B. ASSIGNMENTS OF ERROR

1. The trial court's instruction misstated the law regarding competency to stand trial and deprived Mr. Ortiz-Abrego of due process.

2. The trial court erred in giving Instruction 8.

3. The trial court erred in giving Instruction 9.

4. The trial court erred in giving Instruction 11.

5. The court violated Article I, section 7 when it ordered Mr. Ortiz-Abrego to undergo a physiological evaluation beyond that permitted in 10.77 RCW.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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. Where the trial court's instruction permitted the jury to find Mr. Ortiz-Abrego competent even where he lacked an understanding of the proceedings and/or lacked the ability to assist counsel did they deprive Mr. Ortiz-Abrego of due process?

2. In assessing a person's competency to stand trial, the fact finder must give considerable weight to the opinion of defense counsel regarding the defendant's ability to assist counsel. Here the trial court did not instruct jury that it could consider counsel's opinion much less the requirement the jury afford it considerable weight. Moreover the

court affirmed the state's objections when both previous and current defense counsel offered their opinions of Mr. Ortiz-Abrego's competency. By preventing the jury from properly considering this information did the trial court deprive Mr. Ortiz-Abrego of Due Process?

3. There is no constitutional right to a jury trial at a competency proceeding. Instead, a jury trial is permitted only by virtue of RCW 10.77.086. That statute does not require jury unanimity on the question of incompetency. Did the trial court err in instructing the jury they must be unanimous to find Mr. Ortiz-Abrego incompetent?

4. Article I, section 7 precludes the State from disturbing one's private affairs without authority of law. Due to the intrusiveness of a mental examination, the court is narrowly limited in its authority to order that a person accused of a crime submit to an examination by a psychiatrist. Where 10.77 RCW does not authorize the state to obtain a second psychological evaluation of Mr. Ortiz-Abrego, did the court lack authority of law to order him to submit to a second examination?

D. 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. Supp. CP __, Sub No. 1.

Prior to trial Mr. Ortiz-Abrego met numerous times with his attorney, Anna Samuel. Supp. CP __, Sub No. 163. 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. Supp. CP __, Sub No. 163.

Mr. Ortiz-Abrego appeared in court on the first day of trial with his five-year-old son, because his wife was giving birth to another child. Supp. CP __, Sub No. 163. 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. Supp. CP __, Sub No. 163. The trial court conducted a colloquy, and while the court remained concerned, the judge concluded Mr. Ortiz-Abrego was competent. *Id.*

Although he was facing an indeterminate sentence with a minimum of 12 years, Mr. Ortiz-Abrego declined a plea offer that would have led to a 15 month sentence. Supp. CP __, Sub No. 163.

Because of lingering doubts about her client's competency, in the midst of trial, Ms. Samuel retained Dr. Tedd Judd¹ to evaluate Mr. Ortiz-Abrego. Supp. CP __, Sub No. 163.

Dr. Tedd Judd concluded Mr. Ortiz-Abrego had borderline intellectual ability with an IQ of 71 and that he had a cognitive learning disorder particularly affecting his auditory comprehension. Supp. CP __, Sub No. 163. Dr. Tedd Judd opined that Mr. Ortiz-Abrego exhibited particularly concrete thinking and would thus have difficulty with hypothetical or conditional reasoning. *Id.* 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 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 convicted, he would be sent to

¹ Because the State subsequently retained Dr. Brian Judd in this case, the two are referred to by their first and last names.

prison. Supp. CP __, Sub No. 163. 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 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. Supp. CP __, Sub No. 109.

Following an evaluation, staff at Western State Hospital opined that Mr. Ortiz-Abrego was incompetent. Supp. CP __, Sub No. 163. 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 to help 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. Supp. CP __, Sub No. 163.

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. Supp. CP __, Sub No. 163. The State's experts also opined that Mr. Ortiz-Abrego was

exaggerating his condition in later evaluations. Supp. CP ___, Sub No. 163

Judge Craighead also heard testimony from Dr. Tedd Judd, whom she found “the most credible” of the experts who testified. Supp. CP ___, Sub No. 163. The court found Dr. Judd’s testimony explained why Mr. Ortiz-Abrego was unable to understand the proceedings despite his attorney’s efforts. Supp. CP ___, Sub No. 163. Dr. Tedd Judd explained that without certain accommodations Mr. Ortiz-Abrego would not be able to understand the proceedings or assist his attorney. Supp. CP ___, Sub No. 163.

