

No. 70320-0-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

ALEXANDER ORTIZ-ABREGO, Petitioner

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY 31 AM 9:50

**PETITIONER'S MOTION FOR DISCRETIONARY REVIEW**

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A. IDENTITY OF PETITIONER

Alexander Ortiz-Abrego asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

B. DECISION BELOW

Petitioner seeks review of the determination of competent to stand trial issued by jury verdict on March 15, 2013.

A copy of the decision is found in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does Competency To Stand Trial Require The Capacity To Understand A Trial As It Unfolds And, If So, To What Extent?

a. Was the jury correctly apprised of the law as to the requirements for competency?<sup>1</sup>

2. Do Defendant's Particular Cognitive Impairments Render Him Incompetent To Stand Trial?

a. Is defendant incompetent to stand trial if defendant's cognitive deficits render him functionally

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<sup>1</sup> The trial court, Hon. Susan Craighead, has certified these questions for review. A copy of the Order is found in Appendix B.

unable to track, understand and recall courtroom proceedings?

b. Is defendant incompetent to stand trial if defendant's cognitive deficits render him functionally unable to appreciate his peril by being unable to meaningfully participate in plea bargaining?

c. Is defendant incompetent if he can not appreciate his legal peril.

d. Is defendant incompetent if he does not possess the cognitive capacity to understand plea bargaining or exercise basic decision making skills relating to plea bargaining?

3. What is the proper standard of proof for a finding of competency after an individual has previously been found incompetent in the same proceeding?

4. Was defendant unfairly prejudiced and therefore entitled to a new competency determination trial where the jury was informed the underlying substantive offense was a sex offense?

#### D. STATEMENT OF THE CASE

Alexander Ortiz-Abrego was charged in 2008 and convicted in May 2010 of three counts of child rape alleged to have occurred within the span of a few days between 1999 and 2002. Disclosure of underlying allegations was not made until approximately six

years following the alleged events.

Petitioner is an immigrant from rural El Salvador. He was orphaned at approximately age 6 during that country's civil war in the 1980's and was raised by his older sister. Defendant's deceased mother showed evidence of a major mental illness. The siblings lived a highly impoverished existence for several years. They had no electricity or running water. They had inconsistent adult contact and supervision, and had inadequate food supplies. Defendant attended up to the sixth grade but, according to family members, repeated several grades. An older sister recalled seeing bodies of war dead coming and going from school. No known records exist of defendant's schooling. Defendant was not formally identified as possessing a disability in the fractured, dysfunctional society of his childhood.

Defendant came with his brother to the United States in mid-to- late 1999. He held multiple menial jobs. Defendant and his brother lived in the cousin's garage during the period of time the criminal acts were alleged. The alleged victim was the daughter of

defendant's cousin. Defendant speaks only Spanish. He consistently used a Spanish interpreter in attorney meetings, forensic evaluations, and court proceedings.

The underlying criminal matter went to trial. Trial counsel noted defendant had extreme difficulty in understanding and retaining legal information, even after meeting with him and explaining things multiple times. It did not appear to counsel, who had significant mental health court experience, that defendant had any Axis I mental health diagnosis. Counsel initially failed to appreciate defendant's cognitive limitations as constituting a competency issue.

Later neuropsychological testing established petitioner Ortiz-Abrego is borderline intellectually disabled, is extremely concrete in his thinking, and has a specific learning disability in verbal conceptualization, speed of information processing and quantitative reasoning. In short, defendant's deficits are cognitive and developmental in nature. He has no major mental illness.

Immediately before trial neuropsychological testing was

recommended to trial counsel. The court accommodated a short recess to allow a one-day neuropsychological evaluation. Even the prosecution raised concerns about competency. Prior to proceeding, the trial court conducted a competency colloquy but ultimately found defendant competent under Washington case law.<sup>2</sup>

Defendant had been out of custody before and during trial. Following verdict he was remanded into custody.

Post-trial, but pre-sentencing, trial counsel brought a motion for new trial based on lack of competency. After a preliminary finding of incompetence following evaluation at the King County Jail defendant underwent a first period of competency restoration at Western State Hospital.

A contested competency bench trial with substitute counsel was held in June 2011 following restoration. At its conclusion, Hon. Susan Craighead found defendant "was not competent to stand the

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<sup>2</sup> Attached as Appendix D is the Verbatim Report of Proceedings from May 10, 2010. It is included here because it conveys the issue on the eve of trial, as well as defendant's answers to the court's colloquy.

trial we gave him".<sup>3</sup> The court noted, *et alia*, that "[I]t is apparent to me that the defendant did not understand his trial as it was happening and simply did not appreciate what was going on in the courtroom". The court drew a distinction between a theoretical trial and an actual trial. Defendant's conviction was reversed but he remained in custody.

In December 2011 defendant underwent a second period of competency restoration at Western State Hospital. Post-restoration the State requested a jury hear and determine competency, ostensibly because little had changed and the court had already opined on competency following the first competency hearing.

After a complex competency trial the jury by verdict on March 15, 2013 declared defendant competent to stand trial. This Motion for Discretionary Review follows that jury determination.

Because of the length of the record, the number of experts

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<sup>3</sup> The state appealed the court's finding which is currently pending in Division One in State v. Ortiz-Abrego, #67894-9-1. A copy of the trial court's Findings of Fact and Conclusions of Law following the first contested competency hearing are included here in Appendix C.

and the number of exhibits, a full transcript of proceedings is not yet prepared. Some records from the first hearing and other recorded interviews help convey the nature of the testimony in the second contested competency hearing and are noted and appended hereto.

Over a period of three years defendant was evaluated by a number of state and defense experts. A Spanish-speaking defense neuropsychologist, Dr. Tedd Judd, twice provided written evaluations of defendant. In May 2010 immediately before trial Dr. Tedd Judd determined defendant had a full scale IQ testing of 72, placing defendant in the borderline intellectually disabled range. He predicted defendant would have great difficulty in tracking, understanding and remembering courtroom proceedings. Dr. Tedd Judd suggested a number of disability accommodations at trial including slow proceedings with frequent breaks, explanations from a Spanish speaking cognitive aide, simple written memory compensations, meaningful checks on comprehension during proceedings and non-judgmental resolution of quantitative

discrepancies. Dr. Tedd Judd was not asked to do a competency determination at that time.

After a second round of neuropsychological testing and competency evaluation in September 2012 (following the second period of restoration) Dr. Tedd Judd refined his opinions and determined defendant had a specific learning disability in verbal conceptualization, speed of information processing, and quantitative reasoning and that he is unable to conceptualize legal strategies or track, understand, and remember courtroom proceedings. He opined his earlier suggested accommodations would be inadequate disability compensation at trial and opined defendant was incompetent.<sup>4</sup>

Multiple state forensic psychological examiners evaluated defendant. Portions of two recorded state forensic interviews were transcribed and heard by the jury. Transcripts are included here for

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<sup>4</sup> Dr. Tedd Judd's Reports from May 2010 and September 2012 are found in Appendix E.

review.<sup>5</sup>

State forensic psychologists opined defendant was competent to stand trial because he possessed the “capacity” as required by RCW 10.77.010(15). Some state’s experts agreed the standard for competency, and that employed in their practice, is *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

State’s expert disagreed over what should typically be covered in a forensic competency evaluation. Western State Hospital’s Dr. Hendrickson opined defendant was competent even though little of his interview involved legal proceedings and trial matters. Dr. Brian Judd<sup>6</sup> specifically testified he did not discuss legal proceedings and issues related to plea bargaining with defendant because plea

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<sup>5</sup> Transcripts were provided to the jury only as an aid to the specified recording, but included here in lieu of a completed Transcript of Proceedings. A transcript of the March 2012 forensic interview at Western State Hospital is attached as Appendix F. A transcript of the January 19, 2013 Dr. Brian Judd interview with defendant is attached as Appendix G. Some redactions were made to copies provided to the jury but don’t affect the issues presented here.

<sup>6</sup> Dr. Brian Judd is one of the state’s forensic experts. He is not the same person as, and is unrelated to, Dr. Tedd Judd.

bargaining appeared beyond the necessary scope of forensic inquiry under Washington state law.

Over objection, State's forensic psychologists opined that disability accommodations originally suggested by the defense neuropsychologist would be "helpful but not necessary" for competency purposes at trial.

State's experts disagreed over the role of "adaptive functioning" in forensic competency determinations. Western State Hospital expert Dr. Ray Hendrickson testified a determination of capacity could be made from evidence of adaptive functioning. Another state expert, Dr. Nelson, opined adaptive functioning was only relevant in an indirect way. State's experts had made little or no inquiry with collateral sources. Defense prepared a "biography" of defendant for use by all experts. It included collateral interviews of defendant's family members and friends.

Defense trial counsel testified at both competency hearings. Defendant had, after all, gone through the actual trial and counsel had direct experience with defendant during trial, as did the trial

court. In sum, trial counsel testified defendant was unable to comprehend and fully retain basic information she conveyed on multiple occasions, that he lacked basic decision-making skills with respect to plea offers, and he failed to understand and courtroom proceedings as they occurred in real time. Also, defendant could not understand the need to attend trial for more than a single day and did not appreciate key witness testimony.

Following verdict, counsel met defendant at jail having he had been remanded into custody. Defendant did not understand the jury had made a verdict. He also thought he would be going home in a few days until defense counsel explained he would be “living” at the jail.

Records from Western State Hospital reviewed at trial during expert testimony as well as recorded forensic interviews demonstrate defendant's unstable understanding of courtroom participants, significant confusion over the role of the judge and jury, and the inability to retain information conveyed to defendant after a period of days.

During the jury trial the State, in addition to its experts, substantially relied on recorded statements of defendant made during earlier police investigations, a colloquy with the court at the outset of trial, and jail phone conversations with defendant's common law wife. The state argued, in essence that defendant's ability to recall past facts, hold coherent discussions with his wife as evidenced in selected recorded jailhouse telephone conversations, and his use of some legal terminology was legally sufficient for the low-threshold competency determination.

Significant time and effort was expended at trial by all parties with respect to creating jury instructions. Relevant final instructions are included as Appendix H. The State and defense presented substantially different views of what was required for competency, trying to square the *Dusky* requirements with current Washington statutory and caselaw language. The court ultimately rejected all jury instructions proffered by the defense.

The jury was instructed there was a presumption of incompetence because of the then-recent decision in *State v.*

*Coley*, 171 Wn. App. 177, 286 P.3d 712 (2012). Over defense objection, the court instructed the jury the State's burden to prove competency was evidence by the preponderance of the evidence, despite the presumption of incompetence that concededly applied in the case.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**1. AN INDIVIDUAL MUST HAVE THE COGNITIVE COMPETENCY THAT PERMITS ONE TO UNDERSTAND ONE'S TRIAL AS IT UNFOLDS.**

The trial court, Hon. Susan Craighead, has certified the following question to the court: "Does 'competency to stand trial' require the capacity to understand a trial as it unfolds and, if so, to what extent? Was the jury in this case correctly apprised of the law as to the requirements for competency". (See Appendix B).

Competency requires the "present ability" to consult with one's lawyer with a reasonable degree of rational understanding, as well as a rational and factual understanding of proceedings. *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824

(1960). Case law and common logic contemplates competency requires continuing ability throughout and within proceedings. The *Dusky* standard is applicable from the time of arraignment through the return of a verdict. *Godinez v. Moran*, 509 U.S. 389, 403, 113 S.Ct. 2680 (1993)(J. Kennedy concurring in part and in judgment)

Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. *Drope v. Missouri*, 420 U.S. 162, 181-82, 95 S.Ct 896, 43 L. Ed. 2d 103 (1975); see, *State v. Sanders*, 209 W.Va. 367, 549 S.E.2d 367 (2001) (trial court abused its discretion in failing to direct additional inquiry into mental competency at the close of trial, and reversing). It is well settled that the criminal trial of an incompetent defendant violates the constitutional right to due process of law. *Medina v. California*, 505 U.S. 437, 453, 112 S. Ct. 2572, 120 L.Ed. 2d 353(1992).

Cognitive limitations present a special challenge in competency determinations. One component of the *Dusky* standard

is its emphasis on the presence or absence of rational and factual understanding, which suggests an emphasis on cognitive functioning. *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, G. Melton, J. Petrila, N. Poythress, C. Slobogin, 2d Ed., New York, 1997, p. 122.

“Factual understanding” does not tell the whole story where cognitive limitations do not allow defendants to process and use various pieces of information to meaningfully engage in decision making because deficits in “rational understanding” may preclude defendants’ capacities to apply the information rationally to their own situation. *Evaluating Competencies: Forensic Assessments and Instruments (2<sup>nd</sup> Edition)*, by Thomas Grisso; New York: Kluwer Academic Press, 2002, p. 84.

*Dusky* mandates the conclusion that a defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding to the world around him. *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10<sup>th</sup> Cir. 1991).

a. The jury instructions failed to adequately convey the law of competency and the law as it applied to defendant's particular intellectual disability.

The court also certified the question whether the jury in this case was correctly apprised of the law as to the requirements for competency (See, Appendix B).

The court and parties struggled to define competency trying to square *Dusky* requirements with the statutory definition in RCW 10.77.010(15), case law language, and with factors experts considered relevant. (See, Selected Jury Instructions Appendix H). The instructions largely state what competency does not require, rather than what it does require. Defense argued, *et alia*, competency included the type of decisional competency referenced in the ABA Criminal Justice Section Standards 4-5.2 including that defendant be able, after consultation with counsel, to decide what pleas to enter; whether to accept a plea agreement; whether to waive jury trial; whether to testify in his or her own behalf; and

whether to appeal.<sup>7</sup> See also, *Personal Restraint of Stenson*, 142 Wn.2d 710, 735-36, 16 P.3d 1 (2001). If these decisions are for the client after consultation it implies at very the least the accused have the cognitive ability to adequately conceptualize those parts of the proceeding and have adequate and meaningful ability to discuss them with counsel.

