

NO. 70320-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

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**BRIEF OF RESPONDENT**

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**A. INTRODUCTION**

A jury convicted Alexander Ortiz-Abrego of three counts of child rape in the first degree. After the verdict, the trial court found that Ortiz-Abrego was incompetent for the trial that occurred and granted a new trial; those rulings are the subject of a separate State's appeal that is linked to this discretionary review. State v. Ortiz-Abrego, No. 67894-9-I.

Ortiz-Abrego then was committed to Western State Hospital for restoration of competency. Almost a year after his return from that commitment, a competency hearing occurred before a jury. The jury found Ortiz-Abrego currently competent to stand trial. The case at bar is a discretionary review of whether the trial court correctly instructed that jury as to the requirements for competency.

**B. ISSUES PRESENTED**

1. Did the trial court properly instruct the jury that the legal standard for competency is the capacity to understand the proceedings and to rationally assist in the defense, without requiring a finding that the defendant would actually understand the proceedings or could make an intelligent choice to enter a guilty plea?

2. Did the trial court properly instruct the jury with the statutory definition of competency, requiring a link between a mental disease or defect and the alleged incapacity?

3. Was Ortiz-Abrego's failure to request an instruction that great weight should be given to defense counsel's opinion a waiver of that claim? Would such an instruction be an improper judicial comment on the evidence?

4. Should this Court reject the claim that the trial court violated due process by directing the jury that it must be unanimous in its finding, where Ortiz-Abrego did not raise that issue in the trial court and he offers no authority to support it?

5. Should this Court decline to review the challenge to the trial court order allowing the State's expert to interview the defendant, where that issue is not within the grant of discretionary review and was not properly preserved in the trial court?

6. Should this Court reject the argument that a competency examination by a State expert is implicitly prohibited by RCW 10.77, is not authorized by CrR 4.7, and must be justified in the same manner as a bodily intrusion under Article 1, section 7 of the Washington Constitution?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

On October 17, 2008, the State charged defendant Alexander Ortiz-Abrego with two counts of child rape in the first degree, contrary to RCW 9A.44.073. CP 337-41. Paige Garberding, a senior attorney with a public defender agency, was appointed to represent him in November 2008. 37RP 161.<sup>1</sup> In December of 2009, Garberding's caseload was transferred to attorney Anna Samuel. 37RP 36.

When the case was assigned to the Honorable Susan Craighead for trial on May 10, 2010, the judge conducted a colloquy with Ortiz-Abrego and concluded that he was competent to stand trial. Ex. 68; CP 367-68.

The State amended the information, adding a third count of child rape in the first degree. Supp. CP \_\_ (Sub no. 76, Amended Information). The jury returned guilty verdicts. CP 342; 37RP 80. After trial, the court ordered a competency evaluation. CP 342. After substantial delay, the trial court held an evidentiary hearing and found the defendant was "not competent to stand the trial we gave him" and granted a new trial. CP 333, 383. The State appealed from that order, but trial court proceedings

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<sup>1</sup> The Report of Proceedings is in 42 volumes, referred to in this brief with consecutive numbering as indicated in the Index to Report of Proceedings, Appendix 1.

were not stayed. CP 333-34. That appeal, No. 67894-9-I, is pending and has been linked to the case at bar.

Ortiz-Abrego was committed for restoration of competency at Western State Hospital (WSH). CP 334. After that restoration period and after Dr. Brian Judd concluded that Ortiz-Abrego was competent to stand trial, the State requested a jury determination of the issue of competency, pursuant to RCW 10.77.086(3). 7RP 3-4, 24. The trial court granted the request. 7RP 44.

After a lengthy hearing, the jury concluded that Ortiz-Abrego is competent to stand trial. CP 278. Ortiz-Abrego filed a motion for discretionary review of that verdict, based on the certification of two issues by the trial court. CP 333-36. This court granted discretionary review on August 13, 2013.

## **2. SUBSTANTIVE FACTS.**

Ortiz-Abrego was charged with multiple counts of child rape in the first degree based on his having sexual intercourse with a female relative who was under 12 years old. CP 337. He was 19 years older than the child and living in the child's home at the time of the rapes. CP 339.

### 3. FACTS RELATING TO COMPETENCY.

Ortiz-Abrego was represented by Paige Garberding, an experienced, thorough attorney, for over a year after he was charged; Garberding had done a lot of work on the case, but did not report any concern about Ortiz-Abrego's competency to the court or to the defense attorney who next was assigned the case. 37RP 36, 161-62.

In December 2009, Anna Samuel took over Garberding's caseload. 37RP 36, 161. On January 29, 2010, Samuel mentioned that she had some question about the defendant's competency in a court hearing, but did not request an evaluation. 37RP 57. The issue was not mentioned again until the day of trial, May 10, 2010.

Because Ortiz-Abrego arrived in court that day with his young son and could not recall the name of his son's school, the court became concerned about his competency. CP 366-67. Samuel did not express any concern about his competency at that time. CP 367. The court conducted a colloquy with the defendant. CP 367; Ex. 68.

When asked by the court why he was present in court that day, Ortiz-Abrego replied that it was "because it is said I raped somebody." Ex. 68, p. 17.<sup>2</sup> He said he was not sure what a trial is. Id. at 18. Asked

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<sup>2</sup> The page numbers referred to are the page numbers within the text, mid-page, which reflect the page numbers of the original report of proceedings for May 10, 2010.

the job of the woman sitting next to him (Samuel), he replied “she says she is my attorney.” Id. at 18. Asked what his attorney does, he replied, “she says that she is going to defend me.” Id. Asked if his attorney had told him if he had any choices to make, he replied that he had to decide if he “should declare myself guilty or come to trial.” RP 5/10/10, 19.

As the colloquy continued, the judge asked Ortiz-Abrego if he knew what the prosecutor’s job was, Ortiz-Abrego replied that he could see that “he’s accusing me.” Id. Asked who would decide if he was guilty, he answered, “she says the jury.” Id. at 21. When asked if he knew what could happen if he were to be found guilty, and some time later when asked if he knew what could happen if the jury believed the prosecutor, he replied that he could, “spend the rest of my life in jail.” Id. at 19-20, 24. He demonstrated that he knew he had the option of a two-year sentence if he accepted a plea, and that he understood that his five year old son would be twenty by the time he was released from prison if he was found guilty at trial. Id. at 20-23.