Judge Craighead concluded that Mr. Ortiz-Abrego was unable to understand the proceedings and unable to assist his attorney during trial. Supp. CP ___, Sub No. 163.

The State appealed that finding.

While that appeal was pending, the trial court conducted yet another restoration hearing pursuant to RCW 10.77.060.

Rather than permit Judge Craighead to determine whether Mr. Ortiz-Abrego was competent, the State demanded a jury determine the question of Mr. Ortiz-Abrego’s competency. 1/2/13 RP 4. The trial

court concluded RCW 10.77.086 required it to grant the State's request.
1/2/13 RP 30.

Before the jury, the State again presented the testimony of the Dr. Hendrickson and Dr. Nelson who echoed their testimony from the prior hearing. Each testified they believed Mr. Ortiz-Abrego was competent to stand trial. 2/13/13 RP 335.

The jury heard Ms. Samuel explain, as she had previously, of her efforts to assist Mr. Ortiz-Abrego to gain an understanding of the proceedings to no avail. 3/11/13 RP 55-56. Ms. Samuel explained Mr. Ortiz-Abrego declined a plea offer that would have entailed a 15-month sentence where if convicted at trial he faced an indeterminate sentence of no less than 12 years. *Id.* at 134.

The jury also heard the testimony of Dr. Brian Judd, an expert whom the court permitted the State to retain shortly before trial. Over Mr. Ortiz-Abrego's objection, Dr. Brian Judd was permitted to conduct yet another evaluation of Mr. Ortiz-Abrego. 1/3/13 RP 33, 54-55. Dr. Brian Judd opined Mr. Ortiz-Abrego was competent. 3/4/13 RP 71-72.

Following up on his earlier evaluation, Dr. Tedd Judd conducted extensive neuropsychological testing of Mr. Ortiz-Abrego. 3/6/13 RP 103 116. Dr. Tedd Judd's testing revealed Mr. Ortiz-Abrego's IQ was

in the range of the upper 60's to low 70's. 3/6/13 RP 64. Beyond his initial diagnosis of borderline intellectual functioning with an auditory learning disability, Dr. Tedd Judd realized Mr. Ortiz-Abrego experienced a significant deficit at the conceptual level. *Id.* at 65. He described it as a "largely language-and-conceptually based learning disability." *Id.* at 119.

In large part because he was the only Spanish speaker and practicing neuropsychologist among them, the State's experts agreed Dr. Tedd Judd's testing was the most accurate. 2/28/13 RP 34. Nonetheless, they simply disagreed with the conclusion he reached. *Id.*

After the jury found Mr. Ortiz-Abrego competent, the trial court certified this matter to this Court. Specifically the trial court certified the questions:

Does "competency to stand trial" require the capacity to understand a trial as it unfolds and, if so, to what extent?
Was the jury correctly apprised of the law as to the requirements for competency?

E. ARGUMENT

1. To be deemed competent a person must have the capacity to understand the proceedings as they occur.

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 court must find a person incompetent if the person 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." *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The Court has made clear that 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). *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.” *Moran*, 509 U.S. at 403 (Kennedy, J., concurring).

Plainly the requirement of competency is not temporally limited. RCW 10.77.060 requires the court initiate competency proceeding “[w]hen . . . there is reason to doubt his or her competency.” (Emphasis added.) Even where a person has previously been deemed competent, RCW 10.77.060 is triggered whenever a court is presented with “evidence that his condition had changed.” *State v. Ortiz*, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

“Capacity” means “the ability to do something : a mental, emotional, or physical ability.” <http://www.merriam-webster.com/dictionary/capacity>. The State has argued that a person’s actual ability to understand the proceedings against him is irrelevant to an assessment of his competency. Under the State’s model, capacity is a purely theoretical construct; in essence asking whether a person should be able to understand the proceedings.

But that is not what *Dusky* requires. The necessary understanding is of “the proceedings.” *Dusky*, 362 U.S. at 402. 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). The Washington Supreme 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). Plainly then, to the extent competency means the capacity to understand and assist, it means the capacity to understand and assist as the trial unfolds and not in some purely abstract or theoretical way. And it means the capacity to make the necessary decisions throughout.