Defense excepted to the court's rejection of all proffered defense instructions, including one using solely the *Dusky* language. Final instructions were excepted to by both parties with the state essentially contending the instructions overstated competency and defense contending instructions understated competency requirements.

Washington statutory law does not make clear any requirement an individual possess the "cognitive capacity" to understand one's trial as it occurs, or has continuing application throughout the continuum of legal proceedings. RCW

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<sup>7</sup> American Bar Association, Standards for Criminal Justice, defense counsel functions, Standard 4-5.2 Control and Direction of the Case

10.77.010(15) provides:

(15) "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.

The statutory language is insolubly ambiguous as to whether incompetency is merely a gateway or threshold requirement or a continuing requirement.

No instruction on "capacity" was provided. The jury instructions fail to tie "capacity" to *Dusky's* "present ability" requirement, and describe it as a continuing functional ability. Failing to instruct the jury that the defendant be cognitively capable of following contemporaneous legal proceedings with a meaningful level of comprehension effectively omitted the necessity to be competent *during* trial, but allowed a finding of competency if one possessed the requisite basic understanding of the eve of trial.

Jury instructions did not adequately explain defendant must have the cognitive capacity to correlate expressive ability to the functional ability that permits him to factually and rationally

understand judicial processes and consult with one's attorney on a continuing basis throughout trial. Without the requisite functional ability to meaningfully employ legal language, the competency determination devolves into whether one has the mere ability to articulate legal words, and restoration efforts to focus on forced memorization of legal terminology with no value on actual comprehension.

Jurors were not adequately instructed on the central requirement of "capacity" as it applied to the competency determination in this case. In other contexts the elements instruction is the yardstick by which the jury measures all evidence and it must contain all the essential elements and failure to instruct on them constituted automatic reversible error. *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997). The same is true here.

b. Jurors were not permitted by instruction to find "mental disease or defect" inclusive of cognitive disability.

Washington statutory law specifically ties a determination of "incapacity" as necessarily resulting from a "mental disease or

defect". RCW 10.77.010(15)<sup>8</sup>. It is not at all clear that well meaning jurors would include cognitive disabilities within the requirement of "mental disease or defect".<sup>9</sup> No instruction was provided that cognitive or intellectual disability could be permitted to fit within the statutory definition in RCW 10.77.010(15).

There is no statutory definition to "mental disease or defect" though Washington courts have recognized that "mentally ill" and "mentally disordered" are interchangeable. *State v. Klein*, 156 Wn.2d 102, 116, 124 P.3d 644 (2005)(also noting that "disease or defect" has the common dictionary meaning of "mental disorder"). Cognitive disabilities are plainly not mental illness. In other

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<sup>8</sup> RCW 10.77.010(15) provides: "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.

<sup>9</sup> The legislature in 2010 took action to substitute statutory terms including "mentally disabled" and "mentally retarded" with more respectful language recognizing that certain terms are demeaning and language should put "the person before the disability". It is incongruous for competency purposes to require a cognitive disability to be considered a "mental disease or defect", a pejorative and old-fashioned description. See, RCW 44.04.280.

contexts, “mental disorder” means any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions. RCW 71.05.020(26). Under the instructions, the jury could have been highly cognizant of defendant's cognitive limitations, but find that it did not fit within “mental disease or defect”.

c. The jury was not instructed on the meaning of appreciating one's peril

In Washington to be competent one must be must be capable of properly appreciating his peril. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001); *State v. Rice*, 110 Wn.2d 577, 621, 757 P.2d 889 (1988). To “appreciate” is “estimate justly” and may be synonymous with “know” or “understand” or “realize”. Black's Law Dictionary, 6<sup>th</sup> Ed., West Publishing, 1990. There is no known caselaw defining “peril”.

The court did not, over defense objection, instruct the jury on peril. Thus, the jury had no guidance on this fundamental tenet of existing Washington competency law. The inability to appreciate

peril was dramatically evidenced in the testimony by trial counsel when defendant demonstrated no ability to engage in decision making around a plea offer, had no reaction to live testimony, no reaction to jury verdict, surprise over being remanded into custody, and no appreciation he would remain in custody for a long time despite prior conversations about it.

In the competency hearing at issue the jury instructions were legally deficient because 1) they failed to adequately express that competency is an ongoing requirement throughout proceedings, 2) they failed to explain competency required the cognitive ability to functionally and meaningfully employ articulated legal terminology, 3) failed to permit that cognitive disability can fall within the “mental disease or defect” requirement, and 4) instructions omitted a definition or description of legal peril.

2. DEFENDANT'S INDIVIDUAL COGNITIVE IMPAIRMENTS RENDERED HIM UNABLE TO RATIONALLY AND FACTUALLY UNDERSTAND COURT PROCEEDINGS, AND TO CONSULT WITH HIS ATTORNEY WITH A REASONABLE DEGREE OF RATIONAL UNDERSTANDING.

Assuming without conceding instructions were adequate in this case, the jury determination is legally at odds with the weight of the evidence. There was insufficient evidence of competency. In Washington, no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. RCW 10.77.050. Competency trial evidence showed defendant's disabilities are likely lifelong. They will not change. Teaching defendant to parrot information will not teach him comprehension.

- a. Defendant cannot rationally and factually understand court participants and proceedings.

Defendant has the ability to recite learned information such as the "judge is the boss", the jury is the "twelve people", the prosecutor is the "bad lawyer" wants to put you in jail and the "good lawyer" is supposed to help you. This "static" understanding is

deceiving. Defendant cannot process and use memorized information to meaningfully apply them in a manner that provides adequate or meaningful appreciation. "Static" understanding cannot substitute for the *functional* requirement implicit in the *Dusky* determination. One does not have the capacity required under RCW 10.77.010 (15) if one does not possess the cognitive capacity to functionally utilize the information he possesses. Defendant does not have the cognitive capacity to conceptualize the very *process* of legal decision making or how its participants function within the process.

Defendant's inability to functionally cognitively utilize the bits of learned information were evident in the recorded and transcribed forensic video conducted at Western State Hospital in March 2012 following the second period of restoration. The jury saw the actual video recording and was able to follow along with the transcript attached here as Appendix F.

Despite the fact defendant had previously gone through an actual trial and two periods of "restoration" defendant did not, nearly

two years later, understand the role of the jury (Appendix F, P. 26, 78-80), or understand the process of a jury hearing evidence through witnesses and making a decision. He could not understand the role of the judge or jury because he could not “see” them doing anything. (Appendix F, p. 32-33, 54, 58, 75, 77). He did not understand who decides the “truth” when people say different things, guessing at one point that the police decide who is telling the truth. “They’re [the police] the ones who have to see who is the one who’s lying” (Appendix F, p. 73).

In addition, defendant did not understand why, during trial, he had to come back day after day. (Appendix F, P. 49-50). Defendant indicated he could understand when he was told to stand up, sit down and “come back tomorrow”. He could not, however, understand what actually occurred in court. (Appendix F, p. 49-50). During the interview the forensic evaluator tried to explain concepts including free speech and religion, and the right not to speak to police, with little success. (Appendix F, pps 66-70). Defendant couldn’t conceptualize how he could be in jail if his cousin, who

made the allegation, was lying. (Appendix F, p. 77). The lack of the ability to conceptualize, rather than merely wishful thinking or deep denial, accounts for defendant's particular brand of bewilderment throughout the entire legal proceedings and periods of restoration.

In the final state's forensic evaluation conducted January 19, 2013, just before the competency trial defendant still didn't understand the jury put him in jail or what the jury actually did (Appendix G, p. 14, 27, 30), didn't know what the attorneys actually did (Appendix G, p.24-26), and couldn't say what the judge did except to say that at the hospital they told him the judge is in charge of everybody (Appendix G, p.27).

During the second contested competency hearing it is noteworthy the prosecution did not argue that defendant was malingering, but simply that he was "not putting forth his best effort" and that if he only fully applied himself to the task, he was competent to stand trial.

Records from Western State Hospital evidence at trial showed defendant attended over 90 percent of all restoration

classes. He was never a behavioral problem either at court or during restoration. The clear weight of the evidence is that defendant did not and could not conceptualize legal proceedings as a whole. He does not comprehend the role of jury as decision maker, or understand the function of the judge or lawyers. He did not appreciate his overall legal peril, the significance of witness and victim testimony, or have the ability to meaningfully engage in plea bargaining discussions with his counsel.

b. Defendant cannot follow contemporaneous courtroom proceedings.

Unrebutted evidence of neuropsychological disability in verbal conceptualization and speed of information processing results in a dramatic inability to follow contemporaneous legal proceedings. In her finding after the first contested competency hearing the trial court noted defendant did not understand his trial as it was happening. In her findings of fact the court found:

It is apparent to me that the defendant did not understand his trial as it was happening and simply did not appreciate what was going on in the courtroom. It is one thing for someone not to understand

a “theoretical” trial, and quite another not to understand an actual trial.<sup>10</sup>

It has been aptly noted that the trial process is essentially verbal in nature and is saturated with cultural contexts. *United States. v. Hoskie*, 950 F.2d 1388, 1393 (9th Cir. 1991). In *Hoskie* defendant was convicted of assault, sexual abuse and kidnapping. The reviewing court found clear error in a trial court’s determination of competency. Defendant suffered from mental mild retardation in the borderline range and alcoholism. He was a Navajo Indian who lived on a reservation and needed an interpreter. A magistrate had noted that “defendant is extremely limited in his ability to conceptualize and virtually incapable of thinking in abstract terms” and characterized the degree to which Hoskie understood court proceedings as “extremely limited”. *Hoskie*, 950 F.2d at 1390. Hoskie would display “a glimmer” of understanding about a jury once explained but would not retain it shortly thereafter. Defendant was able to explain that what happens if you break the law is that

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<sup>10</sup> Appendix C, Finding of Fact and Conclusions of Law, p. 21, filed October 3, 2011.

you go to jail. He likewise was able to explain that the defense attorney speaks for him. *Hoskie*, at 1393.

In reversing the conviction the *Hoskie* court concluded:

We are not persuaded that evidence of basic functioning and ability to undertake mechanical tasks correlates in a meaningful way with a defendant's ability factually and rationally to understand the judicial process and consult with his lawyer. There is simply nothing in the record to support a finding that Hoskie could or did understand the trial process.

*Hoskie*, at 1393.

This is precisely the circumstance presented in this case. Before the first trial defense neuropsychologist Dr. Tedd Judd in May 2010 predicted defendant will have “great difficulty in tracking, understanding and remembering courtroom proceedings”. It was this basic observed inability to follow proceedings, despite her own prior determination of competency, that caused the trial court to engage in a retrospective competency inquiry and reverse defendant's conviction.

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This type of circumstance, though limited, has been recognized in cases in addition to *Hoskie*. In *People v. Lucas*, 388 Ill. App. 3d 721, 904 N.E.2d 124 (2009) an appellate court reversed a trial court finding of competency and bench trial conviction of three counts aggravated criminal sexual abuse. The defense attorney had noted that “defendant does not have a clue what goes on in a courtroom” and did not understand counsel’s explanation of the functions of courtroom personnel, plea agreement, jury trials, subpoenas or confrontation right. In *Lucas*, as in the present case, defense counsel would repeat explanations of court process over and over again with little or no understanding. Unrebutted expert testimony in *Lucas* showed defendant had cognitive disorders creating problems with memory, comprehension and verbal expression. *Lucas*, 388 Ill. App. 3d at 725. Expert conclusions supported trial counsel representations that defendant did not understand even basic trial concepts.

In *United States v. Rednour*, (N.D. Ill. 11-8-2012) the United States District Court granted habeas corpus following a murder

conviction after finding trial counsel prejudicially ineffective for failing to investigate known deficiencies in defendant's mental capacity and to raise them with the trial court. The court concluded there was a reasonable probability defendant would have been declared unfit to stand trial after competency hearing. Defendant's cognitive issues included an inability to understand complex or abstract concepts, poor reading and listening skills, memory problems, and a limited vocabulary which caused conversations to break down. The court concluded, *et alia*, defendant was unable to understand or explain the role of the jury and other essential legal concepts that critically bear on a defendant competency to stand trial. *Rednour*, at 27.<sup>11</sup>

Like *Hoskie*, there is no meaningful correlation between defendant's ability to undertake mechanical tasks and his ability to understand the judicial process. The jury's verdict cannot stand.

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<sup>11</sup> In *Rednour*, the defendant's description of the jury was that they "sat in the courtroom. They sat there and listened. They left out. They came back in. Somebody stood up. They said I was guilty." *Rednour*, at 27. This was substantially more understanding of the role of the jury than defendant displayed in the current case.

c. Defendant cannot appreciate his legal peril.

Defendant's concrete thinking and lack of ability to conceptualize made him particularly unable to meaningfully appreciate or justly estimate potential outcomes. Without an appreciation of one's peril, one is oblivious to dangers. This was dramatically demonstrated when, as trial counsel testified, defendant was unaware the jury was making a verdict, and the verdict would result in his incarceration. Despite record evidence he had been told he could face up to life in prison, defendant expected to be out of jail in a few days according to his trial counsel.

The only neuropsychological evidence in the case concluded defendant is unable to conceptualize legal strategies. While an accused does not have to be able to suggest legal strategies, *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144 (1986), defendant's cognitive deficits prevent him from conceptualizing the very notion of a legal defense. He is capable of saying his cousin lied, but incapable of appreciating a jury could believe her.

d. Plea bargaining is an integral part of legal proceedings.