The court concluded that he was competent to proceed. CP 368.

During the trial, Samuel retained Dr. Tedd Judd, a neuropsychologist, to examine Ortiz-Abrego. 38RP 9. Samuel said that she wanted a competency assessment but did not get one. 38RP 8-9. Tedd Judd testified that he was not asked for an opinion about

competency. 34RP 54. He examined the defendant on May 17, 2010, and recommended accommodations that could be made at trial to help him understand more of the proceedings. 34RP 54-55. Samuel did not ask the court to implement any of those accommodations or raise any competency concern based on Tedd Judd's report. CP 372.

After the guilty verdicts, Ortiz-Abrego was extremely upset when he was taken into custody. 37RP 79-80. Samuel did not believe that he understood what happened. 37RP 79, 82.

Post-verdict, the court ordered a competency evaluation at WSH. CP 342. That could not be completed because of disputes about the Spanish interpreter. CP 374; 25RP 236-37. Finally, WSH psychologist George Nelson interviewed Ortiz-Abrego at the jail on October 14, 2010. 29RP 104. Ortiz-Abrego performed very poorly during that interview and Nelson concluded that he was incompetent; his diagnostic impression was that Ortiz-Abrego had an adjustment disorder, with mixed anxiety, depressed mood, and borderline intellectual functioning. 29RP 130-32.

Nelson testified that he later discovered that this opinion was obviously based on false information. 30RP 24. Nelson reviewed a number of phone calls made by Ortiz-Abrego from the jail; based on those calls, it was apparent that Ortiz-Abrego was exaggerating his ignorance during the earlier evaluation. 30RP 24. Nelson saw no evidence of

significant cognitive impairment in the phone calls. 30RP 25. Nelson also had learned that the description of the defendant's colloquy with the court had been misrepresented to him by Samuel. 29RP 152.

However, based on Nelson's 2010 evaluation, Ortiz-Abrego was sent for a period of restoration at WSH. 25RP 237. On October 3, 2011, the trial court found Ortiz-Abrego had been incompetent to stand trial for the trial that was given to him and granted a new trial.<sup>3</sup> CP 382-83. The court ordered Ortiz-Abrego returned to WSH for another period of restoration.

On November 6, 2012, the State informed the court and defense that it had retained an expert to review the work of the two defense experts, because additional testing had been done by the defense and because Tedd Judd had changed his opinion. 4RP 4. The expert was Dr. Brian Judd. 4RP 5. The defense would not permit an interview of Ortiz-Abrego, so Brian Judd wrote his initial report without one. 6RP 3.

On January 2, 2013, the State moved for an order permitting an interview with Ortiz-Abrego and Brian Judd. 7RP 39. After argument on January 3, the court ordered the interview, but required that it be taped.

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<sup>3</sup> Most of the facts included by Ortiz-Abrego relating to competency are drawn from the findings of the trial court after the 2011 competency hearing. These findings do not fairly represent the testimony at the lengthy fact-finding hearing regarding present competency to stand trial in 2013 and some of the facts found there were not presented to the jury.

CP 33-34; 9RP 28-52. The court expressly reserved the issue of the admissibility of the interview at the competency hearing. 9RP 48, 52.

The competency hearing at bar began on February 6, 2013. 23RP 83. Drs. Hendrickson, Tedd Judd, Brian Judd, and Nelson all agreed that at some points, Ortiz-Abrego was malingering, or exaggerating the extent of his disability.<sup>4</sup> 26RP 282, 315, 346 (Hendrickson); 30RP 24 (Nelson); 31RP 37-38, 41, 45, 49 (Brian Judd); 35RP 58-65 (Tedd Judd).

Dr. Hendrickson opined that Ortiz-Abrego has the capacity to assist in his defense, meaning he is able to consult with his attorney with a reasonable degree of rational understanding, and he has the capacity to have a factual and rational understanding of the charges and court proceedings. 26RP 335. This opinion was based on his own interviews with Ortiz-Abrego, as well as consideration of multiple jail phone calls by Ortiz-Abrego, Tedd Judd's testing, the police interviews of Ortiz-Abrego by Detectives Knudsen (in 2008) and Detectives Gordon (in 2006), and chart notes from WSH. 24RP 212-14; 25RP 243-44, 251-52; 26RP 320-30. The jail conversations were quite different from the interviews Hendrickson had with Ortiz-Abrego, and demonstrated familiarity with the role of his attorney, the potential penalties, and the role of the jury.

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<sup>4</sup> The trial court's 2011 findings also include the conclusion that "the defendant has been exaggerating his lack of understanding since at least the fall of 2010." CP 382.

They also showed Ortiz-Abrego's analytical and planning skills. 25RP 252-265. With respect to both police interviews, which related to two different accusations, Ortiz-Abrego appeared to understand the questions, as his responses were coherent and logical. 26RP 312-15.

Dr. Nelson also observed that the jail phone calls demonstrated a more sophisticated understanding of his legal situation. 29RP 153-65. In one call, Ortiz-Abrego was engaged in abstract problem solving involving his apartment, directing his wife in a strategy to deal with items based on contingencies, and managing their finances. Ex. 59; 29RP 160-61. In another, he also displayed abstract problem solving, and the relatively sophisticated ability to break down a task to explain it to his son. Ex. 69; 30RP 18-21.

Dr. Brian Judd described Ortiz-Abrego's 2006 interview with Det. Gordon as a coherent description of what occurred more than three months before that interview. 30RP 149-53. Ortiz-Abrego was able to argue and describe what occurred, contradicting the allegations of the alleged victim. 24RP 108-26; 30RP 150; Ex. 5 (transcript of interview). It was also apparent in that interview that Ortiz-Abrego clearly understood that rape constituted forcible sexual contact. 30RP 154. Judd noted that in the 2008 interview with Det. Knudsen, Ortiz-Abrego provided a consistent version of events that had occurred eight years earlier, which was also

fairly consistent with other witnesses, and suggested alternative explanations for what could have happened, indicating an ability to consider defense strategy. 30RP 155-56; 31RP 23-28.

Portions of two interviews that Brian Judd conducted with Ortiz-Abrego were played at trial. 31RP 55-56; 32RP 12, 58. Brian Judd concluded that the low scores obtained by defense expert Mark Whitehill in an adaptive functioning test were not credible based on Ortiz-Abrego's functioning in the community: he drove, he worked competitively with no special supervision needs, interacted effectively with coworkers, and spoke English at some jobs. 32RP 45-54.

