

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/7/2018 11:03 AM  
BY SUSAN L. CARLSON  
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 95731-2
	)	
vs.	)	ANSWER TO PETITION FOR
	)	REVIEW
	)	
ALEXANDER ORTIZ-ABREGO,	)	
	)	
Petitioner.	)	
	)	
	)	
	)	

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A. INTRODUCTION

This is the second appeal from proceedings regarding Ortiz-Abrego's competency; the first was decided in decision by this court last year. The decision of the Court of Appeals in this case simply applies the law set forth in the earlier decision. Additional issues that Ortiz-Abrego raises were either not preserved or were outside the scope of the interlocutory review granted by the Court of Appeals.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE

Ortiz-Abrego’s petition for review obscures the timeline of his case and blurs the distinction between the two appeals—the State’s appeal from the order granting a new trial on child molestation charges, on the one hand, and the appeal from the competency jury verdict (years later) that is the subject of this appeal. What follows is a chronology and a brief summary of the two appeals that have arisen from Ortiz-Abrego’s .

1. CHILD MOLESTATION CONVICTION –  
COMPETENCY RULING AND GRANT OF A NEW  
TRIAL – FIRST APPEAL.

The appeal this Court previously considered was an appeal from a competency ruling made by Judge Susan Craighead shortly after Ortiz-

Abrego was convicted by a jury of child molestation. The jury trial on child molestation charges was held May 10 - 27, 2010. The trial court subsequently ruled over a year later on July 5, 2011, that Ortiz-Abrego was “not competent for the trial we gave him.” On October 3, 2011, the court ordered a new trial.

The State appealed that order. The Court of Appeals reversed, holding that the trial court had impermissibly blended concepts of disability law and competency law. State v. Ortiz-Abrego, No. 67894-9-I, slip op. at 8-9 (Ct. App., filed August 17, 2015).

On January 12, 2017, this Court reversed the Court of Appeals and remanded for proceedings consistent with the opinion. State v. Ortiz-Abrego, 187 Wn.2d 394, 387 P.3d 638 (2017). This Court held that the trial court had applied the appropriate legal standard for competency and that it was proper to consider, but not require, a defendant’s actual understanding at trial. Ortiz-Abrego, 187 Wn.2d at 406.

2. JURY TRIAL ON COMPETENCY AND INTERLOCUTORY APPEAL OF JURY’S VERDICT.

While the State’s appeal was pending in the Court of Appeals, it was recognized that regardless of who prevailed in the appeal, further proceedings in the trial court – either a new trial or a sentencing hearing – would be needed, and Ortiz-Abrego’s present competency would be at

issue. In anticipation of such a remand, the State retained an expert witness, Dr. Brian Judd, because Ortiz-Abrego's lawyers had performed additional testing on him and because his expert, Dr. Ted Judd (no relation to Brian Judd), had changed his opinion regarding Ortiz-Abrego's competency. 4RP 4-5. The State's expert was allowed to interview Ortiz-Abrego. The State exercised its right to have the competency determination made by a jury. 7RP 3-44.

The jury trial on competency began on February 6, 2013, more than 1 ½ years after the original competency decision by Judge Craighead. On March 15, 2013, the jury found Ortiz-Abrego competent. CP 278.

Ortiz-Abrego sought interlocutory discretionary review of the jury's determination on competency in May, 2013. The trial court certified two narrowly-tailored questions for review and the Court of Appeals accepted that certification. The questions were:

(i) whether competency to stand trial requires the capacity to understand a trial as it unfolds, and (ii) whether the jury in this case was correctly instructed on the law as to the competency requirement.

State v. Ortiz-Abrego, 70320-0-I, 2018 WL 417967, at \*1 (Ct. App. Jan. 16, 2018).

The case was then linked with the existing State's appeal from the grant of a new trial and the cases were argued together. When the Court

of Appeals reversed the grant of a new trial, it stayed consideration of the appeal of the jury competency verdict. After this Court reversed the Court of Appeals ruling the stay was lifted and supplemental briefs were filed.