One legal context for the expression of appreciating peril and likely outcomes is the widely-employed practice of plea bargaining. No instruction informed the jury that plea bargaining was part of the judicial proceedings, and that defendant's need to factually and rationally understand the proceedings encompassed plea bargaining.

Remarkably, no single state forensic expert explored the concept of plea bargaining with defendant, albeit for different reasons. The State argued that an understanding of plea bargaining is beyond what is legally necessary for competency. Regardless, two state's experts from Western State Hospital testified in cross-examination they routinely include an understanding of plea bargaining within their typical non-structured forensic interview.

The United States Supreme Court recently observed that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty plea. Plea bargaining...

is not some adjunct to the criminal justice system, the court observed, it *is* the criminal justice system. In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant. *Missouri v. Frye*, 566 \_\_\_\_\_ U.S. \_\_\_\_\_, 132 S. Ct. 1399 (2012).

Given that plea bargaining is a vital part of judicial proceedings, it must be included within the capacities considered necessary for competency purposes. In this case no state expert ever included a discussion of plea bargaining in their evaluation. The only testimony came from defense counsel reciting her experience that defendant didn't "get it", and did not display even basic decision making abilities when having a conversation relating to plea bargaining. As a result, defendant was thrust into a trial that never should have happened.

The lack of comprehension during trial was plainly evident to the trial court, leading her to reverse the conviction and certify questions to this court.

2. THE STANDARD OF PROOF FOR A FINDING OF COMPETENCY AFTER AN INDIVIDUAL HAS PREVIOUSLY BEEN FOUND INCOMPETENT IN THE SAME PROCEEDING IS BEYOND A REASONABLE DOUBT, OR ALTERNATIVELY, BY CLEAR AND CONVINCING EVIDENCE.

In Washington, a defendant is presumed incompetent when a prior order declaring him in the same proceeding has previously been entered. *State v. Coley*, 171 Wn. App.177, 286 P.3d 712 (2012). More recently, it was decided this presumption of incompetency applies whenever there has been a prior determination of incompetency. *State v. P.E.T.*,# 68068-4-I (Wash. App. 4-29-2013).

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (citation omitted). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance

attached to the ultimate decision. The typical civil case involving a monetary dispute between private parties warrants only a preponderance standard. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself, and employs the beyond a reasonable doubt standard. *Addington v. Texas*, 441 U.S. at 423-24.

Because of the liberty interest at stake and the due process right not to be subjected to trial when incompetent, the highest burden should be imposed in a competency determination where there has been a prior determination of incompetency in the same proceeding.

Research reveals only one state which has established a burden of proof beyond a reasonable doubt in a competency hearing where a prior presumption of incompetency exists. In *Manning v. State*, 730 S.W.2d 744 (Tx. Cr. App. 1987) the court noted a long tradition in Texas common law that the state bears a burden to prove one's competence to stand trial beyond a reasonable doubt when there is a prior finding of incompetence.

The burden outlined in *Manning* and cases cited therein comport with the constitutional considerations outlined in *Addington* and the fundamental rights implicated in such a decision. It is appreciated that where a presumption of competence applies, it does not violate due process for a State to procedurally require a person to prove himself incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1737, 134 L. Ed. 2d 498 (1996). Where the presumption is reversed, however, the relative burden on the State is reduced. Under the preponderance standard there is less confidence in the correctness of the decision, particularly given the grave danger and constitutional implications of subjecting an incompetent person to criminal trial.

In Washington, the clear, cogent and convincing standard applies in civil cases where a presumption is in force. See, *In Re Peters' Estate*, 43 Wn.2d 846, 264 P.2d 1109 (1953)(one who wishes to overcome the presumption of testamentary capacity must do so by clear, cogent, and convincing evidence); *State v. J.F.*, 87 Wn. App. 787, 943 P.2d 303 (1997)(State has burden of

overcoming statutory presumption of incapacity of a child in juvenile proceedings by clear and convincing evidence); see also, *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990)(the state must demonstrate through clear and convincing evidence that consent to a search was voluntarily given). In a criminal case where a presumption of incompetence applies, the applicable burden on the State should be higher than that in a civil case.

In this case the jury was correctly instructed on the State's burden of proof under *Coley*. The jury should have been instructed the proof burden on the State in this case must be beyond a reasonable doubt, or alternatively, a clear, cogent and convincing standard. The court erred in failing to correctly instruct the jury on the proper proof burden.

**3. THE JURY SHOULD NOT HAVE BEEN INFORMED THE UNDERLYING SUBSTANTIVE CHARGE WAS A SEX OFFENSE.**

In sex cases the prejudice potential of prior acts is at its highest. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697

(1982). There is no compelling reason to include the underlying substantive offense when a competency determination is considered by a jury. Such evidence simply functions as evidence of bad character and can inflame the sense that a defendant is trying to “get off” the charge. The relevance of the charge in this case was outweighed by the “highest” potential for prejudice. The court allowed the evidence in many different forms over consistent defense objection.

At trial the state argued that they should be able to demonstrate that defendant could provide a recitation of facts, and that was relevant to the issue of competency because it showed evidence of memory. The state’s argument fails to appreciate the cognitive incapacity in this case. The ability to verbalize and converse about something that personally happened to you is qualitatively different than the ability to listen for a sustained period of time and cognitively integrate unfamiliar legal input when the disability concerns the inability to conceptualize legal abstractions. Moreover, inability to recall past facts does not necessarily

constitute incompetence. *State v. Harris*, 114 Wn.2d 419, 428, 789 P.2d 419 (1990), and ability to relate facts does not constitute competency.

#### E. CONCLUSION

The court should accept review of this important case. Defendant's unique intellectual and cognitive disabilities render him functionally incompetent to stand trial. His cognitive disabilities prevent him from having a rational and factual understanding of the proceedings against him. He is unable to "piece together" the bits of information he possesses to factually and rationally understand judicial processes to a meaningful degree. In addition, he is unable to track, understand and remember courtroom proceedings as they occur in real time.

The jury was not properly or adequately instructed with regard to competency and legal burdens. In addition, the evidence shows Mr. Ortiz-Abrego was competent even under the standard employed at trial.

Mr. Ortiz Abrego should not be in the position, as he was in the first trial, of being thrust into a trial that is a bewilderment to him because he can't conceptualize the process or track and retain information as it is presented in the courtroom.

Dated this 31 day of May, 2013.

Respectfully submitted,

  
James E. Koenig WSBA #19956

# **APPENDIX A**

## Jury Verdict Form

FILED  
KING COUNTY, WASHINGTON

MAR 15 2013

W. KIMMEL, CLERK  
87-ANNE K. BRAFF

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ALEXANDER ORTIZ-ABREGO )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

No. 08-1-12172-7 SEA  
VERDICT FORM

We, the jury, find the defendant ALEXANDER ORTIZ-ABREGO  
COMPETENT (write in incompetent or competent) to stand  
trial in this case.

W. MESSIA  
Presiding Juror

# **APPENDIX B**

## Order Certifying

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**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 08-1-12172-7 SEA
	)	
vs	)	ORDER ON CERTIFICATION
	)	
ALEXANDER ORITZ-ABREGO,	)	
	)	
Defendant.	)	
_____	)	

Before the court is a motion to certify a competency determination rendered by a jury to the Court of Appeals pursuant to RAP 2.3(b)(4). For the reasons set forth below, the motion for certification is granted.

The procedural history of this case is unusual and convoluted. The defendant was charged with Rape of a Child in the first degree in October 2008. The matter was sent to this court for trial in May 2010. Just before and especially during trial questions arose regarding the defendant's competency. The jury found the defendant guilty, but he was never sentenced. Ultimately this court granted a motion for a new trial after finding the defendant incompetent to stand the trial that he had just undergone. The State appealed, and oral argument on this appeal has been set in September 2013. While the appeal was

ORDER

Susan J. Craighead  
King County Superior Court  
516 Third Avenue, C-203  
Seattle, WA 98104

1 pending, the defendant was sent to Western State Hospital for a second attempt to restore him to  
2 competency. After he returned from Western State, another competency hearing was set before this  
3 court. The State demanded a jury trial on the issue of competency, which is authorized by RCW  
4 10.77.086(3). This court then presided over a lengthy jury trial on the issue of competency, during  
5 which experts testified about their understanding of what capacities are essential to competency under  
6 the law (among other things). In addition to experts from Western State, each side offered the  
7 testimony of retained experts. The parties and the court struggled over jury instructions. There are no  
8 pattern instructions and no case in Washington discusses the unique competency issues raised by the  
9 defense in this case. In the end, the jury found the defendant to be competent. Presumably this finding  
10 would allow the new trial to follow, but the appeal of the order granting the new trial is still pending.  
11 As a result, the new trial is stayed pending a decision from the Court of Appeals.

12  
13 Substantively, the central legal issue in this case is this: Does “competency to stand trial” require the  
14 capacity to understand a trial as it unfolds and, if so, to what extent? As it relates to the jury trial, the  
15 additional question for the appellate court is whether the jury was correctly apprised of the law as to  
16 the requirements for competency (taking into account expert testimony, arguments of counsel, and the  
17 court’s instructions to the jury). The defendant in this case grew up in El Salvador with an elementary  
18 school education and speaks Spanish; he has an I.Q. in the range of borderline intellectual functioning,  
19 marked by extremely concrete thinking; there was evidence that he suffers from an auditory processing  
20 disorder that make it very difficult for him to understand and process information that is presented  
21 orally. There is little dispute about any of these facts, although there is dispute about the extent of the  
22 auditory processing problem. This is not a case involving mental illness.

23  
24  
25  
26 ORDER

Susan J. Craighead  
King County Superior Court  
516 Third Avenue, C-203  
Seattle, WA 98104

1 There are no cases in Washington addressing the issue presented by this case, and only a handful that  
2 the parties or the court is aware of nationally: United States v. Hoskie, 950 F.2d 1388 (1991); Newman  
3 v. Rednour F.Supp.2d 2012 WL5463863<sup>1</sup>; People v. Lucas. 904 NE2d 124 (2009). The State has taken  
4 the position that the law in Washington is settled as to what must be established to find a defendant  
5 competent and there is no need to address the issue framed above. There is little doubt that the central  
6 issue in this case remains the defendant's competency to stand trial given his unique limitations;  
7 whether competency includes the capacity to understand a trial as it happens is a controlling question  
8 of law presented by this case. Obviously, if the jury was not properly informed about the required  
9 components of competency, their decision is flawed and no new trial should proceed absent a new  
10 competency hearing. It is important to remember that competency to stand trial is essential to the  
11 fundamental fairness of the proceedings.  
12

13 This court has thought a great deal about whether review of this issue at this time is likely to materially  
14 advance the ultimate termination of this litigation. RAP 2.3(b(4)). In most circumstances this phrase is  
15 interpreted to mean that no trial will take place once the question presented by the certification is  
16 resolved by the appellate court. In this case, if the Court of Appeals were to find in the State's direct  
17 appeal that this court did not abuse its discretion in ordering a new trial, then a new trial would proceed  
18 and the issues posed by this jury trial on competency would be litigated in a subsequent appeal,  
19 assuming the defendant is again convicted. Thus there would be a second appeal raising very similar  
20 issues as the first, but under a different standard of review (the court notes that it is unclear what  
21 standard of review applies to a jury verdict on competency) and with a more complete record. The  
22 child victim would have had to testify a second time and the trial court will devote even more  
23

24 \_\_\_\_\_  
25 <sup>1</sup> It is not clear that this is a published decision, but it is in the 7<sup>th</sup> circuit now and illustrates the morass that will be created  
26 if the issue at hand is not resolved by the state courts.

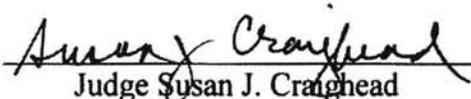
ORDER

Susan J. Craighead  
King County Superior Court  
516 Third Avenue, C-203  
Seattle, WA 98104

1 resources to this case. Rather than address two appeals, the appellate court might choose to join this  
2 case with the earlier-filed appeal. In light of the importance of the issue presented here to the  
3 fundamental fairness of a trial for this defendant and considerations of judicial economy at both the  
4 trial and appellate levels, it appears to this court that review of the issue presented by this jury  
5 determination of competency will materially advance the *ultimate* termination of this litigation.  
6

7  
8 Now, therefore, it is hereby ORDERED that the following issue is certified for discretionary review by  
9 the Court of Appeals: Does "competency to stand trial" require the capacity to understand a trial as it  
10 unfolds and, if so, to what extent? Was the jury in this case correctly apprised of the law as to the  
11 requirements for competency?  
12

13  
14 DATED: May 20, 2013.

15   
16 Judge Susan J. Craighead

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26 ORDER

Susan J. Craighead  
King County Superior Court  
516 Third Avenue, C-203  
Seattle, WA 98104

## **APPENDIX C**

Trial Court Findings of Fact and  
Conclusions of Law October 2011

FILED  
KING COUNTY WASHINGTON

OCT 03 2011

SUPERIOR COURT CLERK  
DAVID WITTEN  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ALEXANDER ORTIZ-ABREGO,

Defendant.