Brian Judd opined that Ortiz-Abrego meets the Washington standard for competency: he has the capacity and is able to assist in his own defense and has an understanding of trial procedures. 32RP 70-71. Judd opined that although Ortiz-Abrego has an intellectual limitation, it does not have a significant impact, based on his functioning in the community. 32RP 73-74.

Dr. Tedd Judd administered a number of psychological tests, in 2010 and in 2012. 34RP 28-61. He opined that Ortiz-Abrego has borderline intellectual disability and a learning disability in auditory comprehension, with conceptual problems. 34RP 63-65. He opined that Ortiz-Abrego is not competent to stand trial. 34RP 122.

Anna Samuel testified for more than a day, describing her interactions with Ortiz-Abrego between December 2009 and her escalating doubts that he understood the proceedings. 37RP 28-188; 38RP 6-72.

**D. ARGUMENT**

This review is from a jury proceeding to determine the competency to stand trial of defendant Ortiz-Abrego. Constitutional due process dictates that an incompetent person may not be tried, convicted, or sentenced as long as that incapacity continues. U.S. CONST. AMEND. XIV; State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). “Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” Godinez v. Moran, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

Washington has a statutory guarantee that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050.

“‘Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15); State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

The jury here was correctly instructed as to the definition of competency, in pertinent part:

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

CP 271 (Instruction 8) (attached, Appendix 2). The jury was provided with these further definitions of the terms used:

“Understanding the nature of the proceedings” means that the defendant must have the ability to have a rational as well as factual understanding of the proceedings against him. This includes the capacity to understand that he can plead guilty or proceed to trial, to choose whether to testify or not, and to appreciate his peril.

“Assisting in his own defense” means that he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.

To be competent, the defendant need not be able to choose or suggest trial strategy, help to form defenses, or even be able to recall past events. He is also not required to be able to decide which witnesses to call, to decide whether or how to cross examine witnesses, or to challenge witnesses.

CP 272 (Instruction 9, para. 2-4) (attached, Appendix 2).

The questions of law presented concerning the definition of competency and the adequacy of the jury instructions are subject to de novo review. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Ortiz-Abrego does not challenge the sufficiency of the evidence presented to support the jury’s verdict that he is competent to stand trial.

**1. THE JURY INSTRUCTIONS CORRECTLY  
DEFINED COMPETENCY TO STAND TRIAL.**

In Section C.1. of his argument, Ortiz-Abrego claims that the jury instructions defining competency were defective because they did not require a finding that he would actually understand court proceedings as they occur or that he had the capacity to make a reasoned choice to enter a guilty plea. This argument is without merit. The requirements of due process and RCW Chapter 10.77 are satisfied if the defendant has the capacity to understand the proceedings and the present ability to consult with counsel, as the jury was instructed.

The federal standard for competency is usually stated as whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The federal competency standard applied in Dusky was statutory; it defined an incompetent person as “presently insane or otherwise so mentally incompetent as to be unable” to understand the proceedings or assist in his defense. Former 18 U.S.C. §4244.

The United States Supreme Court in Moran held that if “the capacity for a ‘reasoned choice’” among alternatives is a higher standard

than the Dusky standard (whether the defendant has a rational understanding of the proceedings), that higher standard is not required for competency. Moran, 509 U.S. at 397-98. It observed that how the ‘reasoned choice’ standard is different than Dusky is not readily apparent. Id. The Court reaffirmed that the standard for competency to plead guilty, to stand trial, or to waive counsel is whether the defendant has the capacity for rational understanding.<sup>5</sup> Id. at 398-99.

The Court explained: “The focus of a competency inquiry is the defendant’s mental capacity; the question is whether he has the *ability* to understand the proceedings.” Id. at 401 n.12 (emphasis in original) (citing Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (holding a defendant is incompetent if he lacks the capacity to understand the nature and object of the proceedings)). Before a guilty plea is accepted, a trial court must in addition be satisfied that the waiver of constitutional rights is knowing and voluntary – an inquiry which “by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision.” Moran, 509 U.S. at 400-01 & n.12 (emphasis in original) (citations omitted).

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<sup>5</sup> Lafferty v. Cook, 949 F.2d 1546 (10<sup>th</sup> Cir. 1991), cited by Ortiz-Abrego, also does not heighten the Dusky standard; the case involved a delusional defendant and held that a defendant must have “sufficient contact with reality” to have a rational understanding of the proceedings. There is no suggestion that Ortiz-Abrego had any mental illness that caused him to be out of touch with reality.

Ortiz-Abrego quotes from the concurring opinion in Moran, suggesting that it identifies a higher standard to establish competency. App. Br. at 10-11. To the contrary, the point of Justice Kennedy's concurrence was that the Dusky standard applies from arraignment through verdict. Moran, 509 U.S. at 402-09 (Kennedy, J., concurring). Justice Kennedy identifies the crucial component of the inquiry as the defendant's possession of "a reasonable degree of rational understanding." Id. at 404 (quoting Dusky). He also notes that "whether the defendant has made a knowing, intelligent, and voluntary decision to make certain fundamental choices during the course of criminal proceedings is another subject of judicial inquiry." Id. at 403.

The Washington Supreme Court has repeatedly held that a defendant does not need to be capable of choosing between alternative defenses or trial strategies in order to be competent. State v. Lord, 117 Wn.2d 829, 900-01, 822 P.2d 177 (1991); Ortiz, 104 Wn.2d at 483. The Court in Ortiz specifically rejected<sup>6</sup> the argument that Ortiz-Abrego makes here, that it had adopted a higher competency standard in State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). The Court in Jones also observed that a defendant may be competent to stand trial while not having the capacity to determine the advisability of entering an insanity plea. Id. at

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<sup>6</sup> Ortiz, 104 Wn.2d at 483.

746 n.3 (noting that it had reached that conclusion in State v. Kolocotronis, 73 Wn.2d 92, 102, 436 P.2d 774 (1968)).