Among the necessary decisions is the decision whether or not to enter a guilty plea. *See Missouri v Frye*, _ U.S. __, 132 S. Ct. 1399, 1408, 182 L.Ed.2d 379 (2012) (holding that because decision to accept guilty plea is for the defendant alone counsel’s failure to communicate a plea offer is basis for finding denial of Sixth Amendment right to effect counsel). The court sustained the State’s objection to Ms. Samuel’s observation that Mr. Ortiz-Abrego did not seem understand the abstract concept of pleading guilty even to a substantially reduced charge. 3/12/13 RP 49. The court instructed the jury that there is an additional finding required before a court could accept a plea. *Id.* That a

court must make an additional finding before accepting a guilty plea, that it was voluntarily and intelligently made, is irrelevant to the question of whether the defendant has the basic ability to understand the availability or potential benefit of such a resolution. Nonetheless, in closing argument that State contended that plea bargaining “is not part of this.” 3/13/13 RP 99. *Jones* construed the ability assist counsel to be the same ability to understand and choose among alternative defenses. 99 Wn.2d at 746. Because the decision to accept a guilty plea is a “necessary decision” in the course of the criminal proceeding, a defendant must have the capacity to understand it.

The State’s argument throughout these proceedings has been to attempt to reduce the requirement of “capacity” to a purely theoretical measure to the exclusion of actual ability. The error in the State’s argument stems from its reliance upon cases which address only pretrial competency determinations. Such determinations are necessarily speculative to a large degree as the evaluators lacks the ability to do anything more than predict how a defendant will respond at trial based upon historical evidence. While the majority of competency questions will be resolved pretrial, that in no way precludes a later determination that despite what all parties may have

thought, a defendant really is not competent. Indeed, the whole point of the pretrial determination is whether he will be competent **during** trial, as that is what the Constitution requires. *Dusky*, 362 U.S. at 402.

When a player is added to a baseball team it is done because it is believed he has the capacity or ability to perform at the expected level. As the season unfolds and errors mount and the player demonstrates an inability to perform to the expected level, it would be nonsensical to insist he nonetheless has the capacity to do so merely because that was the preseason assessment. As another example, many children entering kindergarten will learn to read in the year ahead. Thus, one could rely upon that knowledge to conclude that as a group they have the capacity to learn to read. Yet, some will not learn to read despite their best efforts and those of their teachers. To insist at the end of the year that those who did not learn to read nonetheless had the capacity to so would simply ignore reality.

Yet that is what the State insists must occur on the question of incompetency. The State contends that prediction of ability must trump observed inability; that one cannot look at actual functioning to assess the “capacity to function.” But that is contrary to case law. An assessment of incompetency is not limited to the reports of experts.

Instead the fact finder can rely on a host of other factors such as “the defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.” *State v. Dodd*, 70 Wn.2d 513, 424 P.2d 302 (1967); *accord State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). The validity of observable facts as a basis for determining incompetency plainly indicates that a court is not restricted to a theoretical or predictive assessment as the State would have it.

Competency means a person has the ability to understand the proceedings as they occur and the ability to assist counsel throughout. The jury was not permitted to make that determination here.

2. The trial court’s jury instructions substantially misstate the standard for competency.

The trial court’s instructions to the jury diluted the standard for competency to the point that the jury was required to find Mr. Ortiz-Abrego competent even where the jury determined Mr. Ortiz-Abrego lacked capacity to understand the proceedings or rationally assist counsel.

- a. *The trial court improperly permitted the jury to find Mr. Ortiz-Abrego competent even if it found he lacked the ability to understand the proceeding or rationally assist counsel.*

The court instructed the jury:

....

A defendant is incompetent when he lacks the capacity to understand the nature of the proceedings against him or assist in his own defense as a result of a mental disease or defect.

To prove that the defendant is competent, the State must establish either that the defendant has the capacity to understand the nature of the proceeding and the capacity to assist in his own defense, or that the lack of these capacities is not the result of a mental disease or defect.

CP 271 (Instruction 8). This is an incorrect statement of the law.

Nothing in *Dusky* requires a causal link between a person's inability to understand or assist counsel and a "mental disease or defect." Those terms do not appear in the Court's articulation of the constitutional minimum for competency. The Court's later enunciations of the rule similarly do not require such a narrow causal link. In *Drope* the Court explained:

[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.

