67894-9

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NO. 67894-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

REPLY BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ARGUMENTS IN REPLY

Ortiz-Abrego argues that the State wants this Court to reverse based simply on a disagreement with the trial court's result. That is incorrect. The State's argument is that the trial court reached a seriously flawed result, well outside the mainstream of results in similar cases, based on errors of law, fact and reasoning.

The abuse of discretion standard of review is appropriately demanding in this context because decisions on competency are fact-bound and a trial court is ordinarily in the best position to assess the facts and draw conclusions. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). Still, the standard allows appellate courts to correct mistakes when discretion is abused; otherwise, appellate review would be an empty formality. As the supreme court recently said:

> Affording discretion to a trial court allows the trial court to operate within a " 'range of acceptable choices.' " State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus " 'manifestly unreasonable,' " (2) rests on facts unsupported in the record and is thus based on " 'untenable grounds,' " or (3) was reached by applying the wrong legal standard and is thus made " 'for untenable reasons.' " Id. (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). Under an abuse of discretion standard, so long as the underlying adequacy of a given competency evaluation is " 'fairly debatable,' " the trial

> court has discretion to accept or reject that evaluation in satisfaction of RCW 10.77.060. Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979) (quoting Hill v. C. & E. Constr. Co., 59 Wn.2d 743, 746, 370 P.2d 255 (1962)); Myers v. Harter, 76 Wn.2d 772, 781, 459 P.2d 25 (1969) (same). At the same time, appellate courts retain the authority to clarify and refine the outer bounds of the trial court's available range of choices, and in particular to identify appropriate legal standards.

Sisouvanh, 175 Wn.2d at 623.

Consistent with this standard of review, the State has argued that the trial court abused its discretion by applying the wrong legal standard, relying on facts not supported by the record, ignoring relevant facts, and thereby reaching a decision no reasonable person would have reached had they applied the correct standard and relied on a proper understanding of the facts.

1. THE COURT APPLIED THE WRONG LEGAL STANDARD.

Ortiz-Abrego says that the trial court applied the ordinary standard for assessing competency. Br. of Resp. at 12-18. The State disagrees. A ruling can incorporate *some* correct legal standards yet still be tainted by improper considerations. Ortiz-Abrego simply focuses on the trial court's recitation of competency boilerplate, while ignoring the novel elements

the trial court's ruling introduced into the test, and the impact these novel elements had on the ruling.

Here, the court adopted a novel approach to the competency question; an approach that was used by Dr. Judd:

> Dr. Judd's approach to the question *differs conceptually* from [the approach of the other experts]. In Dr. Judd's view, as a practical matter the defendant is not able to understand what is happening in court without accommodation; if those accommodations can be made, then Dr. Judd believed that the defendant would likely have the capacity to understand the nature of the charges and would be able to assist his attorney. If the accommodations were not made, then he would not have such capacity.

CP 342 (emphasis added). The trial court clearly demanded a showing of both capacity and actual understanding. It concluded that the defendant understood the charges at trial and had the capacity to appreciate his peril, but that a more skilled attorney utilizing accommodations suggested by Dr. Judd "*could have helped the defendant to understand*" his peril. CP 346 (Conclusion of Law 1). The court then goes on to conclude (or find) that "the defendant was unable to understand the trial process, the testimony of witnesses, and argument" and that he was "not competent for the trial we gave him, because he was not capable of properly understanding the nature of the trial proceeding or rationally assisting his legal counsel in the defense of his case." CP 346-47.

The approach used by Dr. Judd and the court "differs conceptually" from the law, too. "Capacity" is a measure of a defendant's *ability* to understand; it is not a measure of whether a person actually *did* understand. Evidence that a defendant understood elements of the trial is evidence that he had the capacity to understand, but the converse is not necessarily true. A person could in fact fail to understand the trial even though he had the *capacity* to understand. Many defendants have the capacity to understand court proceedings but fail to actually understand those proceedings because they are disinterested, they fail to pay attention, they fall asleep, they are angry, they are unrealistic, they have difficulty focusing for long periods of time, etcetera.

By requiring some (indeterminate) showing of *actual* understanding, Dr. Judd and the trial court have substantially raised the bar of competency in a manner that is not required by the law. A competency determination assesses bare capacity; it is required that so that people who have no hope of understanding a criminal trial and punishment are not prosecuted at all. The State is not required to show that the defendant was competent "for the trial we gave him." CP 347. A defendant either has the capacity to understand or he does not. It would be an impossible standard of competency that would demand that courts tailor trials to the amorphous needs of individual defendants.