The existence of impairments that affect communication does not preclude a finding of competency, which would immunize persons with such an impairment from any criminal prosecution. In State v. Lawrence, 108 Wn. App. 226, 233, 31 P.3d 1198 (2001), the trial court found competent a defendant who had an IQ of 60, which classified him as mildly retarded, and a “slow thought process” that at times caused there to be very long pauses between the asking of a question and his answer. Id. at 231. On appeal, Lawrence tried to distinguish himself from the defendants in Ortiz and State v. Minnix,<sup>7</sup> who were found competent despite significant developmental disabilities, because his “mental impairment and response latencies made communication during trial impossible.” Id. at 232. The appeals court affirmed the finding of competency, noting that Lawrence had the capacity to respond, was aware of his own self-interest, and was able to follow his attorney’s directives. Id. The court concluded that “[t]he fact that Lawrence was unable to respond promptly, or that he had a slow thought process, does not prove that he was unable to comprehend what was being said, or unable to communicate his thoughts to counsel.” Id. at 232-33.

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<sup>7</sup> 63 Wn. App. 494, 820 P.2d 956 (1991).

Ortiz-Abrego argues that because there was a trial in this case, and his trial attorney testified that she did not believe he understood that proceeding, he cannot be found competent to stand trial. But even if the testimony of that former attorney was credible, and if she reasonably relied on the representations of the defendant about his understanding, there are many reasons that a competent person may not understand a proceeding – for example, inattention, distraction by personal circumstances, or refusal to participate because of disdain for the system or the lawyer. Illustrating that actual understanding and actual assistance to counsel are not necessary to a finding of competency, a defendant who refuses to cooperate with defense counsel is not for that reason incompetent to stand trial, although the ability to assist counsel is one component of competency. State v. Hicks, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985).

Further, even if Ortiz-Abrego was incompetent during the 2011 trial, that does not establish his incompetency to stand trial in 2013. The psychologists testified that anxiety could affect his cognitive abilities,<sup>8</sup> and his anxiety level certainly could change over time. The trial court observed that while his key problems appeared to be cognitive, they are influenced by depression, adjustment disorder, and perhaps stress, which

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<sup>8</sup> 27RP 385; 29RP 127, 133.

fluctuate. 9RP 55. His discussions of the criminal justice system in the jail phone calls illustrate his capacity to understand the nature of the proceedings.

This Court also should reject the argument that a rational understanding of the proceedings requires that a defendant understand the concept of plea bargaining. As the trial judge noted, plea bargaining involves multiple meetings with the prosecutor where particulars including calculation of the offender score are discussed. 39RP 23-24. Defense counsel at trial agreed that a defendant does not have to understand that process – to the extent that his argument on appeal is that the court erred in failing to instruct the jury that the defendant must have that understanding, he invited the error in the trial court and is precluded from making it on appeal. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

In Instruction 9, the trial court did instruct the jury that “[u]nderstanding the nature of the proceedings’ means that the defendant must have the ability to have a rational as well as factual understanding of the proceedings against him. This includes the capacity to understand that he can plead guilty or proceed to trial...and to appreciate his peril.”

CP 272 (App. 1). No greater capacity to understand the intricacy of plea bargaining is required.

Ortiz-Abrego asserts that the trial court sustained an objection to his former attorney's testimony that Ortiz-Abrego did not seem to understand the abstract concept of pleading guilty. App. Br. at 12, citing 38RP 49. That is an inaccurate reflection of the record. The former attorney, Samuel, had just provided an explanation of an Alford<sup>9</sup> plea; she agreed when the current defense attorney, Koenig, said "that sounds, as you describe it, kind of complicated." 38RP 49. Samuel then testified that an Alford plea was an abstract concept that was too complicated for Ortiz-Abrego. Id. The prosecutor objected, "[t]his is a different standard to plead." Id. The court immediately orally instructed the jury in a manner entirely consistent with Ortiz-Abrego's legal theory on appeal:

I want you to understand that there is a different standard between understanding the plea-bargaining process and actually having the judge accept a plea of guilty. It's a higher standard for accepting a plea of guilty.

You don't worry about the higher standard. I want to make that clear.

Id. Thus, the court told the jury that understanding the plea-bargaining process was relevant to competency. Nor did the court in any way impede

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<sup>9</sup> A manner of pleading guilty without acknowledging guilt, authorized by North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), and State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

the testimony of Samuel on this point; the objection was not sustained, the testimony was not stricken. Direct examination continued on the topic, including whether most defendants do understand an Alford plea. 38RP 50. Samuel repeatedly testified that she did not believe that Ortiz-Abrego understood the option of a guilty plea. 37RP 48-49 (“he did not understand”), 110-14 (“he did not understand ... absolutely did not”), 135 (“he was not weighing the consequences”).

Further, the prosecutor’s argument was consistent with Instruction 9: the defendant does not have to understand the concept of “plea-bargaining,” but must have the capacity to appreciate his peril. 39RP 99. As the prosecutor observed, there was substantial evidence that Ortiz-Abrego did understand the concept of choosing between a trial and a guilty plea, as he knew that a plea bargain was “a deal between the attorneys and makes for a shorter sentence.” 35RP 76; 39RP 99. His understanding was apparent in his discussion of another inmate’s apparently unwise decision to reject a plea offer, which resulted in his much longer sentence after a trial. Ex. 13; 29RP 159-60; 33RP 70.

There is little doubt that most average citizens would be unable to understand all the nuances of courtroom proceedings. Without legal training, there is little chance that a defendant will fully understand evidentiary issues or anticipate the significance of many details elicited

from witnesses, especially expert witnesses who present information in the fields of science or psychology. Actual understanding of every aspect of the proceedings is not required to satisfy fundamental due process. A lawyer is provided to every defendant at public expense to ensure that he has a guide through the system and an advocate in the courtroom.

Further, it would be impossible to establish actual understanding if a defendant simply chose to deny it. All of the experts agreed, and the trial court found, that Ortiz-Abrego was purposely exaggerating his cognitive limitations in at least some of his interactions with evaluators, or at least failing to make a real effort to answer questions. 26RP 282, 315, 346 (Hendrickson); 30RP 24 (Nelson); 31RP 37-38, 41, 45, 49 (Brian Judd); 35RP 58-65 (Tedd Judd). Because he had the capacity to understand the nature of the legal proceedings, his choice not to actively participate during trial and his various denials that he understood even the most basic concepts do not preclude a finding of competency.