420 U.S. at 171; *see also, Moran*, 509 U.S. at 396. Plainly, "mental condition" is a far broader concept than "mental disease of defect."

Instruction 8 permitted the jury to readily agree that Mr. Ortiz-Abrego's mental condition deprived him of the ability to understand the proceedings and/or rationally assist counsel and yet still deem him competent. Indeed, the State made just such an argument to the jury.

The question is for you, if you find that there is an impairment here, the question is: Does it come from a mental disease or defect? That's your query.

3/13/13 RP 109-10. The State made this argument after highlighting the testimony of Dr. Brian Judd that borderline intellectual function does not constitute a "mental disease or defect." *Id.* at 109.

Plainly borderline intellectual function describes a mental condition if not a defect, so too a language-and-conceptually based learning disability. If those condition are "such that [Mr. Ortiz-Abrego] lacks the capacity" to understand the proceedings or assist counsel the jury was required to find him incompetent. *Drope*, 420 U.S. at 171. Instruction 8 eliminated that requirement and violates the due process guarantee announced in *Dusky* and its progeny.

b. *The trial court failed to instruct the jury it must give great weight to defense counsel's view of Mr. Ortiz-Abrego's inability to rationally assist counsel.*

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 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 this is so because:

The 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

Here, two attorneys had worked closely with Mr. Ortiz-Abrego at various points in these proceedings. Anna Samuel, who represented

Mr. Ortiz-Abrego during his trial, and James Koenig, who represented Mr. Ortiz-Abrego in the extensive post-trial proceedings in this matter. Neither was provided a means to truly present their opinions of Mr. Ortiz-Abrego's competency.

In a typical competency hearing before a judge, an attorney can offer her insight into her client's ability to assist her in a variety of ways. The attorney could draft a declaration outlining her opinion or the attorney could simply orally address her concerns and opinion to the court. A jury trial, however, does not lend itself to permitting counsel for one party to freely address the jury regarding his opinion of his client's competence. Here the court tightly constrained the ability of previous defense counsel to relay her opinion. Moreover, current defense counsel was never afforded an opportunity to address his concerns to the jury. By virtue of the State's insistence upon a jury trial, the factfinder did not have the opportunity to hear, much less afford considerable weight to, the opinions of counsel

Attorneys at trial are not supposed to express their opinion. Indeed, the trial court sustained the State's objection during defense counsel's closing argument on the grounds that counsel was expressing his opinion. 3/13/13 RP 123. The court sustained that objection. *Id.*

Further, the court specifically instructed the jury that remarks and statements of counsel are not evidence. CP 262 (Instruction 1). The court's instructions and rulings beg the question how defense counsel is supposed to relay his opinion of Mr. Ortiz-Abrego's incompetency to the jury.

Counsel could not simply submit a declaration as an exhibit, as that would plainly constitute hearsay. If he became a witness and testified he could not continue as counsel. RPC 3.7. The factfinder at a competency trial has to be able to hear and afford great weight to the opinion of defense counsel. But once the State demanded a jury trial there was no mechanism to permit defense to relay his opinions and concerns to the jury.

Ms. Samuel did testify regarding her difficulty explaining the proceedings to Mr. Ortiz-Abrego. Ms. Samuel offered her opinion that despite her repeated efforts to explain the proceedings, Mr. Ortiz-Abrego did not seem to understand. She described him as unfailingly polite but incapable of truly following what she was telling him or more importantly offering feedback or input. Ms. Samuel explained Mr. Ortiz-Abrego did not seem to understand the significant distinction between a plea offer of a 15 month sentence, and the possibility of an

indeterminate sentence with a 12-year minimum if he were convicted at trial.

The State objected to Ms. Samuel's testimony, arguing Ms. Samuel could not offer her opinion. Indeed the State contended Ms. Samuel's opinion regarding Mr. Ortiz-Abrego's ability to understand her advice was not relevant. 3/11/13 RP 118. The State objected yet again, when in closing argument defense counsel urged the jury to trust Ms. Samuel's explanation of her inability to communicate with Mr. Ortiz-Abrego. 3/13/13 RP 123. Ms. Samuel's opinion that Mr. Ortiz-Abrego was unable to understand or assist her was more than merely relevant, it was critical to the jury's determination.