NO. 08-1-12172-7 SEA

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The court heard a contested competency between April 6, 2011 and June 30, 2011. The court now enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In September 2008 Detective Knudson contacted the defendant because of a report of sexual touching of a child that had allegedly occurred several years earlier. Detective Knudson speaks Spanish proficiently. When he arrived at the defendant's home, he learned that the defendant was on his way to the funeral of his child. He gave the defendant his card

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, P. 1

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Fax: (206) 622-3812

1 and asked him to appear the next morning at the detective's office at the RJC. The detective  
2 did not have any difficulty conversing with the defendant.  
3

4 2. The defendant appeared on time the next day, September 10th. The defendant was able  
5 to read his Miranda rights out loud in Spanish with no significant errors. He said he  
6 understood and agreed to speak with the detective. The two of them had a lengthy back and  
7 forth conversation, during which the detective gave the defendant some information about  
8 the allegations and the defendant denied ever having inappropriately touched the victim, his  
9 cousin Daysi's daughter, Daysita. The defendant spoke several times about an incident when  
10 he found the girl asleep on the couch and picked her up in his arms to take her to her room.  
11 From the defendant's account, this event provoked an argument with the mother because the  
12 child alleged a sexual touching. He denied any other touching, including the oral sex that  
13 allegedly occurred at another time in the girl's bedroom.  
14

15 3. During the conversation, the defendant appeared perplexed by the allegation and its  
16 timing; he suggested that perhaps the child was confused, or perhaps she was thinking of one  
17 of the Hondurans who lived in the house at the same time. His account remained consistent.  
18 He did not become upset, despite the seriousness of the allegations. The detective did not  
19 encounter problems conversing with the defendant, except when the detective did not  
20 understand a word in Spanish. On those occasions the defendant was able to clarify.  
21

22 4. Although the defendant and the detective were able to understand one another, the  
23 defendant's speech (as translated) displays the impoverished use of language described by the  
24 defense expert, neuropsychologist Tedd Judd, Ph.D. The defendant's answers were vague,  
25  
26

1 lacking in detail, and used pronouns more than nouns or proper nouns, as Dr. Judd described.

2 His speech meandered and is difficult to follow on the printed page. See Ex. 6.

3  
4 5. The defendant agreed to participate in a polygraph examination and recalled having done  
5 so during an unrelated investigation in 2006. He answered the examiner's questions, this  
6 time through an interpreter. His answers were the same as he had given the detective, but  
7 showed deception. The detective confronted him about the deception. The defendant did not  
8 become upset, and did not change his story. At the end of this second interaction with the  
9 police, the defendant told the detective he could give the defendant charges if it would make  
10 the child feel better. The detective testified that nothing about the way the defendant said  
11 this suggested that he appreciated the gravity of such charges. On the other hand, he was not  
12 laughing or joking, and did not appear to be cavalier.

13  
14 6. Charges were filed, initially two counts of rape of a child. The defendant was assigned  
15 to the Associated Counsel for the Accused and was represented for about a year by Page  
16 Garberding. Ms. Garberding did not testify at the competency hearing. The Court is familiar  
17 with Ms. Garberding, as Ms. Garberding has been a public defender for many years. There  
18 was no testimony regarding Ms. Garberding's work on the case, except that she did not raise  
19 any concerns about competency to the Court or the State.

20  
21 7. In January 2010, Ms. Anna Samuel was assigned to take over Ms. Garberding's  
22 caseload. She has been a public defender for many years, but has very limited felony  
23 experience. The defendant's trial was her second felony trial in King County; approximately  
24 10 years earlier she had tried a few felonies in Pierce County. Ms. Samuel had just come  
25 from two years in Mental Health Court, where she became very familiar with mental illness  
26

1 and frequently utilized competency evaluations from Western State Hospital. She had never  
2 utilized the OPD process to obtain a defense evaluation for any client before this case, but  
3 she had obtained a defense evaluation once before in municipal court.  
4

5 8. At one of their first meetings in court, Ms. Samuel became aware that the defendant did  
6 not appear to understand what a trial is, even though he had been coming to court for a year-  
7 for some portion of that time for Omnibus Hearings in preparation for trial. The defendant  
8 appeared unable to tell her why he was coming to court other than that someone writes his  
9 court dates down on a piece of paper and he comes. Ms. Samuel was shocked. She arranged  
10 to spend an hour that day, and later several two hour meetings in her office, attempting to  
11 explain to the defendant the court process. At all times she used a court-certified interpreter.  
12

13 9. Ms. Samuel also attempted to learn more information from the defendant about his  
14 background and about the events surrounding the allegations in this case. He consistently  
15 repeated what he had told the detective, but gave her little additional information - such as  
16 who else was living in the house when, why the mother or the child might make up a story,  
17 and so on. He also was unable to tell Ms. Samuel his birth date, when he met his wife, or  
18 how he met his wife - for this information he had to call his wife on his cell phone. Let me  
19 be clear about the relevance of this information: in and of itself, the defendant's difficulty  
20 providing Ms. Samuel with the information she was seeking does not make the defendant  
21 incompetent; what is relevant is the extent to which these observations are consistent with  
22 Dr. Judd's evaluation and the evaluations of the WSH experts.  
23

24  
25 10. Throughout her meetings with the defendant, he did not appear to understand that it was  
26 possible that a jury would believe the allegations of Daysi and her daughter. She repeatedly  
27

1 told the defendant that if the jury did believe them, his sentence could be as long as the rest  
2 of his life in prison. He could momentarily repeat the information she taught him back to  
3 her, but did not appear able to recall it at later meetings. Even when he recited that he could  
4 spend "life" in prison, he did not seem distressed. This contrasted, in Ms. Samuel's  
5 experience, with how other clients reacted.  
6

7 11. Within a few days of beginning trial, Ms. Samuel was unaware that cognitive limitations  
8 could be grounds for a finding of incompetence to stand trial under either RCW 10.77 or case  
9 law. However, within a couple of days of trial she attended a CLE where she spoke with a  
10 trainer who told her that, based on what she was reporting about the defendant, she should  
11 arrange for a neuro-psychologist to see him.  
12

13 12. On May 10, 2010, the case was sent out to trial. Ms. Samuel at that point made frantic  
14 arrangements to have a neuropsychologist evaluate the defendant and, fortuitously, was  
15 referred to Dr. Tedd Judd, the foremost expert in Washington on Spanish-speaking  
16 neuropsychological testing and evaluation.  
17

18 13. Sent to my courtroom for trial, the defendant appeared with his 5-year-old son, Alex.  
19 His wife had given birth via C-section the day before, and was in the hospital. I did not want  
20 a young child to hear any of the allegations in this case, so I asked the defendant to tell me  
21 where his child goes to school to see if there was a way to provide for early morning and late  
22 afternoon care for him. The defendant, it became apparent, did not know the name of his  
23 child's school and was foggy about the school district. Ultimately, he had to call his wife in  
24 the hospital and she was able to provide the phone number for the school.  
25  
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27

1 14. This interaction with the defendant immediately made this Court concerned about his  
2 competency. Ms. Samuel did not at that point express any concerns. However, the  
3 prosecutor, Mr. Richey, did. He asked the Court to engage in a colloquy with the defendant  
4 to explore his competency to stand trial.  
5

6 15. As set forth in Exhibit 2, this Court engaged in a colloquy with the defendant. He was  
7 able to answer some questions correctly, but others he could not answer. For example, he  
8 was able to say that Ms. Samuel was his attorney, but he could not say what a trial is and he  
9 could not say what Ms. Samuel had done so far - only that he just kept showing up. On the  
10 other hand, he was able to tell the Court that he had a choice between "declaring" himself  
11 guilty or "come to a trial." He was able to say that Ms. Samuel's job was to "defend" him.  
12 He was able identify Mr. Richey as the person accusing him. He told the court that if he  
13 were found guilty, "she [Ms. Samuel] tells me [I would] spend the rest of my life in jail." He  
14 was not aware of specific numbers of years that could be his minimum sentence and the  
15 Court chose a round number of 15 for purposes of the colloquy. The defendant was able to  
16 calculate that his five-year-old son would be 20 when he was released if he spent 15 years in  
17 prison. He understood that a jury would decide whether he was guilty or not guilty.  
18  
19

20 16. When the Court asked him why he was in court that day, the defendant was not able to  
21 answer. When the Court asked him to define the term "trial," he was unable to do so. He  
22 asked the Court to explain what the term "testify" means, and inquired: "what sort of  
23 witnesses - I mean, if it's a lie." He understood that if the jury believed these witnesses he  
24 would go to prison, and recalled that the Court had mentioned 15 years earlier.  
25  
26

1 17. After the colloquy had gone on a little while, the Court returned to a subject brought up  
2 earlier and asked the defendant: "Can you tell me again what it means when a witness  
3 testifies?" The defendant indicated that he did not know, and that while he remembered that  
4 the Court had explained it, he could not remember what the Court said. The Court explored  
5 whether he understood the significance of adding a count; he was able to respond to the  
6 Court's math question with regards to the significance of adding a charge, but not to the  
7 question of: "Is it a big deal for them to add a third charge, or not?" There was no testimony  
8 about whether Ms. Samuel had ever spoken with the defendant about the possibility of  
9 adding a third count or explained the nuances of what adding a third count would do under  
10 the scoring system of the Sentencing Reform Act.

11  
12  
13 18. The State expressed some concern about whether the defendant really understood what  
14 was happening, but urged that the minimal requirements set forth in the case law had  
15 probably been satisfied. The Court agreed, explicitly finding on the record that the defendant  
16 had met the standards for competency set out in State v. Lawrence.

17  
18 19. Ms. Samuel pointed out that she had had six meetings with the defendant going over the  
19 exact same information as had the Court, and yet after 10-12 hours of coaching the answers  
20 still demonstrated minimal understanding. She indicated that she questioned his ability to  
21 assist in his own defense, but made no formal motions on the subject. Ms. Samuel could not  
22 recall when she had last reviewed the court process information with the defendant prior to  
23 trial.

24  
25 20. In the end, plea negotiations failed. The State offered assault 3rd degree with sexual  
26 motivation and a 15 month sentence (10 months with good time), but rejected a straight

1 assault 3 counter offer proposed by defense counsel. It remains unclear what the defendant's  
2 reasons were for rejecting the State's offer, but it could have had something to do with  
3 immigration consequences (a subject Ms. Samuel had apparently neglected to bring up with  
4 her client). This could have been a reasonable basis upon which to reject a plea offer.  
5

6 21. No request was made by either side to delay trial to enable an evaluation of the  
7 defendant to take place. The Court allowed a recess to enable the defendant to go to  
8 Bellingham to be evaluated by Dr. Judd. This Court did not on its own motion ask for a  
9 competency evaluation.  
10

11 22. As trial proceeded, the Court became increasingly concerned about whether the  
12 defendant understood what was happening. He appeared to the Court to exhibit no reaction  
13 to any of the testimony, even by the child victim. Ms. Samuel reported that after the victim  
14 testified, she asked the defendant whether her testimony was good for him or bad for him.  
15 He eventually answered only: "It's fine." In the Court's experience, such detachment is  
16 extremely unusual. Ms. Samuel also reported that the defendant asked her at the end of each  
17 day whether he needed to return the next, apparently not understanding the process that was  
18 in motion. Neither the Court nor defense counsel raised any of these concerns during the  
19 trial. The defendant never displayed confusion and returned to court each day on his own, on  
20 time and appropriately dressed and groomed.  
21

22  
23 23. The defendant was evaluated in the middle of trial by Dr. Judd. The defendant was  
24 bewildered by having been sent for evaluation, explaining only that "my lawyer sent me."  
25 He was vague about his family background, but acknowledged that his mother appeared to  
26 have psychiatric problems.  
27

1 24. Dr. Judd was by far the most qualified expert to testify in this competency hearing,  
2 especially with respect to cross-cultural communication. He speaks fluent Spanish, has  
3 taught neuro-psychology throughout the Spanish-speaking parts of the world. He is the  
4 author of books and articles on the subject. With respect to evaluating Latinos, he testified  
5 that it is especially important to engage in "personalismo," or small talk, to develop rapport.  
6

7 25. In his report, Exhibit 4, he indicates that with respect to comprehension, the defendant  
8 had "difficulty understanding what was expected of him, and even when he understood he  
9 often had to have it re-explained for each new item in the same pattern... When asked to write  
10 a sentence about the weather in Seattle in winter, it took about six explanations before he was  
11 able to proceed, including explaining what a sentence was."  
12

13 26. Dr. Judd concluded that the defendant was borderline mentally retarded with an I.Q. of  
14 71, based on tests normed on Spaniards. The population to which a test is normed is  
15 important because populations vary as to education and sophistication; had the I.Q. test been  
16 normed on El Salvadorans, Dr. Judd implied that the score could have been higher. He also  
17 found that the defendant had notably poor "story memory" (5th percentile) and "story recall"  
18 (0.4 percentile). "His story memory was furthermore notable not just for failing to recall but  
19 for errors in recall, such as getting names wrong, substituting birthday for a wedding  
20 anniversary, saying the protagonist was buying a cake rather than ingredients for a cake,  
21 indicating that they were coming from rather than going to Acapulco." Dr. Judd labeled this  
22 an auditory comprehension learning disability.  
23  
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1 27. Dr. Judd found that the test results were valid, by performing some tests designed to  
2 identify malingering. Dr. Judd was not able to complete all of the testing he would ideally  
3 like to have done during the May session.  
4

5 28. Dr. Judd found that the defendant was notable for his concrete thinking. By way of  
6 illustration, he suggested that if someone said to the defendant: "what if someone said you  
7 were in Texas...." The defendant would "but I was not in Texas." This is exactly the problem  
8 his attorney identified and that was identified at WSH - the defendant simply could not get  
9 past the notion that if he were not in Texas, then it did not matter if anyone said he was, or  
10 that a jury believed he was.  
11

12 29. While Dr. Judd was careful in his report and his testimony to leave the determination of  
13 the defendant's competency to the Court, he raised very serious doubts about the defendant's  
14 competency. "Mr. Ortiz-Abrego's borderline intelligence, concrete thinking, and auditory  
15 comprehension disability will have a substantial impact on his ability to participate in a trial.  
16 Most notably, he will have great difficulty in tracking, understanding, and remembering the  
17 proceedings. He will do worst with rapid speech, abstract concepts, and unfamiliar material.  
18 He will do somewhat better with slower proceedings, repetition, concrete material, and  
19 familiar events. He will have a great deal of difficulty responding to questions and will need  
20 repetition and simple questioning." See Exhibit 4. Dr. Judd also testified that if the Court  
21 were able to implement certain accommodations, it was possible that the defendant could  
22 track court proceedings, including sentencing. In the absence of these accommodations, the  
23 defendant would not have the capacity to understand the nature of the proceedings and assist  
24 his attorney.  
25  
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27