**2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH THE STATUTORY LANGUAGE REQUIRING A LINK BETWEEN A MENTAL DISEASE OR DEFECT AND THE ALLEGED INCAPACITY.**

Ortiz-Abrego challenges the statutory requirement that to constitute incompetency, incapacity must be a result of mental disease or

defect; that statutory standard was set out in Instruction 8. CP 271 (Appendix 2). He contends that this standard is inconsistent with the due process standard articulated in Dusky, supra. This challenge to the constitutionality of RCW 10.77.010(15) is meritless. This court should reject it, as the trial court did. 16RP 43-44. Even if including the causation requirement was error, it was harmless beyond a reasonable doubt in this competency proceeding.

A statute is presumed constitutional. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). A party challenging the statute has the burden of proving beyond a reasonable doubt that it is unconstitutional. Id.

The federal competency standard applied in Dusky was statutory, defining an incompetent person as “presently insane or otherwise so mentally incompetent as to be unable” to understand the proceedings or assist in his defense. Former 18 U.S.C. §4244. The cause of the defendant’s inability to understand was not at issue and that requirement was not mentioned in the Court’s two-paragraph opinion accepting a concession of error in that case. Dusky, 362 U.S. at 402-03.

The current federal code uses the same language as RCW 10.77.010(15), incompetency must be caused by “a mental disease or

defect.” 18 U.S.C. §4241(d). Ortiz-Abrego has cited no case questioning the constitutionality of that federal competency statute.

The link to a mental disease or defect is ubiquitous in competency definitions. The history of the prohibition against trying incompetent defendants was reviewed in Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). The Court’s discussion of the common law regarding competency refers to a statement from the Blackstone Commentaries that a “prisoner [who] becomes mad” will not be tried because he cannot make his defense. Id. at 356. The Court notes that many older cases referred to the competency issue as “the prisoner’s sanity” or “present sanity.” Id. at 357 n.8; see also id. at 356-60 (review of common law authority).

Leading United States Supreme Court cases addressing competency procedures approve statutes that require the incapacity be caused by mental disease or defect. In Drope v. Missouri, supra, which recognized the fundamental right not to be tried while incompetent, the Court approved the applicable state statute, characterizing it as “jealously guard[ing]” a defendant’s right to a fair trial. 420 U.S. at 173. The Missouri statute in question provides that a person “who as a result of mental disease or defect lacks capacity” to understand the proceedings or assist in his defense is incompetent. Id.; Missouri Rev. Stat. §552.020(1).

The Court held that the statutory scheme was constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. 420 U.S. at 173.

The Court in Medina v. California,<sup>10</sup> which approved placing the burden of proving incompetence on a defendant, also framed the competency question as one of "capacity." 505 U.S. 448. Of note, the California statute upheld in that case provided that a person is incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the proceedings" or rationally assist in his defense. Id. at 440; Cal. Penal Code § 1367.

These Supreme Court cases indicate both that a requirement of capacity (not actual understanding) is sufficient to satisfy due process and that a requirement that incompetency be as a result of a mental disease or defect does not offend due process standards. In Moran, the Court emphasized that the focus of a competency inquiry is "mental capacity," "the *ability* to understand." 509 U.S. at 401 n.12 (emphasis in original).

The only way that a person could be lacking the mental capacity to understand the proceedings at a fundamental level is if he has a mental illness or an impairment in cognitive function. The reference to a "mental defect" in RCW 10.77.010(15) is sufficiently broad to include a cognitive

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<sup>10</sup> 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

impairment, as the trial court found. 16RP 45, 57. “Defect” has the common meaning of “want or absence of something necessary for completeness, perfection, or adequacy in form or function.” Webster’s Third New Int’l Dictionary 591 (1993). Where the legislature has not defined a term, courts must give the term its everyday meaning. State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997). When a word is not exclusively of legal cognizance, an understanding of its meaning can fairly be imputed to laypeople. Id.

The Washington Supreme Court has incorporated the ordinary meaning of the term “mental disease or defect” in another section of Chapter 10.77, related to release of person acquitted by reason of insanity. State v. Klein, 156 Wn.2d 102, 116-17, 124 P.3d 644 (2005). The court concluded that the term had the common meaning of “mental disorder” and refused to further define it. Id. at 116-17. The court observed that the definition is broad but noted that other aspects of the statutory scheme would provide an appropriate framework. Id. at 118.

The trial court here asked counsel what kind of problem could render a defendant incompetent but not fall under the category of a mental disease or defect; none was offered. 16RP 38-39.

Ortiz-Abrego has not met his burden of establishing that the statutory definition of incompetency is unconstitutional (as a violation of due process) beyond a reasonable doubt.

Even if the court erred in refusing to excise the requirement of causation by a “mental disease or defect,” the error was harmless. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). “Mental defect” has a common meaning that is sufficiently broad to include a cognitive impairment, which was what the defense argued was the basis of, and caused his alleged inability to understand the proceedings. 34RP 62-65; 39RP 114-17. Two of the State’s experts agreed that a cognitive impairment was a mental disorder. 24RP 178-80, 186-89; 27RP 390-91; 28RP 28; 30RP 25, 66. A third stated that he was not sure if borderline intellectual functioning would fall within the legal term “mental defect,” but that the defendant did have an adjustment disorder that is a mental disorder. 32RP 68-70.

Ortiz-Abrego inaccurately asserts that the State’s experts opined that he “must be found competent because they did not believe borderline intellectual function with cognitive disabilities to be a mental disease or defect.” App. Br. at 24. The citation to the record is to the State’s closing,

in which the prosecutor said, “We know he has a mental disease or defect,” and “if I recall, just about every expert observed that he did except for maybe Dr. Hendrickson.” 39RP 109. (Hendrickson’s testimony was unclear on this point. 27RP 390-92.) The prosecutor continued:

If you find that this man has impairments but it’s from something other than that, like his own explanation of “It’s not that I’m crazy, it’s because of where I’m from because I didn’t have much education,” then that doesn’t count. That’s the inquiry for you.

39RP 110. This statement was accurate.

**3. AN INSTRUCTION THAT GREAT WEIGHT SHOULD BE GIVEN TO THE OPINIONS OF DEFENSE COUNSEL WAS NOT REQUESTED AND WOULD HAVE BEEN AN IMPROPER JUDICIAL COMMENT ON THE EVIDENCE.**

Ortiz-Abrego contends that the trial court should have instructed the jury that great weight should be given to the opinion of defense counsel.<sup>11</sup> That instruction was not requested in the trial court and the claim should not be considered here. Further, such an instruction would be an improper judicial comment on the evidence.