Moreover, measuring a defendant's *actual* understanding of a trial is extremely difficult. *What* must be understood: Details of trial strategy? Evidentiary rulings? The likelihood of conviction? The legal arguments of lawyers? Factual intricacies and distinctions? And, if any of these must be (and can be) measured, to what *degree* must the defendant actually understand? Compounding this difficulty is the problem of measuring understanding, especially as to a defendant who is admittedly malingering, as was Ortiz-Abrego. RP 6/9/11, 21-22 (Dr. Judd agreed that it would "absolutely" be difficult to assess the defendant's knowledge if he was malingering). [1]

The trial court applied a misconception of the competency standard; use of that erroneous legal test was an abuse of discretion.

2. THE COURT RELIED ON FACTS NOT SUPPORTED BY THE RECORD, MISREMEMBERED RELEVANT FACTS, AND IGNORED RELEVANT FACTS SHOWING COMPETENCY.

The court made significant errors of commission and omission in its consideration of the evidence. First, as argued in the State's opening brief, the trial court seemed to suggest that it was finding incompetency based on Dr. Judd's testimony, but Dr. Judd never tested for, nor offered

[1] RP 6/8/11, 167 (Dr. Judd agrees that malingering strongly suggests a conscious effort to look mentally worse and the defendant may have malingered after attending hearing about his mental health because he saw some advantage to faking mental acuity).

an opinion on, competency. In fact, Dr. Judd expressly stated in his report that "a specific evaluation of competence to stand trial was not requested and a full evaluation of this capacity was not completed." CP 55. It was an abuse of discretion to cite Dr. Judd as a basis for finding Ortiz-Abrego incompetent when Dr. Judd, himself, never reached that conclusion.

Second, the court erred when it relied on Dr. Judd's assessment of competency, when the court erroneously believed that Judd had reviewed the relevant portions of the jail telephone calls. CP 345. In fact, Dr. Judd admitted in his testimony that he had reviewed only "two or three" of the jail transcripts, RP 6/9/11, 17. He appears not to have read even the June 1, 2010 call, in which Ortiz-Abrego discusses plea bargaining, appeals, lawyers, and other legal concepts about this trial.[2] Dr. Judd admitted that he had not reviewed the transcript in which Ortiz-Abrego devised a plan to have his five-year-old son call the wife of a different inmate to discuss with them putting money into that inmate's jail account. RP 6/9/11, 15. He had not reviewed the transcript where the defendant talks about future job planning for his wife. Id. at 16-17. The trial court's failure to appreciate the factual limits of Dr. Judd's review of the jail call transcripts

[2] Dr. Judd also failed to realize that Ortiz-Abrego was collecting unemployment insurance, RP 6/8/11, 153, and that he had changed his story about how he was hit in the head as a child, Id. at 160.

caused the court to erroneously conclude that the jail conversations did not suggest competency.

That such reliance was misplaced is more apparent when one recalls that three different experts who had initially found the defendant's competency to be concerning, changed their opinions after seeing the jail calls.

The jail calls provide a window into Ortiz-Abrego's mind in an unguarded context, at a time (around June 10, 2010) when he and his lawyers were making representations to the court about his mental state; representations that painted a picture much different that suggested by the evidence. The jail conversations show that Ortiz-Abrego had a firm grasp on the fundamental legal situation he faced, including his peril, the role of his lawyer, the role of the prosecutor, the role of the judge, the function of appeal, and many other related concepts. The trial court appeared not to recognize any of that. Especially in the context of a defendant who was unquestionably malingering, such objective evidence merits careful consideration.

For instance, in discussing with his wife the subject of whether to pay the telephone bill, Ortiz-Abrego said, ". . . the attorney is good and well, he'll get me out. We don't know. . . . only God knows and the attorneys, if an attorney is good he can get me out." Ex. 11 (transcript of

6/1/10 jail call, at 6-7). On that same date, while discussing the time he would be required to serve in jail, he said

> Yes, not now, but you have to be patient and everything. I hope so, God willing, everything will work out. Uh, and this attorney will do something and, and, and maybe he can get me out of here.

Id. at 7. He also clearly recognizes the advocacy role of his attorney and he actively sought to bring a new lawyer on board.

Ortiz-Abrego:	Yes, but that's why now I want that attorney, that's why, that attorney is the only one who can do something.
Wife:	Uh-huh.
Ortiz-Abrego:	Yes, the attorney is good and he knows. He'll help.
Wife:	He's our salvation right now.
Ortiz-Abrego:	Okay then.
Wife:	Peter says that he's good because he already, I asked him again and he said he's good.
Ortiz-Abrego:	Uh-huh. He told you he's good?
Wife:	Yes, he's good. He told me, he said, "he's good."
Ortiz-Abrego:	Yes.
Wife:	That's what he told me.
Ortiz-Abrego:	Yes, I hope so, because ... fuck. I mean, I'm gonna spend a year here. . . .

Ex. 11 (transcript of 6/1/10 jail call at 16-17).