The stay was lifted after this Court's decision in 2017. The Court of Appeals invited supplemental briefing and then rejected Otriz-Abrego's arguments on the two certified questions. Its decision was rooted in the language of this Court's decision in the State's appeal. In particular, the court rejected Ortiz-Abrego's argument that the State had the burden to prove actual understanding of the proceedings. It held, instead, that

There is no requirement of actual understanding, but a defendant's actual understanding may be considered as circumstantial evidence in a competency determination. '[R]equiring proof of actual understanding to support a finding of competence ... would be a departure from Washington's competency standard.'

Ortiz-Abrego, at \*3 (quoting Ortiz-Abrego, 187 Wn.2d at 407). The court also held that restricting competency determinations to defendants with a "mental disease or defect" did not violate due process. Id.

The court rejected additional instructional challenges because they were never argued to the trial court. Id. at 4. The court declined to consider the argument that Ortiz-Abrego should not be interviewed, because interlocutory review had never been granted on that question. Ortiz-Abrego, at \*4-5.

### 3. PETITION FOR REVIEW

Ortiz-Abrego's Petition for Review includes the challenges to the jury instructions—both preserved and unpreserved—and the challenge to the trial court's order allowing the State's expert to interview him.

As for the actual competency proceedings, the petition for review says the evidence at the competency jury trial "largely mirrored" the evidence presented two years earlier to Judge Craighead. Petition for Review at 1. This is incorrect. The defense expert had changed his opinion, additional psychological testing had been done, a State's expert witness had been hired and had reviewed the entire record and had interviewed Ortiz-Abrego, and additional evidence had been examined and presented to the jury, including additional recorded conversations in the jail between the defendant and his wife. This evidence provided a much fuller picture of Ortiz-Abrego's capacity than had been presented to the judge almost two years earlier. See Brief of Respondent, at 8-12.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Ortiz-Abrego argues that this Court should grant review because "the trial court's jury instructions substantially misstate the standard for competency" and because the trial court should not have ordered him to undergo a competency evaluation prior to the jury trial. Petition for

Review, at 7, 16. Neither issue merits review by this Court. Other issues raised in his petition were never preserved for review.

The Court of Appeals decision points out that the trial court's jury instructions are consistent with the law of competency as stated in this Court's recent decision in Ortiz-Abrego's other appeal. This court already rejected the precise argument he now raises—that the jury instructions should have *required* the State to prove that he understood the proceedings. As the Court of Appeals observed:

[I]t would have been improper to instruct the jury that a demonstrated lack of understanding compels the conclusion that he lacked the capacity to understand. Consistent with our Supreme Court's recent decision addressing the first competency hearing in this case, actual understanding during trial is merely circumstantial evidence that may be considered to determine whether he had the capacity to understand.

Ortiz-Abrego, 2018 WL 417967, at \*3. There is no conflict between the Court of Appeals decision and this Court's prior decisions.

Moreover, the statutory language that focuses competency determinations on a “mental disease or defect” is similarly unremarkable. “Mental defect” is a broad term that encompasses the disability Ortiz-Abrego claims he suffered. It does not violate due process to limit competency to a defendant who suffers from mental defects. Id.

The Court of Appeals also properly declined to reach issues that Ortiz-Abrego had never argued below. Id. at 4.

Finally, interlocutory review was granted only as to the jury instruction issue. Whether the State had a right to obtain a new evaluation of Ortiz-Abrego about two years after the initial evaluation is simply not an issue that is presented in this appeal. Id. at 4-5.

E. CONCLUSION

This case has been pending on appeal for seven years. The arguments in the petition for review present no conflicts in the law or issues of substantial public interest. The case should be allowed to return to the trial court for further proceedings. For the foregoing reasons, the petition for review should be denied.

DATED this 7<sup>th</sup> day of May, 2018,

Respectfully submitted,

By: \_\_\_\_\_  
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**May 07, 2018 - 11:03 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95731-2  
**Appellate Court Case Title:** State of Washington v. Alexander Ortiz-Abrego  
**Superior Court Case Number:** 08-1-12172-7

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