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<sup>11</sup> He suggests that Samuel’s testimony was improperly limited and that Koenig should have been allowed to submit a declaration of his opinions, but has not assigned error to any ruling by the court that caused these events.

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection would have given the trial court an opportunity to correct any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In addition, when a party fails to request an instruction, it "cannot predicate error on its omission." State v. Lucero, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), rev'd on other grounds, 168 Wn.2d 785 (2010) (quoting McGarvey v. City of Seattle, 62 Wn.2d 524, 533, 384 P.2d 127 (1963)).

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). For a constitutional error to be manifest, the defendant must demonstrate actual prejudice to his rights at trial, and that prejudice must appear in the record. Kirkman, 159 Wn.2d at 926-27; McFarland, 127 Wn.2d at 334. Actual prejudice means that the alleged error had practical and identifiable consequences in the trial. O'Hara, 167 Wn.2d at 99. This exception to the ordinary requirement that an error be preserved by a timely objection must be construed narrowly. Kirkman, 159 Wn.2d at 935.

Ortiz-Abrego did not raise this claim in the trial court. When the State requested a jury for this hearing, the judge asked how the perspective of defense counsel could be presented in a jury trial. 7RP 9. The State explained that it would be presented in two ways – Koenig had written a declaration that was considered by both Brian Judd and Tedd Judd; and Samuel’s testimony from the prior hearing was available. Id. Ortiz-Abrego did not argue that this method of presenting the opinions of defense counsel was inadequate.

Ortiz-Abrego has not demonstrated that the failure to instruct the jury to give great weight to defense counsel’s opinion was a constitutional violation or that it caused him actual prejudice. There is no constitutional right to such an instruction, as argued *infra*. To the contrary, it would be a prohibited judicial comment on the evidence. In the end, Samuel testified at great length in this hearing. 37RP 28-188; 38RP 6-72. Ortiz-Abrego has not demonstrated actual prejudice in the failure to give such an instruction.

If the issue is reviewed, it should be rejected on its merits. Far from conferring any constitutionally-mandated special weight to the opinions of defense counsel, Drope noted only that when counsel expresses a doubt about a defendant’s competency, the court should

consider that in determining whether an evaluation of competency should be ordered. Drope, 420 U.S. at 177 & n.13.

Courts have often noted the clear relevance of the observations of defense counsel regarding competency, but counsel's opinions are not controlling or insulated from careful examination. E.g., Hicks, 41 Wn. App. at 307 (must be given considerable weight). It is not a rule of law, and certainly not a requirement of due process, that a fact-finder must accept testimony that is not credible or is outweighed by other evidence.

Samuel's opinions appeared to be not entirely reliable, as the trial court noted. CP 373 (noting Samuel cared deeply about the defendant, appeared to fear her representation was lacking, is not the clearest communicator, and misrepresented the Court's colloquy to an evaluator). Dr. Nelson testified to the information that Samuel had provided to him when he attempted to evaluate the defendant's competency. 29RP 125-26. He also testified that when he compared Samuel's statements about the defendant's responses during the colloquy on May 10, 2010, to the transcripts of that colloquy, they were inconsistent. 29RP 152. It would not be appropriate to compel the jury to ignore Samuel's apparent bias or unreliable memory.

Notably, the very experienced attorney who represented Ortiz-Abrego in this case for a year before Samuel took over, Paige Garberding,

did not testify. Garberding never reported any concern about Ortiz-Abrego's competency. 37RP 161-62. Another experienced attorney who talked to the defendant about a possible plea on the first day of trial also did not testify – there was no evidence that he was concerned about competency. 37RP 162-63.

Appellant cites no case that purports to require a fact-finder to find defense counsel credible. Yet that is the message that would be sent if the jury had been instructed to give the opinions of Samuel (or Koenig) “great weight.” It would be entirely inappropriate for the court to put its thumb on the scale in that manner. Such an instruction would be an impermissible comment on the evidence in violation of the Washington Constitution, WA. CONST. ART. 4, § 16, which prohibits a judge from conveying to the jury her personal attitudes toward the merits of the cause. State v. Foster, 91 Wn.2d 466, 481-82, 589 P.2d 789 (1979).

Ortiz-Abrego's suggestion that the court's introductory instruction directed the jury not to consider the testimony of Samuel is meritless. That instruction did tell the jurors that “the lawyers' statements are not evidence.” CP 262. No reasonable juror would have understood that to mean that the jury could not consider the testimony of a witness because she happened to be a lawyer. Further, instructions must be read as a whole. State v. Dana, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968).

Instructions that are readily understood and not misleading to the ordinary mind are sufficient. Id. at 537. The next sentence of this instruction was: “The evidence is the testimony and exhibits.” CP 262. No reasonable juror would be misled to believe that it could not consider the lengthy testimony of Samuel.

Koenig presented his opinion in a declaration to the experts. 7RP 9. Koenig did not ask to present evidence of his own opinions to the jury. In any event, there is no authority establishing a constitutional right to present a declaration to a jury that is not subject to testing by cross-examination, even if an attorney may be permitted to provide such a declaration to a judicial fact-finder. Koenig’s attempt to vouch for Samuel’s opinion in closing argument, stating “I think you should trust Ms. Samuel,” was improper. 39RP 123. It is improper for an attorney to vouch for a witness’s credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

The claim that Samuel’s opinion was not presented to the jury is frivolous. She gave her opinion many times. A small set of examples include: “I didn’t think he was understanding anything” at trial (37RP 73); “I understood he didn’t understand” what had happened when the verdict was returned (37RP 82); “I don’t have any doubts” he did not understand (37RP 86).

There was no error in the jury evaluating the testimony of Samuel using the same criteria applied to any other witness. CP 262. “[T]he opportunity of the witness to observe or know the things he or she testifies about” is the first criterion listed; the jury would understand that it could give Samuel’s testimony any additional weight that was warranted based on her opportunity to observe Ortiz-Abrego.

**4. THE COURT DID NOT ERR IN REQUIRING A UNANIMOUS VERDICT.**

Ortiz-Abrego claims that because there is no statutory requirement of unanimity in a competency determination, it was error to require it. That argument was not raised in the trial court and should not be considered here. Further, he offers no authority of any kind for this novel theory, and it should be rejected on that basis.