Ortiz-Abrego demonstrated a relatively sophisticated understanding of legal processes when he correctly described the strategic aspects of plea bargaining and derided another inmate for not taking a plea deal, and he also correctly noted that a defendant could appeal.

> Ortiz-Abrego: . . . there are two Hispanics and there's a white guy and there's another one here who has a case just like mine. . . . Same thing happened to him like with me, everything the same and he was given five years. He was offered three months staying at home and the dumbshit said no. Now, he'll go to the slammer for five years.
>
> Wife: Why? So he can't do anything else?
>
> Ortiz-Abrego: . . . attorney will appeal now . . . he says.

Id. at 11-12. He understood the jury had found him guilty after a trial. Id. at 15 (Wife: "But what did the, the jury say to you?" Ortiz-Abrego: "The jury found me guilty."). He recognized the desirability of a reduced sentence, recognized the judge's role in the case, understood the term "sentencing," and showed anger and frustration at the length of his sentence. He recognized that some lawyers practice criminal law while others practice immigration law.

The court also erroneously concluded that Ortiz-Abrego was confused about the length of his sentence.

> In a phone call from the jail days after Ms. Samuel met with the defendant, he tells his wife that he can live with one year in jail, just not 12 years. He appears to have understood that he had been found guilty, but it is completely unclear where he got the one year figure or the 12 year figure, as neither apply to him.

CP 337 (Finding of Fact 36). In fact, Ortiz-Abrego's estimates are roughly correct and had been supplied to him by the trial court and defense counsel in a colloquy on May 10, 2010, about three weeks before the recorded telephone call. In that colloquy, the court told Ortiz-Abrego that he faced a sentencing range of between 10 and 15 years in prison, depending on how many counts he was convicted of. RP 5/10/10, 23. It is no stretch to think that Ortiz-Abrego would have concluded that, with time off for good behavior, he would serve about 12 years. Id. at 32. Ms. Samuel told Ortiz-Abrego. "I said the State can offer you a lesser charge. The State can – perhaps they do one year in jail instead of the possible jail 15 years to life." Id. Given these estimates, Ortiz-Abrego's statements on the recording were generally correct. The statements support competency rather than incompetency.

In sum, Dr. Judd raised concerns about competency but did not reach a conclusion in that regard, yet he overlooked key objective

evidence of competency. The other three experts looked at the objective evidence and ultimately concluded that Ortiz-Abrego was competent. Failure to consider the relative factual bases for the four expert opinions was an abuse of discretion, as was the trial court's misunderstanding about key points of fact.

3. A RULING THAT RESULTS IN AN INCOMPETENCY FINDING IN CIRCUMSTANCES WHERE PRACTICALLY NO OTHER COURT HAS FOUND INCOMPETENCY SUGGESTS THE TRIAL COURT HAS ABUSED ITS DISCRETION.

In addition to identifying the court's novel legal approach to competency and its factual errors, a measure of whether this trial court correctly applied the competency test is to compare the court's ruling with rulings in other cases. This measure may not be determinative standing alone, because judges may exercise proper discretion across a range of circumstances. But, as suggested in the State's opening brief, the trial court's ruling in this case is markedly out of step with published Washington cases where defendants with mental capacity significantly below Ortiz-Abrego's ability were found competent. App. Br. at 34-36. The Washington cases suggest that generally speaking, a low intelligence quotient (IQ) is not – standing alone – a sufficient basis on which to find

incompetency. RP 6/9/11, 8 (Dr. Judd agreed that low IQ does not establish a lack of competency).

The same trend seems to be true nationally; intelligence quotient of around 70 is almost never sufficient to find incompetency without some other evidence of markedly low functioning in society, or some other mental illness. An annotation gathering cases from all states shows that defendants with intelligence quotients similar to or below Ortiz-Abrego's are found incompetent only if the low IQ is accompanied by some other significant mental abnormality. Annot., Competency to Stand Trial of Criminal Defendant Diagnosed as "Mentally Retarded," 23 A.L.R. 4th 493 (1983). The collection of cases shows that of 37 defendants with an IQ between 51 and 70, only three were found to be incompetent. 23 A.L.R. 4th at § 4(a). In three cases, the trial court had ignored evidence of profoundly bizarre conduct like eating feces, or the defendant had psychotic episodes and auditory hallucinations and conversed with imaginary beings, or the court wholly disregarded testimony of two court-appointed psychiatrists. Similarly, in the analysis of 29 cases where a defendant had an IQ of 71 or greater, 24 defendants were found competent. The five defendants found incompetent all had serious present mental disorders, a history of significant mental disorder, a history that

included bizarre behavior, or a combination of the those deficiencies. 23 A.L.R. 4th at § 5(a).

Thus, the trial court's finding in this case is truly an outlier. Although not dispositive of whether this court abused its discretion, the unusual nature of the result raises a significant question as to whether the trial court abused its discretion.