1 30. Dr. Judd's report explained for Ms. Samuel why her lessons about the court process had  
2 not worked, but the report lacked the "magic words" regarding competency that she was used  
3 to seeing from WSH, and therefore she did not know what to do with the report despite the  
4 concerns it raised regarding the defendant's competency. The report set forth a list of  
5 possible accommodations that could be made to enable the defendant to understand the  
6 proceedings. Ms. Samuel deemed them impractical and, in any case, at least half of the trial  
7 had already occurred. The defense made no motions on the basis of the report. The report  
8 was provided to the Court and the State during trial. Neither the Court nor the State nor  
9 defense counsel raised the issue of the defendant's competency based on the report.  
10

11  
12 31. Ms. Samuel testified that she had no concerns about the defendant's ability to recount  
13 his version of the alleged events; in fact, she testified that she felt confident in his ability to  
14 discuss the allegations because he had been completely consistent in discussing them with  
15 her. However, Ms. Samuel attempted to practice testimony with the defendant, but he could  
16 not understand the need to avoid topics that had been excluded in motions in limine. After  
17 reviewing Dr. Judd's report, Ms. Samuel decided not to call the defendant to testify without  
18 discussing the subject with him.  
19

20 32. Ms. Samuel testified that the defendant asked no questions during the trial and made no  
21 comment about the testimony or any other aspect of the trial. Ms. Samuel attempted to  
22 engage with the defendant during the beginning of the trial, but after receiving Dr. Judd's  
23 report she became too discouraged to continue doing so.  
24

25 33. After the case went to the jury, Ms. Samuel (at the urging of the Court) informed the  
26 defendant that if the "people in the box" (as she described the jury) found him guilty, he  
27

1 would be taken to jail. The next day, Ms. Samuel asked the defendant if he had told his wife  
2 that he would be taken to jail if he were convicted, and learned that he had not done so.  
3 Mindful of the baby at home, Ms. Samuel insisted that he do so. Even with that, he did not  
4 appear to appreciate what could happen - and did not, right up until the officers arrived  
5 following the verdict to take the defendant into custody. At that point, for the first time, he  
6 expressed distress - crying for his children as he was taken from the courtroom. Here, Ms.  
7 Samuel's observations are consistent with the Court's own observations.  
8

9  
10 34. The next day, Ms. Samuel visited the defendant in jail. She ran into his wife and a man  
11 (whom she later learned was an attorney) on her way in; the defendant had not told them he  
12 had been found guilty. When she went to see the defendant, he asked her when he would be  
13 going home. She finally just told him he would be "living" in jail, which made him upset.

14  
15 35. I should note in evaluating Ms. Samuel's testimony that (1) she cares deeply about the  
16 defendant; (2) she appears to fear that her representation of the defendant was lacking; (3)  
17 based on the manner in which she testified, she is not the clearest of communicators; and (4)  
18 she misrepresented the Court's colloquy to a WSH evaluator - perhaps innocently - which  
19 makes the Court examine critically her representations about the defendant's lack of  
20 understanding.  
21

22 36. In a phone call from the jail days after Ms. Samuel met with the defendant, he tells his  
23 wife that he can live with one year in jail, just not 12 years. He appears to have understood  
24 that he had been found guilty, but it is completely unclear where he got the one year figure or  
25 the 12 year figure, as neither apply to him. There are references in this phone call and in  
26 subsequent phone calls to a male attorney, apparently an immigration attorney. In response  
27

1 to a question from his wife about what the jury said, the defendant replied that the jury found  
2 him guilty.  
3

4 37. The defendant appeared to fall apart after going into custody. He sobbed uncontrollably  
5 in court and with Ms. Samuel at the jail. Both parties agreed he should be sent to WSH for a  
6 15-day evaluation.

7 38. When the defendant arrived at WSH in July, 2010, he was able to answer questions  
8 about his life more or less at the same level he was able to answer Dr. Judd's questions. It is  
9 not clear that WSH initially had a copy of Dr. Judd's evaluation, but once the doctors had it  
10 they generally agreed with his assessment that the defendant was borderline mentally  
11 retarded. Due to his emotional distress, he received a diagnosis of adjustment disorder, with  
12 depression and anxiety.  
13

14 39. During the summer of 2010, WSH and Ms. Samuel and, eventually, the Court, engaged  
15 in a pitched battle over whether the evaluation of the defendant could be undertaken without  
16 a court certified interpreter; this became an issue because the interpreter who initially  
17 appeared for the evaluation indicated that she had to add her own explanations for concepts  
18 people did not understand - which would compromise the validity of a competency  
19 evaluation.  
20

21 40. In retrospect, it may not have been in the best interests of the defendant to argue about  
22 the qualifications of the interpreter, as the defendant went from late May to October without  
23 a WSH competency evaluation.  
24

25 41. By the time he was evaluated in October, by Dr. Nelson, a WSH DD specialist, assisted  
26 by a court interpreter, the defendant had begun to exaggerate his disability. At the time, Dr.  
27

1 Nelson attributed the defendant's extremely poor performance to emotional problems that  
2 might be remedied with medication. Looking back, this is the first instance that the  
3 defendant appeared to be malingering in the context of an evaluation. Dr. Nelson had nearly  
4 a decade of experience working with developmentally delayed persons either receiving  
5 services from the Division of Developmental Disabilities or seeking those services. The  
6 Court is impressed by his expertise, but mindful that qualification for DDD services is a very  
7 different inquiry from determining whether a defendant is competent to stand trial. It is not  
8 clear where he got the idea (some of the witnesses suggest the strategy might have been  
9 suggested by another inmate), but the defendant by this point saw some advantage to  
10 exaggerating what he could not understand, even though he had been able to respond to  
11 similar questions by Dr. Judd and in July 2010 at WSH. The fact that the defendant could  
12 understand that some advantage might be gained from exaggeration demonstrates that he  
13 could think strategically, although he obviously failed to appreciate the perils of unsuccessful  
14 malingering. His malingering was transparent and unsophisticated.

18 42. During the evaluation with Dr. Nelson, he was extremely emotional; his appearance on  
19 that date contrasted with what Dr. Judd had reported, leading Dr. Nelson to believe that with  
20 medication, the defendant could be restored to competency. Dr. Nelson at the time of the  
21 evaluation did not suspect malingering or exaggeration, given the defendant's tearful affect.  
22 By the time of the competency hearing, Dr. Nelson had subsequently reviewed the court's  
23 colloquy with the defendant prior to trial, the interview with Detective Knudsen and several  
24 jail phone calls. The information in these exhibits led Dr. Nelson to conclude that the  
25 defendant had been malingering or exaggerating in the October evaluation and that the  
26

1 defendant did have the capacity to understand the nature of the charges and to assist his  
2 attorney. Dr. Nelson changed his opinion; from his testimony and his demeanor on the  
3 witness stand, he clearly felt he had "been had" by the defendant and was angry about having  
4 to admit his mistake.  
5

6 43. Dr. Nelson at the time determined that the defendant was incompetent to stand trial. The  
7 Court sent the defendant back to WSH for 90 day commitment. When the defendant returned  
8 to WSH in November 2010, doctors observed a marked deterioration in what he appeared to  
9 understand and what he told the evaluators about himself as compared to his intake in July.  
10

11 44. The defendant began 90 days of competency restoration classes at WSH, with the  
12 assistance of an interpreter. Although neither the teacher nor the social worker were  
13 provided with Dr. Judd's evaluation, he was placed in classes geared to a basic level of  
14 understanding. The reports from the teacher and the interpreters suggested that the defendant  
15 was not very interested in the classes concerning the court process, except when a  
16 documentary was shown - and then he asked his interpreter a lot of questions. He resisted  
17 taking the quizzes that were offered. The interpreters reported that he had difficulty  
18 understanding legal concepts and did not retain the information. It should be noted that the  
19 defendant was unusual insofar as he had actually lived through a three week trial, a fact that  
20 no one at WSH appears to have factored in to their treatment of or questioning of, the  
21 defendant. It should also be noted that WSH did not tailor any of its questioning of the  
22 defendant or, apparently, its teaching to the fact that the defendant had already lived through  
23 a three week trial and been found guilty by a jury - everything was put in terms of the trial he  
24 would have in the future.  
25  
26

1 45. At the end of the 90 day period, in February, 2011, the defendant was formally evaluated  
2 by Dr. Hendrickson and Dr. Gleyzer in an interview attended by about six people and that  
3 was videotaped. The Court has watched the entire video tape. It is apparent that the  
4 defendant is acting worse than he did either in July 2010 or during his evaluation with Dr.  
5 Judd, but it also must be noted that Dr. Hendrickson's approach to the interview is opposite to  
6 the one Dr. Judd would have recommended. This was a two hour interrogation, with math  
7 questions, verbal questions, and memory tests. It is apparent that the defendant struggled  
8 with the dynamic of being questioned through an interpreter and, during the interview, being  
9 prompted to ask questions of his attorney who was also present. Dr. Hendrickson would ask  
10 the defendant to ask his attorney a question, and he was evidently puzzled: why did neither  
11 the doctor nor the interpreter ask the question if the attorney was right there in the room.  
12

13  
14 46. Dr. Hendrickson initially reported that the team was unable to determine whether the  
15 defendant was competent. The doctor opined that either the defendant was exaggerating or  
16 suffered from some unknown affliction. However, following this report, Dr. Hendrickson  
17 reviewed the Court's colloquy with the defendant, the transcript of the detective's interview  
18 of the defendant, and the jail phone calls between the defendant and his wife. Dr.  
19 Hendrickson found this information to be extremely relevant to a consideration of  
20 competency and concluded that it enabled him to find the defendant competent. Dr.  
21 Hendrickson opined that the defendant had the capacity to understand the charges against  
22 him and to assist his attorney. As long as he had the capacity to understand, it was up to his  
23 attorney to teach him. Any learning disability would simply make the process take longer.  
24  
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27

1 When Dr. Hendrickson considers capacity, he does not consider whether, in fact, someone  
2 understands - since apparent lack of understanding could be attributed to many things.  
3

4 47. Like Dr. Hendrickson, Dr. Gleyzer, the psychiatrist on the WSH evaluation team,  
5 initially was unable to determine whether the defendant was competent, but determined that  
6 the defendant had been exaggerating his limitations and had the capacity to understand the  
7 nature of the charges and to assist his attorney after reviewing the colloquy, the interview,  
8 and the jail phone calls. Dr. Gleyzer was aware of Dr. Judd's analysis that the defendant  
9 suffered from an auditory comprehension problem, but in Dr. Gleyzer's view it did not bear  
10 on whether the defendant has the "capacity" to understand the nature of the charges or assist  
11 his attorney. Dr. Gleyzer did not disagree with this aspect of Dr. Judd's diagnosis.  
12

13 48. All three WSH doctors opined that the defendant had the capacity to understand the  
14 nature of the charges and the ability to assist his attorney. Dr. Judd's approach to the  
15 question differs conceptually from their approach. In Dr. Judd's view, as a practical matter  
16 the defendant is not able to understand what is happening in court without accommodations;  
17 if those accommodations can be made, then Dr. Judd believed the defendant would likely  
18 have the capacity to understand the nature of the charges and would be able to assist his  
19 attorney. If the accommodations were not made, then he would not have such capacity.  
20

21 49. Dr. Hendrickson indicated a respect for Dr. Judd and his work; he said that it would have  
22 been inappropriate for WSH to have attempted neuropsychological testing through an  
23 interpreter, and so they had to rely on his results. However, the Court notes that Dr. Judd's  
24 report, containing suggested accommodations, was never provided to the restoration staff and  
25 it further notes that Dr. Hendrickson did not adopt an interview style that was likely to  
26

1 achieve the same results as Dr. Judd. Dr. Judd recommends engaging in "personalismo" with  
2 Latino subjects - that is, small talk - to develop rapport before launching into an evaluation.  
3 Without that, Latinos may just shut down and the interview may fail.  
4

5 50. The Court notes that even though the defendant was at WSH for 90 days (preceded by  
6 most of the summer), neither Dr. Hendrickson nor, it appears, anyone else, spent any  
7 significant time getting to know the defendant or attempting to make him comfortable  
8 answering questions. In total, Dr. Hendrickson spent about three hours with the defendant in  
9 the 90 days he was at WSH. He did no collateral interviews and did not much care what Ms.  
10 Samuel thought about competency. In the end, he produced rule out diagnoses. He testified  
11 at the competency hearing on the basis of his evaluation, plus a review of the jail phone calls.  
12 The transcripts of those phone calls and the transcript of the Court's colloquy with the  
13 defendant confirmed for Dr. Hendrickson that the defendant was feigning his lack of  
14 understanding.  
15

16  
17 51. With respect to Dr. Hendrickson's testimony, the Court notes the contrast between his  
18 account of what took place after the video tape was turned off, and Ms. Samuel's. She  
19 contends that Dr. Hendrickson referred to the defendant as a "vegetable" and demanded of  
20 her how he could have become so; he denies having used the term. Dr. Hendrickson claimed  
21 that after the evaluation, Ms. Samuel asked him to undertake memory tests of the defendant;  
22 Ms. Samuel testified that it was Dr. Hendrickson's idea, and that he did not want her to  
23 attend. The Court finds Ms. Samuel to be the more credible reporter of these events. These  
24 events bear on the bias Dr. Hendrickson showed toward the defendant at the competency  
25 hearing.  
26