The issue of unanimity was raised twice in the trial court in discussion of the jury instructions; in neither instance did Ortiz-Abrego assert that unanimity was not required. 9RP 5; 36RP 30-32. He took exception to the unanimity instruction, but only because it referred to the proceeding as a criminal case. 36RP 33-34. This court should not consider this issue for the first time on appeal. Kirkman, 159 Wn.2d at

926. Ortiz-Abrego has not established a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333.

The Washington Constitution provides for the possibility of non-unanimous verdicts only in civil cases. WA. CONST. ART. 1, § 21. Ortiz-Abrego cites no authority for his position that due process mandates that it apply to competency proceedings in criminal cases. The court can assume that, after diligent search, he has found none. Roberts v. Atlantic Richfield, 88 Wn.2d 887, 895, 568 P.2d 764 (1977). This Court should decline to consider this argument based on his failure to cite any authority. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

Moreover, the jury was instructed that Ortiz-Abrego was presumed incompetent.<sup>12</sup> CP 274. He cannot establish prejudice where an instruction that unanimity was not required (he has not proposed what majority is required by due process) would only have favored the State.

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<sup>12</sup> The presumption should have been that Ortiz-Abrego was competent, but the trial court acted in reliance on a lower court opinion that was reversed after this trial. 5RP 10; 36RP 21-22; State v. Coley, 180 Wn.2d 543, 554-55, 326 P.3d 702 (2014).

**5. THIS COURT SHOULD DECLINE TO REVIEW OR, IF CONSIDERED, SHOULD REJECT THE CLAIM THAT THE COURT ERRED IN ALLOWING THE STATE'S EXPERT TO INTERVIEW ORTIZ-ABREGO.**

a. This Issue Is Not Properly Presented For Review.

This Court should decline to consider the propriety of the trial court's order permitting Brian Judd to interview Ortiz-Abrego in January 2013 because the issue is beyond the scope of this discretionary review, as argued in the State's motion to strike this claim. If the motion to strike is denied, these claims should be rejected because they were not preserved in the trial court.

This Court granted review based on the certification of the trial court as to two legal issues relating to the instructions in the competency hearing. CP 333-36. The order allowing an interview by the State's expert was a separate, earlier order, and was not referred to in the certification. Id. The order allowing an interview by the State's expert also was not identified in the petitioner's motion for discretionary review.

The State has moved to strike this issue as outside the scope of this discretionary review. The State incorporates by reference its briefing on the motion to strike, which the Commissioner deferred to the panel on the merits.

In addition, Ortiz-Abrego did not preserve the claim in the trial court. He objected to an interview on the basis that it was not expressly provided for in RCW 10.77, was not authorized by CrR 4.7, and would not be helpful. 9RP 33-37, 44-46, 50. He did not argue that a mental examination was protected by Article 1, section 7. When the trial court allowed the interview, it expressly reserved the issue of admissibility of any evidence from the interview. 9RP 48-49, 52. Ortiz-Abrego never objected to the admission of the interviews into evidence, or to any testimony related to the interviews.

Because Ortiz-Abrego did not object to the admission of the related evidence at trial, he has not preserved his objection to that evidence. In re Audett, 158 Wn.2d 712, 723-27, 147 P.3d 982 (2006); State v. Powell, 126 Wn.2d 244, 257, 893 P.2d 615 (1995). Thus, only his constitutional argument may be considered, and then only if he meets the standards of RAP 2.5(a)(3), previously discussed, because he did not raise the constitutional issue below. This court should not consider this issue for the first time on appeal. Kirkman, 159 Wn.2d at 926.

Ortiz-Abrego has not established a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333. He has not demonstrated actual prejudice to his rights at trial—that the alleged error had practical and identifiable consequences in the trial. O’Hara, 167

Wn.2d at 99. While he claims the prejudice is that Brian Judd testified at trial, he does not demonstrate what portion of that testimony related solely to the interviews. Brian Judd would have testified absent the order, based on his review of the case records and the reports of other experts who had interviewed Ortiz-Abrego. He had prepared a report based on that review before the interview was ordered. 7RP 23-24, 35. Ortiz-Abrego concedes that Brian Judd's testimony included opinions as to definition of terms and as to the adequacy of testing of other experts and the opinions of those experts. App. Br. at 36. None of that testimony was dependent on his interview with the defendant.

Ortiz-Abrego's allegation that the interviews prejudiced him because the jury could "hear his statements" although he did not testify is perplexing. It must be based on the premise that the hearing of his voice tended to establish his competency, but he does not explain how. A large part of this competency proceeding was the repetition of statements made by Ortiz-Abrego to various experts, to his attorney, to the court, and on the jail recordings. The jury saw video recording of Ortiz-Abrego, from his interviews with Hendrickson. 25RP 267-70. The use of a recording is not inherently prejudicial.

Because Ortiz-Abrego did not object to admission of the related evidence below and has not established constitutional error or actual prejudice in the competency hearing, this court should decline review.

- b. The Trial Court Properly Ordered That The State's Expert Should Be Allowed Access To Ortiz-Abrego To Conduct An Interview.

The trial court's order permitting Brian Judd to interview Ortiz-Abrego in January 2013 was authorized by Criminal Rule 4.7. Because an interview is not an intrusion into the body or "private affairs" as defined by the courts, the requirements of Article 1, section 7 of the Washington Constitution are inapplicable.

Criminal Rule 4.7 controls discovery in a criminal case. It provides, in relevant part:

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

...  
(viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;

CrR 4.7. This rule clearly authorized the trial court's order. Ortiz-Abrego does not argue that the examination ordered was unreasonable, or that the order was an abuse of discretion under the terms of the rule itself.

Ortiz-Abrego's first argument is that because such an interview is not explicitly authorized in RCW 10.77, it is necessarily prohibited. That argument is meritless. While the procedures set out in RCW 10.77 satisfy the requirements of due process, exact compliance with the statute is not a constitutional requirement. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009)(holding a defendant may waive compliance or stipulate to different procedures, but cannot waive the existence of competency). Ortiz-Abrego has cited no authority that suggests that other court rules do not apply to competency proceedings.