Aside from the inability to present the opinions of counsel to the jury, the jury was never informed they must afford considerable weight to those opinions. The importance of the opinion of counsel, as the person who most closely works with a defendant, is not diminished simply because the factfinder is a jury rather than judge. The court's instructions do not convey the importance of counsel opinion.

Indeed, Instruction 9 confuses the issue more by stating the requirement of an ability to assist in one's defense is a "minimal requirement." CP 272. Thus, the jury was not provided meaningful

information of counsels' opinions, was not instructed that those opinions should be afforded great weight, and was in fact told that the requirement itself was in any event a "minimal" one.

Ironically, when the court granted the State's jury demand, the court recognized that doing so raised the question of how the jury would hear and consider the perceptions of defense counsel regarding Mr. Ortiz-Abrego ability to assist them. 1/2/13 RP 8-9. The court recognized "case law says [that] is extremely important." *Id.* at 8. But the court then limited the jury's ability to hear it and never instructed the jury of how "extremely important" that information was. The Court did not properly instruct the jury on the information it must consider in assessing Mr. Ortiz-Abrego's competence.

c. The trial court erroneously instructed jurors they must unanimously agree in order to find Mr. Ortiz-Abrego was incompetent.

There is no constitutional right to a jury trial on the question of competency. Indeed, if there were, then the countless instances in which judges have found individuals competent in Washington without first obtaining jury-trial waivers would necessarily violate the constitution. Instead, use of a jury to determine competency exists only as a matter of statute. RCW 10.77.086(3). But that statute does not

require a unanimous jury to determine incompetency or for any verdict it might render.

Here the court instructed the jury that in order to answer the question on the verdict form their decision must be unanimous. CP 275. The verdict form in turn directed the jury to write in either “competent” or “incompetent.” There is no legal requirement that the jury unanimously agree to return a verdict. Instruction 11 misstated the law.

d. Mr. Ortiz-Abrego is entitled to a new hearing.

Due process only permits the trial of a competent person. *Drope*, 420 U.S. at 171-72. As set forth above, the instructions allowed the jury to conclude Mr. Ortiz-Abrego competent even where he fell below the standard set forth by the Supreme Court in *Dusky*. Because that error violated Mr. Ortiz-Abrego’s right to due process, it requires reversal unless the State can demonstrate beyond a reasonable doubt it did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State cannot meet its burden here.

Not only did Instruction 8 permit the jury to find Mr. Ortiz-Abrego competent even where it found he lacked understanding of the proceedings or the ability to assist counsel, the State highlighted that

misstatement of the law in its closing argument. 3/13/13 RP 109-10.

The State's experts offered their opinion that Mr. Ortiz-Abrego must be found competent because they did not believe borderline intellectual function with cognitive disabilities to be a mental disease or defect. *Id.* The State cannot show the error is harmless beyond a reasonable doubt.

Additionally, the State cannot show that failing to instruct the jury on the importance of defense counsels' opinions, and failing to permit defense counsel to share those opinions with the jury, was harmless. Again, the State objected to former counsel's testimony of her opinion and to current counsel's efforts to offer his views. The court limited evidence regarding Mr. Ortiz-Abrego's ability to understand the plea bargain he was offered. The State cannot show the exclusion of did not contribute to the verdict.

Finally, the State cannot demonstrate that erroneously a requirement of unanimity on the jury was harmless.

The Court should remand this matter for a new restoration hearing at which the proper standard of competency is applied.

3. The court violated Article I, section 7 and exceeded its authority under 10.77 RCW by requiring Mr. Ortiz-Abrego to submit to an evaluation conducted by the State's retained expert.²

The State asked the court to order that the State's retained expert be allowed to review the evaluation of the defense expert. 11/6/12 RP 7 Defense counsel objected arguing nothing in 10.77 RCW permitted the State to retain such an expert much less permit that expert to review the evaluations prepared by defense experts. *Id.* The State conceded the statutes did not provide for what it was asking. 11/6/12 RP 10. The court granted the State's request. Noting the statute does not provide for an additional expert for the State, but that "fairness dictates that the State have an opportunity . . . to have an expert review the raw data."

Id.