1 52. Several jail phone calls were admitted at trial. The first, as mentioned above, was from  
2 shortly after the verdict--June 1, 2010 (Exhibit 11). Exhibit 13 is a transcript of a phone call  
3 from October 14, 2010, just prior to Dr. Nelson's evaluation; Exhibit 14 is from October 14,  
4 2010 at 3:59 pm, just after the evaluation; Exhibit 15 is from March 19, 2010. After having  
5 articulated some idea of what he was facing in the first call, the defendant does not do so in  
6 the remaining three calls. He refers to himself as "lost," complains frequently that he does  
7 not understand what is going on with his legal situation, and describes himself as doing badly  
8 in subsequent calls. He uses almost no proper nouns – usually referring to his children by  
9 their gender and age, not their names. During neither of the phone calls before or after his  
10 interview with Dr. Nelson does he discuss the evaluation at all, which raises questions about  
11 whether he grasped its importance. Neither does the failure to mention the evaluation  
12 support (or necessarily contradict) the notion that the defendant was engaged in a scheme to  
13 exaggerate his lack of understanding. There is some evidence in these calls that the  
14 defendant appreciated, to some degree, that there are good attorneys and not so good  
15 attorneys, the defendant repeats over and over again that he does not understand anything,  
16 that he feels ill or bad, and that he is being screwed. While there are certainly moments in  
17 these calls when the defendant engages in some relatively sophisticated thinking, these are  
18 brief and outweighed by the balance of the conversations that reflect the type of speech and  
19 thinking described by Dr. Judd. Dr. Judd did not testify that the defendant was unable to  
20 engage in a conversation about subject he understands, such as his family; the fact that the  
21 defendant was able to converse with his wife about domestic matters is not inconsistent with  
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1 Dr. Judd's assessment of the defendant's ability to understand the court process and assist his  
2 attorney.  
3

4 53. Dr. Judd reviewed transcripts of some of these phone calls and concluded that, to the  
5 extent he could follow them at all, they reflected accurately the person he met in May 2010.  
6 Dr. Judd acknowledged that there were glimpses of abstract thinking in the calls, and agreed  
7 that it was important to consider the transcripts in determining whether the defendant is  
8 competent to stand trial. Nonetheless, it appeared that Dr. Judd did not find the transcripts he  
9 read to bear significantly on the issue.  
10

11 54. In April of 2011, Dr. Judd went to the jail to attempt to do additional neuropsychological  
12 testing of the defendant and to repeat some of his earlier tests. Dr. Judd testified that the  
13 defendant's presentation in his April meeting was similar to that in the video of the WSH  
14 evaluation. The defendant performed much more poorly than he had a year earlier, so Dr.  
15 Judd performed a test to detect malingering and found that the defendant was, in fact,  
16 exaggerating his inability to answer questions and participate in the testing. Dr. Judd  
17 described this as unsophisticated malingering, endorsing the Court's comparison of the  
18 defendant's approach to a child exaggerating a sore throat to get ice cream. Of all of the  
19 experts who testified, the Court found Dr. Judd to be the most credible, in light of his  
20 willingness to answer questions in a manner that would not necessarily assist the defendant.  
21 For example, he acknowledged that with careful explanation, the defendant would likely be  
22 able to decide between a guilty plea and a trial, or whether or not to testify. If the  
23 accommodations he recommended could be followed, then he believed the defendant would  
24 be competent to be sentenced.  
25  
26  
27

1 55. I find that it is possible to evaluate the defendant's competency as it stood in May of  
2 2010 based on Dr. Judd's evaluation, the detective's interview, the observations of his  
3 attorney, the jail phone calls, and the Court's colloquy with the defendant and that this is the  
4 appropriate baseline. I recognize that the defendant has been exaggerating his lack of  
5 understanding since at least the fall of 2010, but I am not persuaded that this exaggeration is  
6 sufficiently sophisticated to undermine the results of Dr. Judd's evaluation or the  
7 observations of Ms. Samuel and the Court. While it is true that WSH evaluators did not  
8 conclude he was exaggerating initially, they also did not conduct the relatively simple tests  
9 for malingering that Dr. Judd utilized or read the defendant's interview with the police, that  
10 was available to them. Dr. Hendrickson did not to take a position on competency until  
11 shortly before the hearing. It is apparent to me that the defendant did not understand his trial  
12 as it was happening and simply did not appreciate what was going on in the courtroom. It is  
13 one thing for someone not to understand a "theoretical" trial, and quite another not to  
14 understand an actual trial.  
15  
16  
17

#### 18 CONCLUSIONS OF LAW

- 19 1. I find by the preponderance of the evidence that at the time of trial, the defendant  
20 understood the charges made against him. I have significant doubts about the defendant's  
21 ability to appreciate his peril, but I cannot make the finding that he lacks this ability  
22 because it is possible that a more skilled attorney utilizing the type of accommodations  
23 suggested by Dr. Judd could have helped the defendant understand this.  
24  
25 2. However, because none of the accommodations Dr. Judd suggested were made, I find by  
26 a preponderance of the evidence that the defendant was unable to understand the trial  
27

1 process, the testimony of witnesses, and argument as a result of the combination of his  
2 borderline intellectual functioning and his auditory processing disability. Therefore, I  
3 find that he lacked the capacity to assist his attorney in the absence of the  
4 accommodations outlined by Dr. Judd, as set forth in Exhibit 4.  
5

6 3. I find by a preponderance of the evidence that the defendant was not competent to stand  
7 the trial we gave him, because he was not capable of properly understanding the nature of  
8 the trial proceeding or rationally assisting his legal counsel in the defense of his cause.  
9

10 4. I find that the defendant is not competent to be sentenced because even if the Court were  
11 to adopt the accommodations recommended by Dr. Judd, he did not understand the  
12 proceeding that lead to his conviction.

13 ORDER

14 The motion for a new trial is granted.

15  
16  
17  
18 Entered in open court this 3<sup>rd</sup> day of October, 2011.

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21 HON. SUSAN CRAIGHEAD  
22 King County Superior Court  
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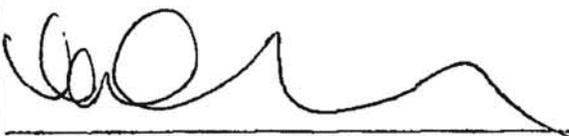
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Prepared and Presented by:



JAMES H. KOENIG, WSBA #19956  
Attorney for defendant

Approved as to form/*objections made by filing & open court*



VALIANT RICHEY, WSBA #37209  
Deputy Prosecuting Attorney

## **APPENDIX D**

Verbatim Report of Proceedings, May  
10, 2010.

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	HON. SUSAN J. CRAIGHEAD
	)	
vs.	)	NO. 08-1-12172-7 SEA
	)	COA NO. 67894-9-I
	)	
ALEXANDER ORTIZ-ABREGO,	)	
	)	<u>5-10-10</u>
	)	
Defendant.	)	

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VERBATIM REPORT OF PROCEEDINGS

Proceedings had in the above-entitled cause before the Honorable Susan J. Craighead, Superior Court Judge, King County Courthouse, Dept. 18, reported by Kevin Moll, Certified Court Reporter.

APPEARANCES:

FOR THE PLAINTIFF: VALIANT RICHEY  
 KC Deputy Prosecuting Attorney

FOR THE DEFENDANT: ANNA SAMUEL  
 Attorney at Law

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(5-10-10)

THE COURT: Thank you. Please be seated.

MR. RICHEY: Good morning, Your Honor. This is State of Washington vs. Alexander Ortiz Abrego, 08-1-12172-7 Seattle designation. Val Richey on behalf of the State. Defendant is present, out of custody, along with his attorney, Anna Samuel.

There are also two interpreters present, and I would ask that they introduce themselves for the record, please.

INTERPRETER: For the record, Your Honor, Amy Andrews, Washington State court certified Spanish interpreter.

INTERPRETER: Good morning, Your Honor. Sheila Harrington, certified court interpreter for Spanish.

THE COURT: Let me swear you both in.

(Interpreters sworn)

THE COURT: Thank you.

MR. RICHEY: Your Honor, we've been assigned to this court for trial. We had requested a few extra moments this morning for defense counsel to speak to her client about what's going on in his life right now, and rather than summarizing what I've been told, perhaps it's just best if she presents that information. Thank you.

THE COURT: Ms. Samuel.

MS. SAMUEL: For the record, Anna Samuel. I found out

1 late last night that Mr. Ortiz-Abrego's wife was in the  
2 hospital to have a baby. We've known all along that she  
3 was very pregnant, but we didn't know exactly when the  
4 baby was due. So we clarified with the help of the  
5 interpreter this morning that she was taken to the  
6 hospital last Wednesday.

7 Apparently her amniotic fluid was low and the baby was  
8 high, and they kept her. And yesterday, that's Sunday,  
9 at 2:00 in the afternoon, they had a baby girl. She's  
10 still being kept in the hospital, at least until  
11 Wednesday, because of the -- she had a Cesarian section,  
12 and she's going to be staying in the hospital at least  
13 till Wednesday.

14 Mr. Ortiz-Abrego has come to court multiple times, and  
15 for the first time he's brought his five-year-old son  
16 out, and the reason is that they had no one to look after  
17 the little boy, and the school only starts at 9:00 only.

18 At this point he is the sole caretaker for the child,  
19 until his wife is able to get on her feet and be able to  
20 start looking after little Alex, also.

21 He says that perhaps once she's settled down a bit he  
22 can -- I tried to talk to him about logistics of how he  
23 can come to court and be here. He seemed to not quite  
24 understand that trial's more than a day, and I explained  
25 that to him. So he says what he can do is he can drop

1 his child at 9:00 in the morning and get to court, but  
2 his -- the school lets out at 2:45. There is a person  
3 who has babysat in the past and he can ask them and they  
4 charge about \$10 a day, which is extremely difficult at  
5 this time, but they can try and make that work.

6 THE COURT: Is this the only child, or are we talking  
7 about another child who's school age?

8 MS. SAMUEL: No, only this little Alex, who's in  
9 court, and then the new baby.

10 THE COURT: Little Alex, is he in preschool or is he  
11 in kindergarten?

12 MS. SAMUEL: Kindergarten.

13 THE COURT: What school is he at?

14 MS. SAMUEL: Which school? Let's do it in Spanish,  
15 okay, and then the interpreter will tell me.

16 THE DEFENDANT: Southcenter School.

17 THE COURT: Is this -- is this at Southcenter, where  
18 the mall is, or --

19 THE DEFENDANT: No, it's White Center.

20 THE COURT: White Center. And -- okay. And what is  
21 the name of the school?

22 THE DEFENDANT: It's something like White Center  
23 School, but I'm not sure.

24 THE COURT: Okay. And your son is in kindergarten?

25 THE DEFENDANT: Yes.

1 THE COURT: Do you have a phone number for the school?

2 THE DEFENDANT: No. My wife is the one who has it.

3 MS. SAMUEL: Your Honor, he can call his wife, because  
4 he did call her today, while she was in the hospital, and  
5 she knows all the detail of their life. He doesn't.

6 THE COURT: Here's what I'd like to do. I'd like to  
7 find out how to contact the school and see if we can make  
8 arrangements for before and after school care. It's  
9 really not appropriate for him to be listening to the  
10 subject matter of this child, but it sounds like it may  
11 be more effective if perhaps my bailiff talks to the  
12 school. So if we could get a phone number for the school  
13 or at least a name of the school, that would be progress.  
14 So why don't we go off the record for a moment, and you  
15 can go ahead and make that phone call.

16 (Pause)

17 THE COURT: I printed out a list of all the elementary  
18 schools in Highline/White Center, and I'm wondering if  
19 the defendant can take a look at this list, if any of  
20 them seemed right. I also printed up school profiles for  
21 White Center Heights Elementary since that sounds most  
22 likely like what he was describing, with a picture of the  
23 principal, so maybe that will work.

24 MS. SAMUEL: Your Honor, Mr. Ortiz-Abrego seems to  
25 recognize the White Center Heights Elementary.

1 THE COURT: And I printed out something from White  
2 Center Heights Elementary, thinking that that might be  
3 the one. There's a picture of the principal there, too.

4 MS. SAMUEL: Your Honor, Mr. Ortiz-Abrego got a call  
5 from his wife, and he says the phone number is two  
6 206-433-2437.

7 THE COURT: Okay.

8 MS. SAMUEL: He says the teacher's name is Ms. Topper.

9 THE COURT: Okay.

10 MS. SAMUEL: He seems to think it's White  
11 Center/Highline.

12 THE COURT: Okay. There doesn't appear to be a White  
13 Center/Highline Elementary, but we'll go from there.

14 What is his son's name?

15 MS. SAMUEL: Alex. What's his full name?

16 THE DEFENDANT: Alexander Ortiz-Cortez.

17 THE COURT: Okay. So Barb, your mission is to get  
18 ahold of the school, do whatever you have to do to get to  
19 a live person, and explain the situation and that it's  
20 not appropriate for him to be here, and that we need to  
21 see what we can do about before and after school care,  
22 that we're not -- I don't think the defendant can afford  
23 to pay for it, but under the circumstances we really need  
24 their help, and see what they can do.

25 So I'm going to have my bailiff work on trying to

1 figure out what we can do with your son during the trial.  
2 I'm pretty confident we can come up with something, just  
3 be persuasive. For the moment the child is asleep, so I  
4 think we can proceed.