The suggestion that the procedures in RCW 10.77 preclude application of the rules of criminal procedure to a competency proceeding is absurd. If application of CrR 4.7 to a competency proceeding renders the proceeding void as a violation of due process, the normal discovery process would be thwarted. CrR 4.7 also provides that “[s]ubject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.” CrR 4.7(g). If the rule is unenforceable, competency proceedings would be trials by surprise, which the discovery rule is

intended to avoid. State v. Hutchinson, 111 Wn.2d 872, 876-79, 766 P.2d 447 (1989).

The Washington Supreme Court has held that a trial court has inherent authority to order competency examinations, in addition to the power conferred by RCW 10.77.060. State v. Bebb, 108 Wn.2d 515, 522, 740 P.2d 829 (1987). The trial court ordered a second round of examinations in that case because the first set was incomplete. Id. at 519. The Supreme Court held that this was a proper exercise of the court's authority. Id. at 522.

Court-ordered examinations relating to insanity also are mandated by RCW 10.77.060, and the provision for mental examinations in CrR 4.7 has been applied to cases in which an insanity defense has been raised. State v. Haq, 166 Wn. App. 221, 272-73, 268 P.3d 997 (2012)(holding a defendant who pleads insanity may be ordered to submit to an examination by an expert retained by the State). The constitutional limitation that has been applied in the context of examinations relating to mental defenses is the privilege against self-incrimination, not the protection of private affairs in Article 1, section 7. Id. at 273-76.

Ortiz-Abrego's reliance on In re Williams, 147 Wn.2d 476, 55 P.3d 597 (2002), is misplaced. That case interpreted the Sexually Violent Predator statute and concluded that, at a stage when the statute did not

permit an evaluation by the State, the civil discovery rules did not permit it. Id. In contrast, under RCW 10.77.060, a court-ordered competency evaluation by an expert designated by Western State Hospital is mandated once the court determines that there is a reason to doubt the defendant's sanity. This proceeding was well beyond that stage. Further, Williams is inconsistent with the case law interpreting the availability of psychological examinations in criminal proceedings pursuant to CrR 4.7.

The argument that an interview is an intrusion into private affairs prohibited by the Washington Constitution (WA. CONST. ART. 1, § 7) also is without merit. The interview did not involve an intrusion into the defendant's body, so the analysis of State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010), is inapposite. The requirements applicable to bodily intrusion are inapplicable here. If they did apply, the statutory competency procedures in RCW 10.77 would be unconstitutional, as they allow continued examination of the mental state of the defendant without the enhanced procedures applicable to bodily intrusion. A statute is presumed constitutional, and the party challenging it has the burden of proving beyond a reasonable doubt that it is unconstitutional. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). Ortiz-Abrego has not met that burden here.

A matter falls within the scope of constitutionally protected “private affairs” if it is an interest that Washington citizens “have held, and should be entitled to hold, safe from government trespass.” State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007). There is no authority to suggest that an interview to determine the defendant’s capacity to stand trial for a felony offense falls within that category. The State’s interest in prosecution of serious crime has been held to justify the involuntary administration of medication in order to attain competency. State v. Hernandez-Ramirez, 129 Wn. App. 504, 119 P.3d 880 (2005) (citing Sell v. United States, 539 U.S. 166, 180-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003)). It would be unreasonable to conclude that a person could avoid prosecution, defeating a State interest that can justify involuntary medication, by refusing to submit to a psychological evaluation to establish their competency. Citizens are not entitled to that windfall.

This appeal rests almost entirely on the premise that it is a violation of due process and fundamental fairness to subject a person who is incompetent to a criminal trial. If a question is raised as to competency, it cannot be resolved without examining the defendant’s mental state. Under these circumstances, the compelling state interest in prosecuting persons accused of crimes establishes that citizens should not be entitled to prevent access to their mental status and thereby avoid prosecution.

Thus, their mental capacity is not entitled to heightened protection under Article 1, section 7. Washington has a long history of determinations of competency based on examinations of the mental state of the defendant, evidencing the lack of any expectation by the citizens of the state that such an examination is a prohibited intrusion into private affairs. See, e.g., State v. Superior Court of King County, 45 Wash. 248, 88 P. 248 (1907); State v. Peterson, 90 Wash. 479, 156 P. 542 (1916).

The examination ordered was authorized by CrR 4.7, was not implicitly prohibited by RCW 10.77, and was not within the scope of Article 1, section 7. The trial court's order was within its discretion and should be affirmed.

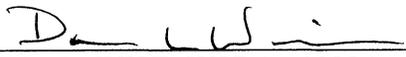
**E. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm the jury's finding of competency to stand trial.

DATED this 27<sup>TH</sup> day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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# **Appendix 1**

# **Appendix 1**

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<sup>1</sup> This volume has 4 dates on the title page, but the transcript for each date is separated. The page numbering is consecutive.

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# **Appendix 2**

# **Appendix 2**

No. 8

The defendant has been charged with a crime. The defendant is presumed innocent. This hearing, however, has nothing whatsoever to do with a finding of guilt or innocence on that charge. This hearing is to determine whether the defendant is incompetent or competent to stand trial on the crime charged.

A defendant is incompetent when he lacks the capacity to understand the nature of the proceedings against him or to 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 proceedings 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.

No. 9

In order for the defendant to be determined to be competent, he must have the capacity to have a basic "understanding of the proceedings" against him. The requirement that he have the capacity to "assist in his own defense" is a minimal requirement. Competency to stand trial is essential to ensure fundamental fairness.

"Understanding the nature of the proceedings" means that the defendant [must have the ability to have a rational as well as factual understanding of the proceedings against him.] This includes the capacity to understand that he can plead guilty or proceed to trial, to choose whether to testify or not, and to appreciate his peril.

"Assisting in his own defense" means that he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.

To be competent, the defendant need not be able to choose or suggest trial strategy, help to form defenses, or even be able to recall past events. He is also not required to be able to decide which witnesses to call, to decide whether or how to cross examine witnesses, or to challenge witnesses.

In reaching your determination, you may consider the defendant's appearance, demeanor, conduct, personal and family history, past behavior, and medical, psychological, and psychiatric opinions. You also may consider whether the defendant can recall and relate past facts, understand the roles of the

judge, jury, defense attorney and prosecuting attorney, and appreciate the possible outcomes of a trial. You also may consider any other factor that reasonably bears on whether the defendant can rationally assist his attorney.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Gregory C. Link, containing a copy of the Brief Of Respondent, in STATE V. ALEXANDER ORTIZ-ABREGO, Cause No. 70320-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

02/27/15  
Date