² While this issues was not among the two specific issues in the trial court's Order certifying this matter to the Court. At bottom the court's order highlighted the absence of case law governing the procedural and substantive issues which arose because of both the unique procedural posture of this case and that fact that it involved a jury trial. Thus, in the inters of judicial economy the trial court's order suggests resolving the issues which arose in the competency hearing now rather than in a subsequent direct appeal of possible conviction. The court's order noted such proceeding would be wholly unnecessary if the competency hearing itself was so flawed as to require reversal. In its response to the motion for discretionary review, the State concede warranted review. This error is of the same category of errors. Moreover, it plainly meets the standard for discretionary review under RAP 2.3 as it is obvious error which renders further proceedings useless. Finally, this Court has inherent authority to address such a claim because it is necessary to reach a proper decision and to clarify case law. *State v. Cantu*, 156 Wn.2d 819, 822, n.1, 132 p.3d 725 (2006).

Two months later, the State returned to court asking the court now order Mr. Ortiz-Abrego to undergo an evaluation with its retained expert. 1/2/13 RP 39. Again, Mr. Ortiz-Abrego argued 10.77 RCW did not permit it. *Id.*; 1/3/13 RP 33-34. The State again conceded nothing in the statute authorized the evaluation. 1/3/13 RP 43. Instead, the State argued the evaluation was permitted by CrR4.7. 1/3/13 RP 43. As it had previously, the court observed such an evaluation was not authorized anywhere in 10.77 RCW or by any case. CP 34; 1/3/13 RP 55. But concluding it be would difficult for the State's newly retained expert to opine on competency without conducting an evaluation and relying on CrR 4.7, the court ordered Mr. Ortiz-Abrego to participate. CP 34; 1/3/13 RP 54-55.

a. *10.77 RCW dictates the procedures which apply to competency proceedings.*

Where a court has doubts as to a person's competence to stand trial, the court must order an evaluation of the person's mental status. RCW 10.77.060(1)(a). The "procedures of the competency statute [chapter 10.77 RCW] are mandatory." *State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009) (citing *In re the Personal Restraint of Fleming*, 142 Wn.2d 858, 863, 16 P.3d 610 (2001)). The "failure to observe these procedures is a violation of due process." *Id.*

b. 10.77 RCW did not permit the court to compel Mr. Ortiz-Abrego to undergo an evaluation by the State's retained expert.

Pursuant to these mandatory procedures the court:

... on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant

RCW 10.77.060(1)(a).

The chapter permits a defendant to obtain his own evaluation.

RCW 10.77.070 provides:

When the defendant wishes to be examined by a qualified expert or professional person of his or her own choice such examiner shall be permitted to have reasonable access to the defendant for the purpose of such examination, as well as to all relevant medical and psychological records and reports.

In addition, RCW 10.77.020(2) provides in relevant part:

Whenever any person is subjected to an examination pursuant to any provision of this chapter, he or she may retain an expert or professional person to perform an examination in his or her behalf. In the case of a person who is indigent, the court shall upon his or her request assist the person in obtaining an expert or professional person to perform an examination or participate in the hearing on his or her behalf. . . .

Neither of these statutes affords the State a similar ability to retain outside experts. Nothing in the chapter permits the State to retain an

additional evaluator or permits the court to require a defendant to participate in such an evaluation.

This case is substantially similar to *In re the Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). In *Williams*, a 71.09 commitment proceeding, the State contended it was entitled to obtain a pretrial evaluation of the respondent under CR 35 even though nothing in 71.09 RCW provided for such an evaluation. The Court rejected that claim stating

The Legislature has expressly provided that evaluations by experts are allowed in the proceeding following commitment as a sexually violent predator. In the absence of such statutory language for pretrial discovery, it can be inferred that the Legislature did not intend for the State to conduct such evaluations before commitment. Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). Omissions are deemed to be exclusions. *State v. Williams*, 29 Wn. App. 86, 91, 627 P.2d 581 (1981).

Williams, 147 Wn.2d at 491.

As does 71.09 RCW, 10.77 RCW specifies which experts may conduct evaluations and when. The State is afforded the right to approve the expert designated to conduct the evaluation under RCW 10.77.060(1). The defense is entitled to retain, or have appointed, its

own expert under RCW 10.77.0020(2) and RCW 10.77.070. As the State conceded, there is no provision for an evaluation by the state's retained expert.