5 MS. SAMUEL: Okay.

6 THE COURT: We have a variety of issues, and there  
7 also appears to be a request from the State to amend.

8 MR. RICHEY: That's correct, Your Honor. The State is  
9 moving to amend to add one count of rape of a child in  
10 the first degree. I had held off amending despite  
11 telling defense a long time ago that we were going to be  
12 doing this, because I was hoping that counsel could talk  
13 with her client a little bit more about what it means to  
14 have three counts of rape of a child in the first degree.

15 Some of what the court has experienced over the last  
16 few minutes is indicative of what the parties have  
17 experienced over the last year. I took over the case  
18 from a previous prosecutor in the summer, and there have  
19 been many times when it has been -- it has appeared to,  
20 both, myself and I think defense counsel that the  
21 defendant is not total totally up to speed on everything  
22 that's happening, and I -- it is my practice, when  
23 prosecuting somebody with impacts that are this  
24 significant to make sure they understand what's happening  
25 before we go forward, so that they can make an informed

1 decision and we don't have something down the road where  
2 they're suddenly realizing what has happened.

3 I know Ms. Samuel has had these conversations with the  
4 defendant several times; however, she's also expressed to  
5 me concern that despite the length of those conversations  
6 and their number, she still has concerns about whether or  
7 not he's understanding.

8 So I wanted to make sure this morning, before we move  
9 to amend the information, that the defendant knows  
10 exactly what's happening.

11 He -- the parties had discussed the idea of  
12 negotiating, and counsel had come to me with a proposal  
13 that was nowhere near what we would even consider in this  
14 case, yet I think that that was based on the defendant's  
15 understanding of what was happening, and I think his  
16 belief that the trial would last a day is sort of  
17 consistent with that.

18 So my request is to have counsel put on the record  
19 some indication of the conversation, not the content, but  
20 at least that the information has been relayed to her  
21 client regarding the standard ranges for these offenses  
22 and what it means -- the consequences that flow from  
23 three counts of this charge, including minimum terms and  
24 the indeterminate sentence, because it's a bundle of  
25 time. He has a family, and it will probably finish his

1 life up. I mean, it's significant. So I want to make  
2 sure that that conversation has been had before we go  
3 forward.

4 THE COURT: And if somebody just could keep an eye on  
5 little Alex. I really don't want him to have to hear  
6 this, so if he starts to wake up, please let me know.

7 Ms. Samuel.

8 MS. SAMUEL: Your Honor, I inherited this case just a  
9 few months ago, and I've talked to Mr. Ortiz-Abrego  
10 several times, because he's -- we kept setting omnibus  
11 over, and, again, Mr. Richey is right, several times I've  
12 raised the issue of finding that he doesn't seem to  
13 understand even the basic information of the case. Even  
14 -- I know he's had -- the case had gone on for about the  
15 year before, and even down to the issue of why haven't  
16 you been coming to court, and his understanding is  
17 someone gives me a green piece of paper and says you need  
18 to come, and that's why I keep coming.

19 He didn't seem to -- and I checked with the previous  
20 attorney, who's extremely thorough, and she's explained  
21 things to him. On and off I've raised my concern about  
22 competency, and then I also had my social worker  
23 separately interview him for about two hours to determine  
24 what she -- what her consideration was.

25 She seems to indicate a serious problem with

1 comprehension, and she thought that was the primary  
2 issue. So at that time I didn't raise -- I didn't look  
3 for an expert, and so at this point on most other fronts  
4 I'm ready for trial. But last week I asked another

5 social worker who was on the case, I said, you know --  
6 because I just realized, I was talking to other attorneys  
7 and I was told that, you know, social worker doesn't  
8 really make the decision that you have a  
9 neuropsychological problem, it's only an expert who  
10 really knows that. Social worker can direct you to one,  
11 but the ultimate decision as to whether there's a  
12 neuropsychological problem should not be made by them.

13 So I asked my social worker can you just expedite it  
14 and try to find him a neuropsychologist as soon as  
15 possible, because I know we're working with one on  
16 another case. If we could just do an evaluation this  
17 week. I didn't want to delay the case because of the  
18 other motions. Perhaps we could start on those motions,  
19 I'm not sure. So she is working on that even today, and  
20 Mr. Richey has repeatedly said, can you -- are you sure  
21 he understands what the issues are and those options?

22 I tried explaining that to him. I don't think he  
23 really understands it. I have gone over it though. I  
24 don't think he really understands it. I've gone over it  
25 with him. I've told him that this case carries about

1 15 years in prison, and then they can keep him for the  
2 rest of your life, because he has always absolutely  
3 denied these charges, so they may say that you're not  
4 cured and they may just decide to keep you because you're  
5 denying. And he keeps repeating, no, I didn't do it, so  
6 how can I plead to anything?

7 So I think he doesn't quite -- I mean, I can't go  
8 beyond that with him. I think I'll know more after we  
9 have this evaluation.

10 THE COURT: Ms. Samuel, do you know what's involved in  
11 a neuropsych evaluation?

12 MS. SAMUEL: Pardon?

13 THE COURT: Do you know yourself what's involved with  
14 a neuropsych evaluation?

15 MS. SAMUEL: Not all the details.

16 THE COURT: It takes a long time to be done properly.  
17 It takes a long time. Now, it may not be necessary to do  
18 a full battery of neuropsychological tests to determine  
19 competency, but your average neuropsychologist wouldn't  
20 know how to -- wouldn't know what it takes to be  
21 competent in a criminal case. It's a very specialized  
22 thing, to be able to put together the neuropsych  
23 expertise with the forensic knowledge that you really  
24 have to have to be able to do that kind of evaluation.

25 Unfortunately, I've had a tremendous number of brain

1 injury cases, so I have met an awful lot of  
2 neuropsychologists and have heard a lot about it after  
3 two years on civil, and my own son has gone through some  
4 of these tests, so I have a real grasp of what is  
5 involved.

6 MS. SAMUEL: Okay.

7 THE COURT: But I am very concerned about the  
8 defendant's level of understanding. I mean, if we had  
9 this much trouble figuring out what school his kid goes  
10 to, this is really challenging.

11 Do you have any news for us, Barb?

12 THE BAILIFF: I spoke to, I'm assuming, a receptionist  
13 at the school, and she forwarded me on to the counselor.  
14 She did say, however, they have no childcare at the  
15 school, but she passed me on to the counselor. I had to  
16 leave a message, which I did, and I told her it was  
17 fairly urgent, so hopefully she'll call me back, and she  
18 might have some suggestions for us. I don't know.

19 THE COURT: I have to say I'm pretty concerned about  
20 the defendant's competency, and I don't want to invade  
21 the province of attorney/client privilege here.

22 MS. SAMUEL: That's fine, Your Honor. Anything helps.

23 THE COURT: I'm thinking that perhaps the court should  
24 have a little colloquy with the defendant.

25 Is that acceptable to the parties?

1 MS. SAMUEL: It is, Your Honor, and -- that's fine,  
2 Your Honor, and if the court -- if it just helps the  
3 court, if I can just give you a little bit of background  
4 information, that Mr. Ortiz-Abrego is brought up in -- he  
5 was born in El Salvador, he grew up there till he came to  
6 the U.S.

7 I think they were getting permits to come to the U.S.,  
8 and he just -- from his information and from that of Mrs.  
9 Rodriguez, who's the complaining witness's mother, it  
10 appears that Mr. Ortiz-Abrego's mother might have had  
11 some mental illness, and she one day just disappeared  
12 into the streets.

13 He also -- I did inquire at length about any injuries  
14 he might have had, and he says that some friend  
15 accidentally hit him on the head with a big stone and he  
16 was taken to the hospital. It was bleeding. He doesn't  
17 know -- no one told him anything after that.

18 He also says that -- because even something as small  
19 as asking, "When did your wife go into the hospital," he  
20 didn't know that it was a Wednesday, or how many days  
21 exactly it was, and he had to call her to ask, and I  
22 asked him why is it that you don't know, whether it's two  
23 days or three days that she's been in the hospital, since  
24 it's so recent.

25 So his answers are very literal. He says, well, you

1 told me be specific and correct when you answer any  
2 question, so he was trying to be accurate, he says.

3 He doesn't -- I was at mental health court for a  
4 while, so basic psychological evaluation I'm familiar  
5 with, so I did just now again try, and I've done this  
6 before, asked him when I was talking, asked him to  
7 remember three little words, and I'll ask you about that  
8 a few minutes later, and then after a very brief,  
9 five-minute conversation, I asked him if he could he  
10 could remember one, and I asked him why couldn't you  
11 remember the rest, and he said because you were talking  
12 after you told me.

13 I know he tries very hard, and what I found in the  
14 beginning is he agrees to everything, he acknowledges  
15 everything, he says yes, but when you ask him the  
16 questions back, he doesn't understand.

17 I think at least six or seven omnibus hearings my  
18 conversations with him are just what is a jury trial,  
19 tried to explain that to him. But again, I stopped  
20 because I've been through the whole interview with my  
21 social worker, you know, who's one of our litigation  
22 specialists, and I assume she's got greater expertise on  
23 these matters, and I've done my part but I don't think he  
24 really understands. But I don't know whether he's not  
25 competent, like in a normal competency kind of analysis.

1 THE COURT: All right. Leanne, could you do me a  
2 favor, because Barb's on the phone? Could you get the  
3 sentencing guidelines book off the top there, it's on top  
4 of the boxes, in front of the bookcase.

5 Mr. Ortiz-Abrego, you need to wear your -- I just want  
6 to make sure that you understand me, so be sure and  
7 listen to the interpreter.

8 Can you tell me, why are you here today?

9 THE DEFENDANT: Well, because it is said that I raped  
10 somebody.

11 THE COURT: And what are we supposed to begin today?

12 THE DEFENDANT: I don't know.

13 THE COURT: Okay, so what are we doing in court today?

14 THE DEFENDANT: Well, what happens is I've never been  
15 in something like this, so I don't know about this.

16 THE COURT: This is something you and your attorneys  
17 have talked about?

18 THE DEFENDANT: Yes, yes, but I have no idea how it  
19 was -- well, she had explained it to me, but I thought it  
20 was going to be different.

21 THE COURT: Well, you're here for a trial.

22 Have you heard that word before? Have you heard that  
23 word before?

24 THE DEFENDANT: Yes, but what happens is that I don't  
25 know how these -- this is, these things are.

1 THE COURT: So if I ask you what a trial is, can you  
2 tell me?

3 THE DEFENDANT: No, because I'm not sure what it is.

4 THE COURT: Well, now, Ms. Samuel, who's been sitting  
5 next to you, what's her job?

6 THE DEFENDANT: Well, she says she is my attorney.

7 THE COURT: Okay. What does your attorney do for you?

8 THE DEFENDANT: Well, she says that she's going to  
9 defend me.

10 THE COURT: Well, what sort of things would she do to  
11 defend you?

12 THE DEFENDANT: I don't know.

13 THE COURT: Okay. What has she done so far?

14 THE DEFENDANT: Well, you know, I keep up -- showing  
15 up. I don't know.

16 THE COURT: That's good. That's good. Has she been  
17 talking to you about your case?

18 THE DEFENDANT: Yes.

19 THE COURT: And has she told you that you had any  
20 choices to make?

21 THE DEFENDANT: Yes.

22 THE COURT: I don't want to know too much about it,  
23 but can you tell me a little bit about what you think the  
24 choices are that you have to make?

25 THE DEFENDANT: Well, that I should declare myself

1 guilty or come to a trial.

2 THE COURT: All right. Now, this man over here, Mr.  
3 Richey, what's his job?

4 THE DEFENDANT: I don't know, but I could see that  
5 he's accusing me.

6 THE COURT: That's right. He's what we call a  
7 prosecutor. A prosecutor is a lawyer, just like your  
8 lawyer, except his job is to represent the State of  
9 Washington.

10 Now, Mr. Richey has told me that he would like to  
11 increase the charges against you because you're going to  
12 trial. This is a really important decision to make, that  
13 your lawyer told you about, between pleading guilty and  
14 going to trial.

15 I want to understand what you think would happen to  
16 you if you were found guilty in a trial.

17 THE DEFENDANT: I don't know.

18 THE COURT: Well, what are some ideas? What are some  
19 things that could happen to you? What do you think?

20 THE DEFENDANT: Well, she says that to spent the rest  
21 of my life in jail.

22 THE COURT: That's one thing that could happen. Am I  
23 right, Counsel, that his score would be a six if he were  
24 convicted?

25 MR. RICHEY: That's correct.

1 THE COURT: Do you know how much time you have, at  
2 minimum, in prison if you went -- if you were found  
3 guilty?

4 THE DEFENDANT: No.

5 THE COURT: Would it be fair to say about 15 years,  
6 Mr. Richey?

7 MR. RICHEY: I actually haven't looked at the range.  
8 It's a level 12, and he'd be a six.

9 THE COURT: I think it's 162 to 216. I'm going to  
10 just use round numbers, because there's a big range here.  
11 But let's say it's 15 years.

12 How old would little Alex be in 15 years?

13 THE DEFENDANT: 20 years.

14 THE COURT: 20. So if you were found guilty at a  
15 trial, you would be in prison at least until he turns 20.

16 THE DEFENDANT: But I haven't done anything.

17 THE COURT: Okay. I'm not going to talk to you about  
18 what really happened or didn't happen. I just want to  
19 make sure that you understand what's going on here.

20 We're getting ready to have a trial in this courtroom.  
21 Who is going to decide if you're guilty or not guilty?

22 THE DEFENDANT: Well, she says the jury.

23 THE COURT: Okay, and the jury would sit over there  
24 and there would be 12 of them. Mr. Richey's job is going  
25 to be to prove that you committed this crime, and he

1 would probably call witnesses. When he calls witnesses,  
2 what would your lawyer do? What would her job be?