4. IF THE TRIAL COURT'S APPROACH IS AFFIRMED, ORTIZ-ABREGO AND DEFENDANTS LIKE HIM ARE OUTSIDE THE LAW'S REACH.

The State's interest in this case is not limited to the fact that this defendant – who was convicted by a jury of three counts of child rape and who was previously investigated for sexual misconduct with a minor – may have to be retried on these charges. Nor is the State's interest in the competency standard purely academic. Rather, the State is concerned that the trial court's manner of reasoning on the topic of competency, and its ultimate ruling, mean that this defendant and others like him will simply be beyond the reach of the law—both criminal and civil.

A defendant deemed "incompetent" cannot be prosecuted until competent. But low intelligence cannot be treated like mental illness; one cannot "restore" a person to competency if the reason for incompetence is chronically low mental capacity. Nor is there a high probability that IQ

can be raised with time.[3] Thus, a defendant like Ortiz-Abrego cannot be prosecuted now for his current crimes, nor for future crimes.

At the same time, it is very unlikely that the civil law will be able to protect society from defendants like Ortiz-Abrego. Under existing law, it is very difficult to incapacitate a person. To commit someone against their will for even a fourteen day period of evaluation, a court must find

> by a preponderance of the evidence that such person, as the result of mental disorder, presents a likelihood of serious harm, or is gravely disabled, and, after considering less restrictive alternatives to involuntary detention and treatment, finds that no such alternatives are in the best interests of such person or others

RCW 71.05.240. At the end of the fourteen day period the court must, in order to justify continued detention and treatment, that

> (1) Such person after having been taken into custody for evaluation and treatment has threatened, attempted, or inflicted: (a) Physical harm upon the person of another or himself or herself, or substantial damage upon the property of another, and (b) as a result of mental disorder presents a likelihood of serious harm; or
> (2) Such person was taken into custody as a result of conduct in which he or she attempted or inflicted physical harm upon the person of another or himself or herself, or substantial damage upon the property of others, and continues to present, as a result of mental disorder, a likelihood of serious harm; or

[3] When asked whether Ortiz-Abrego could learn about a trial sufficiently to be prosecuted, Dr. Judd acknowledged that "[i]t would seem to me unlikely to be able to be accomplished even with ideal resources within what might be regarded as a reasonable period of time." RP 6/8/11, 135. Of course, the defendant is highly unlikely to learn if he knows that a failure to learn means he cannot be prosecuted.

> (3) Such person has been determined to be incompetent and criminal charges have been dismissed pursuant to RCW 10.77.086(4), and has committed acts constituting a felony, and as a result of a mental disorder, presents a substantial likelihood of repeating similar acts. In any proceeding pursuant to this subsection it shall not be necessary to show intent, willfulness, or state of mind as an element of the crime; or
> (4) Such person is gravely disabled.

RCW 71.05.280. These may be appropriately demanding standards but they are standards that would not likely permit the commitment of someone like Ortiz-Abrego. He does not have a "mental disorder," it will be difficult to predict at any given moment that he "presents a likelihood of serious harm," and, as a functioning member of society, he is clearly not "gravely disabled."

Thus, under the trial court's approach to competency, defendants like Ortiz-Abrego cannot be prosecuted and cannot be civilly committed. They are beyond the reach of the law. It is for this reason that the competency standard is a truly minimal standard.

It does not follow that low-functioning people charged with crimes cannot get a fair trial. Such defendants are provided at public expense with lawyers, social workers, investigators, witnesses, and expert witnesses. The trial court has the authority to put in place whatever accommodations it deems necessary to enhance the defendant's understanding of the proceedings, or to make it more likely that he will be

able to assist his lawyer. These goals can be achieved without changing the competency standard, as the trial court did here.

B. CURRENT STATUS OF THE CASE

Neither the State nor Ortiz-Abrego has sought a stay of the trial court proceedings pending this appeal. The ruling under appeal vacated the jury's verdict, granted Ortiz-Abrego a new trial, and ordered an assessment of his present competency to be prosecuted. The process of assessment has been painfully slow. After multiple examinations by a number of experts over the course of the entire year (2012), the State demanded a jury trial on the issue of competency. As of the filing of this brief, a jury has been selected, and witnesses are being examined. Due to the trial court's schedule, a verdict on the competency trial is not expected until late February, 2013. Because Ortiz-Abrego's present competency must be determined regardless of the outcome of this case, the verdict will not directly affect this State's appeal.

C. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse the trial court's ruling and remand this case for sentencing on three counts of rape of a child.

DATED this 14th day of February, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the respondent, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Reply Brief, in STATE V. ALEXANDER ORTIZ-ABREGO, Cause No. 67894-9-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.

C Brame
Name

2/15/13
Date 2/15/13

Done in Seattle, Washington