If a person is deemed incompetent, RCW 10.77.086(1) details the restoration process. That statute provides:

(1)(a) If the defendant is charged with a felony and determined to be incompetent, until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense, or has been determined unlikely to regain competency pursuant to RCW 10.77.084(1)(b), but in any event for a period of no longer than ninety days, the court:

(i) Shall commit the defendant to the custody of the secretary who shall place such defendant in an appropriate facility of the department for evaluation and treatment; or

(ii) May alternatively order the defendant to undergo evaluation and treatment at some other facility as determined by the department, or under the guidance and control of a professional person.

Id.

This statute speaks only of where restoration may occur. Here there was no contention that Dr. Brian Judd was providing “evaluation **and** treatment” or that he was the party responsible for “guidance and control” of Mr. Ortiz-Abrego. The State did not seek to retain Dr. Brian Judd to participate in the restoration process at all. Instead, the State was simply shopping for an expert to provide a more credible

evaluation than that provided by the doctors at Western; i.e., the only evaluation the State was statutorily permitted. Indeed, in closing the State described Western's handling of this case as a "debacle." 3/13/13 RP 99. But despite the State's wishes, the statutes did not permit the Court to compel Mr. Ortiz-Abrego to submit to an evaluation by the State's retained expert.

An evaluator who works for the state is more likely to be aligned with the prosecution. The accused person may want an examiner who is unaffiliated with the prosecution and therefore the statute gives the accused the right to have an independent evaluator. RCW 10.77.020(2); RCW 10.77.060(2). Moreover, the State's experts at Western had had unlimited access to Mr. Ortiz-Abrego throughout his several lengthy stays at Western. There is simply nothing in the statute to suggest that the Legislature intended the State to have more than that. It is reasonable as well as faithful to the express language of the statutory scheme to authorize only the defense and not the prosecution the ability to seek a second opinion.

Finally, the court's reliance on CrR 4.7 as an alternative source of authority for an evaluation is precisely the argument rejected in *Williams*. Competency evaluations are not discovery tools. *Heddrick*

has made clear 10.77 RCW governs the procedures for competency proceedings. Because that chapter does not provide for a State expert beyond that provided in RCW 10.77.060, much less an additional evaluation, there is no authority to support the court's ruling.

There is no legal authority permitting the State to retain an additional expert to conduct a separate evaluation after that performed by the Department. Thus, the court erred in ordering Mr. Ortiz-Abrego to submit to an evaluation by Dr. Brian Judd. *Williams*, 147 Wn.2d at 491.

c. In the absence of the "authority of law" a compelled psychological evaluation violates Article I, section 7.

Article I, section 7 of the Washington Constitution guarantees "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

i. A compelled psychological evaluation disturbs one's private affairs.

The statutory limitations on the availability of court-ordered mental examinations are purposeful and reasonable due to the nature of a mental examination. The examination is extremely intrusive to the individual. *See Williams*, 147 Wn.2d at 498 (Chambers, J., concurring) ("an examination by an expert hired by the opposition is rarely a

desirable experience. . . .”). Such extreme exercise of judicial power should only happen upon a most stringent showing of necessity”); *see also Schlegenhauf v. Holder*, 379 U.S. 104, 119-20, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964) (court ordered mental or physical examinations, unlike other discovery, require good cause and court limits on scope of examination). Other states have found mental evaluations to invade the privacy rights of the individual. *See, e.g., In re: T.M.W.*, 553 So.2d 260, 263 (Fla. App. 1989) (compulsory mental examination “traditionally deemed invasion of privacy”); *Simms v. Montana 18th Judicial Dist. Ct.*, 68 P.3d 678, 683 (Mont. 2003) (right to obtain mental examination must be weighed against state constitutional right to privacy); *In re T.R.*, 731 A.2d 1276, 1281 (Pa. 1999) (in termination proceedings court’s order directing psychological evaluation of parent violated parent’s right to privacy). As in these cases, the contents of one’s thoughts must be at the core of the private affairs protected by Article I, section 7. Unquestionably a psychological evaluation constitutes an invasion of one’s private affairs.

RCW 10.77.060(1)(b) recognizes the privacy interest at stake in a competency proceeding by providing:

The signed order of the court shall serve as authority for the evaluator to be given access to all records held by

any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant.

This statute implicitly recognizes what is indisputably true, a compelled psychological evaluation disturbs a person's private affairs.

ii. A compelled psychological evaluation requires the "authority of law."

In RCW 10.77.060(1), the Legislature, recognizing the invasion of privacy occasioned by a psychological evaluation, purported to provide the authority of law by way of the statute. However, the "authority of law" requirement is not met by a statute which seeks to eliminate the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 352, n.3, 979 P.2d 833, 839 (1999) (citing *inter alia Seattle v. McCready*, 123 Wn.2d 260, 274, 868 P.2d 134 (1994)). Thus, it is doubtful RCW 10.77.060 could provide the constitutionally required authority of law. But even assuming a lawful order under 10.77 RCW could be the authority of law required by Article 1, section 7, "authority of law" can certainly mean nothing more than what is permitted by 10.77 RCW.

Even if the court could justifiably rely on CrR 4.7 to compel an evaluation, that invasion of privacy must still satisfy the commands

of Article I, section 7. *State v. Garcia-Salgado*, 170 Wn.2d 176, 186, 240 P.3d 153 (2010). *Garcia-Salgado* held that even though CrR 4.7 permitted the taking of a biological sample for DNA analysis, because that implicates the person's privacy it must still satisfy the warrant requirement of Article I, section 7. *Garcia-Salgado*, 170 Wn.2d at 186. Indeed, while CrR 4.7(2) permits certain intrusions of defendants' privacy, it specifically makes them "subject to constitutional limitations." Thus, any such order must

. . . be entered by a neutral and detached magistrate, must describe the place to be searched and items to be seized, must be supported by probable cause based on oath or affirmation, and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

Garcia-Salgado, 170 Wn.2d at 186.

Here the prosecutor's request for the evaluation was not made under oath. *See Garcia-Salgado*, 170 Wn.2d at 188. Even if it were, it would not establish probable cause to permit the invasion of privacy. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (probable cause exists when there is reason to believe evidence of the criminal activity will be found). Here an evaluation to assess one's fitness for trial and not to discover evidence of criminal activity.

Thus, the order did not satisfy the warrant requirement. Nor did Mr. Ortiz-Abrego consent to the intrusion. Indeed, he objected noting, 10.77 RCW made no provision for such an examination. The court acted without authority of law in ordering Mr. Ortiz-Abrego to undergo a psychological evaluation with the State's retained expert.

d. Mr. Ortiz-Abrego is entitled to a new competency hearing free of the fruits of the improperly obtained evaluation.

The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, whenever the right is violated an exclusionary remedy must follow. *Id.*; *State v. Winterstein*, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009). This exclusionary remedy focus upon the illegality of the evidence, remedies the injury inflicted on the individual whose rights were violated, and protects the integrity of the process. *Winterstein*, 167 Wn.2d at 632, 634.

Here the State relied heavily upon the information gathered during Dr. Brian Judd's evaluation. First, the State admitted a transcript of Dr. Brian Judd's interview of Mr. Ortiz-Abrego's. 2/28/13 RP 57,

Ex. 77. Thus, even though Mr. Ortiz-Abrego did not testify, the jury was able to hear his statements.

Next, the State called Dr. Brian Judd as a witness and elicited his opinion that Mr. Ortiz-Abrego was competent. 3/4/13 RP 71-72.

Dr. Brian Judd went further and opined that borderline intellectual functioning was not a “mental disease or defect” and thus any resulting incapacity could not be the basis of a finding of incompetency. 3/4/13 RP 69. The prosecutor highlighted this point in the State’s closing argument. 3/13/13 RP 109-10.

Aside from his own opinion of Mr. Ortiz-Abrego’s competency, the State also asked Dr. Brian Judd to comment on the adequacy of testing and ultimate conclusions drawn by defense experts and the previous evaluations conducted by the State. 3/4/13 RP 29-35.

Moreover, the State’s evaluators from Western State testified they had reviewed Dr. Brian Judd’s reports and that they considered it in forming an opinion at the competency trial. 2/26/13 RP 136

Mr. Ortiz-Abrego is entitled to a competency hearing free of the fruit of poisonous tree that was the improper compelled evaluation.

F. CONCLUSION

Because Mr. Ortiz-Abrego's competency trial fell below the standards of due process, and because the compelled evaluation violated the provision of Article I, section 7, this court should reverse the jury's finding of competency and remand for a proceeding which satisfies these constitutional commands.

Respectfully submitted this 9th day of October, 2014.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70320-0-I
v.)	
)	
ALEXANDER ORTIZ-ABREGO,)	
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **BRIEF OF PETITIONER** 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF OCTOBER, 2014.

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