3 THE DEFENDANT: Defend me.

4 THE COURT: Right, but what would she do?

5 THE DEFENDANT: Well, I don't know.

6 THE COURT: When a witness comes into court, what does  
7 a witness do?

8 THE DEFENDANT: I don't know.

9 THE COURT: You look very sad.

10 THE DEFENDANT: I haven't done anything.

11 THE COURT: You know, I'm not here to decide that  
12 right now. I'm here to make sure that you understand  
13 what's going on and what your choices are. I have a very  
14 open mind. I'm going to take a break for a moment and  
15 see if we can find something to do with little Alex,  
16 because there's a lot that I don't want him to hear, and  
17 it sounds like you don't really want him to hear it  
18 either.

19 Is that okay with you?

20 THE DEFENDANT: Yes.

21 THE COURT: Let's go off the record, Kevin.

22 (Off-record discussion)

23 MS. SAMUEL: What I'd like to do is intro -- Your  
24 Honor, I was thinking if your madam bailiff doesn't mind,  
25 the little boy hasn't eaten breakfast, because they had

1 to leave very early.

2 THE COURT: We'll make that happen.

3 MS. SAMUEL: I could give him some money.

4 THE COURT: Let me get Barb out here. She loves it  
5 when I put her to work this way. What we were talking  
6 about is what would happen at a trial, and what I would  
7 expect is that there would be -- the State would call  
8 some witnesses who would say that you did commit this  
9 crime. Let's say that happened.

10 What would Ms. Samuel's job be?

11 THE DEFENDANT: I don't know.

12 THE COURT: Well, I'm going to tell you that maybe one  
13 thing she might try to do is ask them some questions that  
14 might make the jury think maybe they shouldn't believe  
15 those witnesses. But Mr. Richey would probably ask some  
16 questions that would make the jury think they should  
17 believe the witnesses.

18 When Mr. Richey is finished asking his witnesses  
19 questions, you would have the opportunity to testify if  
20 you wanted to. No one could make you testify, but you  
21 could choose to do that if you wanted to.

22 THE DEFENDANT: What does it mean, to testify? What's  
23 that mean?

24 THE COURT: Okay, that's a good question. When a  
25 witness comes in to tell what happened, they promise to

1 tell the truth. I swear them in and they promise to tell  
2 the truth, and then they sit in that chair and tell the  
3 jury what they say happened.

4 THE DEFENDANT: And what sort of witnesses -- I mean,  
5 if it's a lie?

6 THE COURT: Well, they may not believe it's a lie. I  
7 don't know. But the jury would have to decide who's  
8 telling the truth. And let's suppose the jury believes  
9 the people who come and testify and say you committed the  
10 crime.

11 What would happen then?

12 THE DEFENDANT: I would go to prison.

13 THE COURT: For how long?

14 THE DEFENDANT: 15 years, it was said.

15 THE COURT: At least 15 years. It could be for the  
16 rest of your life. I don't make that decision. I can  
17 say how long is the low end of your prison stay, but  
18 other people decide how long it could be. Okay?

19 THE DEFENDANT: Yes.

20 THE COURT: So when Ms. Samuel has talked to you about  
21 the choices that you face, I'd like you to tell me what  
22 you think those choices are.

23 THE DEFENDANT: Well, that I should declare myself  
24 guilty or go to trial.

25 THE COURT: What might be a good reason to declare

1           yourself guilty even if you don't believe you're guilty?

2           THE DEFENDANT: I don't know.

3           THE COURT: Well, how much time in prison would you  
4           have to spend if you decided to declare yourself guilty  
5           instead of have a trial?

6           THE DEFENDANT: I don't know.

7           THE COURT: Has your attorney talked to you about a  
8           way of pleading guilty and not necessarily going to  
9           prison for more than six months?

10          THE DEFENDANT: Two years, she said. Oh, I don't  
11          know.

12          THE COURT: All right, let me ask you this: Has she  
13          talked to you about something called a SOSA?

14          THE DEFENDANT: I don't know what that is.

15          THE COURT: Has she talked to you about getting  
16          treatment instead of going to prison?

17          THE DEFENDANT: Yes.

18          THE COURT: Now, I don't know if that's really an  
19          option for you, but do you see that as a choice between  
20          -- that might avoid going to trial and going to prison?

21          THE DEFENDANT: She told me that I'm crazy, and I'm  
22          not crazy.

23          THE COURT: Well, she didn't mean that you're really  
24          crazy. She may have felt that you weren't making a good  
25          decision. I have no idea what the right choice is. I

1 just want to make sure you understand what your choices  
2 are, and I particularly want to make sure that you're  
3 able to assist Ms. Samuel in putting on a case.

4 The allegations in this case are from a long time ago,  
5 between 1999 and, let's see, what's the --

6 MS. SAMUEL: 2002.

7 THE COURT: Back in 2002, and I want to know if you  
8 can remember back then.

9 THE DEFENDANT: Yes.

10 THE COURT: So you remember living with this family  
11 back then?

12 THE DEFENDANT: Yes. Yes.

13 THE COURT: Do you understand that you would have to  
14 work with Ms. Samuel during the trial to make sure she  
15 knows everything you know about that time period?

16 THE DEFENDANT: Yeah.

17 THE COURT: Can you tell me again what it means when a  
18 witness testifies?

19 THE DEFENDANT: Well, no. No, I don't know.

20 THE COURT: I told you that a few minutes ago.

21 Do you remember what I said?

22 THE DEFENDANT: Yes.

23 THE COURT: What did I say?

24 THE DEFENDANT: Well, now I don't remember, I'm not  
25 sure, but yes, yes.

1 THE COURT: So you remember me telling you, but you  
2 don't remember what I said?

3 THE DEFENDANT: Yes, I don't remember.

4 THE COURT: Can you tell me how many counts of rape of  
5 a child you're currently facing?

6 THE DEFENDANT: Three.

7 THE COURT: Currently I believe it's two.

8 Is that right?

9 MR. RICHEY: Yes.

10 THE COURT: All right, and the State wants to add a  
11 third charge.

12 What difference does it make when they add a third  
13 charge?

14 THE DEFENDANT: I don't know.

15 THE COURT: Does it have -- if you're convicted of all  
16 three charges, is that more time in prison than if it's  
17 only two charges?

18 THE DEFENDANT: Yes.

19 THE COURT: How much less?

20 THE DEFENDANT: No, no -- I don't know. 15 years,  
21 they say.

22 THE COURT: Well, 15 years if you're convicted of  
23 three, maybe ten years if you're convicted of two.

24 Do you see the difference now?

25 THE DEFENDANT: Yes.

1 THE COURT: Tell me back what the difference is.

2 THE DEFENDANT: Five years.

3 THE COURT: So is it a big deal for them to add a  
4 third charge, or not?

5 THE DEFENDANT: I don't know. No.

6 THE COURT: Are you guessing?

7 THE DEFENDANT: No. The thing is I'm tense. I don't  
8 know.

9 THE COURT: It's hard to answer questions in a  
10 courtroom, from a lady in a black robe up here, right?

11 THE DEFENDANT: Yes.

12 THE COURT: I understand. But I'm really trying to  
13 make sure you understand what your choices are. I guess  
14 I really want to understand from you why does it make  
15 sense to you to have a trial in your case instead of  
16 pleading guilty and looking at less time in prison, or  
17 even just treatment?

18 THE DEFENDANT: Well, I'm going to treatment. What I  
19 want to do is to be left alone or wherever. But I don't  
20 want to be a prisoner, because I haven't done anything.

21 THE COURT: Okay. All right, Counsel, what do you  
22 think the record at this point -- I want to hear from  
23 both of you -- shows as to competency?

24 MR. RICHEY: Your Honor, I think that the defendant  
25 has showed a very basic level of information about what a

1 trial entails. I can't say that that information that he  
2 has relayed shows that he understands, and it does appear  
3 from his manner of answering that there is some ambiguity  
4 about whether or not he is parroting information, or he  
5 is relaying it because he knows it.

6 That being said, under the case law the burden is his  
7 to show that he's not competent, and that's where I get  
8 concerned about whether or not -- where we are in that  
9 spectrum.

10 My personal interest in this is that I think, based on  
11 the evidence that I am aware of in this case, based on  
12 the witnesses, this case is a good case to negotiate, and  
13 I think that that is even more so the case given what  
14 we've heard here today, and I've encouraged counsel, and  
15 I know that she's talked with her client about that, but  
16 we haven't made too many steps of progress.

17 I don't know if the defendant knows that he can plead  
18 guilty without necessarily admitting what he has done or  
19 what he is accused of, but I don't think I'm in a  
20 position to say that he's demonstrated that he's  
21 incompetent.

22 I wish that we had an evaluation to really seal the  
23 deal on that, because it gets a little dicey when we go  
24 forward when there's concern. But I think that the  
25 transcript will reflect that he's giving information that

1 is accurate, generally. And if that's the case, then  
2 that's enough, under the very low threshold, I think.

3 He says he can remember that period of time. He says  
4 that he understands that it will be a jury that makes  
5 this decision, and that he is facing prison time.

6 So I guess my position is that it's not particularly  
7 crystal clear what's going on inside his head, but he  
8 has, for purposes of the law, demonstrated a sufficient  
9 understanding of what's happening, and I want to  
10 encourage counsel to -- you know, she may have a  
11 different position, but I want to encourage her to have  
12 another chat with him about whether or not he will  
13 consider some reasonable middle ground here, as far as a  
14 resolution that will potentially require substantially  
15 less time, treatment is probably not going to be an  
16 option if he can't -- if he doesn't want to admit it, but  
17 substantially less time to try to avoid the consequences  
18 that could be coming. So that's my position.

19 THE COURT: Ms. Samuel.

20 MS. SAMUEL: Your Honor, I've been struggling with  
21 this since the day I got the case. I can add that I've  
22 had at least six meetings with him for two hours each,  
23 with the interpreter, and every one of those meetings was  
24 trying to explain from beginning to end what a trial is,  
25 and at the end of each meeting he seemed to be able to

1 give back the answers that I wanted.

2 And so his answers today are minimal, if you factor in  
3 the fact that he's had about 10 or 12 hours of coaching  
4 on the very basic questions of what happens in a  
5 courtroom, and I explained to him what a jury is, what a  
6 witness does exactly, physically, where each person  
7 physically walks up, where they sit, what they do, and  
8 when you can factor that in as well, his understanding is  
9 too basic.

10 He also seems to exhibit a lot of inability to retain  
11 any information that's provided to him. That's not just  
12 from the court's questions, but even the questions that  
13 we had about when did your wife have the baby, when did  
14 you go into the hospital, which is all things about the  
15 last two, three days. It's not simply an issue of  
16 memory. I've asked him questions of, again mentioned  
17 earlier, just remember three little words, and asked it  
18 five minutes later, and because there were words and  
19 conversation in between me saying the words and me asking  
20 the words -- the question again, he can't retain that.

21 So I was hoping that his ability to at least very,  
22 very basically understand some court procedure might  
23 overcome his inability to comprehend the right to go to  
24 trial, the -- and it will somehow improve his ability to  
25 assist.

1           Again, on last Wednesday I was talking to some  
2 attorneys about this, and what one of them suggested is  
3 you've trained him to answer your questions about how the  
4 court works. It doesn't mean that he understands.

5           Even something down to just what time is it, of the  
6 day, he seems to come to court always on time and he  
7 seems to come for appointments always on time, and -- but  
8 if you exactly ask him, he doesn't know.

9           And then one of the -- in one of my meetings, one of  
10 the interpreters -- it seemed he was so confused even  
11 about the time of the day, even though he was there on  
12 time, that one of the interpreters I had finally just  
13 lifted his watch and looked at it and they said the watch  
14 wasn't working, whatever he was wearing.

15           So there are clues that alert me to something deeper  
16 going on. He doesn't seem to think he has any mental  
17 illness, and I've asked him, have you been diagnosed?  
18 Have you ever been to a hospital? But neither has he had  
19 formal opportunities to have mental health evaluations,  
20 and so that's why he was -- he keeps saying, "I'm not  
21 crazy."

22           So I don't think he has the ability to assist, from  
23 what he is saying and the way he's -- and it's more the  
24 manner of his understanding and the manner of his answers  
25 and the ability to retain. He's extremely willing -- I

1 know he works at it and tries to understand and tries to  
2 explain and tries to give the right answers, but I don't  
3 think it's adequate. And he simply cannot understand the  
4 concept of a SSOSA.

5 THE COURT: I'm not confident that he would be a good  
6 candidate for a SSOSA, to begin with it. I just think  
7 that the issue we're talking about really means he  
8 wouldn't be a good candidate for a SSOSA.

9 MS. SAMUEL: I would agree.

10 THE COURT: But I am concerned about whether or not he  
11 understands an Alford plea as a possibility and what sort  
12 of offer the State is considering.

13 So I think what we should do is take a break, let the  
14 interpreters have a break, let Kevin, whom I'm so glad to  
15 have back, have a break, and then maybe you could have a  
16 chat with him about that one more time, and I guess I  
17 want to use that as an opportunity for me to inquire  
18 further of him.

19 MS. SAMUEL: I'll do that, Your Honor. And again, we  
20 waive any objection to the court inquiring about the  
21 nature of that conversation.

22 THE COURT: Thank you very much, Ms. Samuel.

23 (Recess)

24 MR. RICHEY: Thank you, Your Honor, for some more  
25 time. I had to take that time to go down and talk to my

1 office a little bit about our thoughts on this record and  
2 also on a resolution, because we've never really had this  
3 conversation very thoroughly, and then I also needed to  
4 call the victim's family to talk with them about it.

5 So you know we are willing to negotiate, and I think  
6 that we're -- we are able to put that into some concrete  
7 terms, although I haven't talked to -- specifically about  
8 that yet, because I'm waiting to see what the defense  
9 reaction is, if he wants to negotiate or not.

10 The other problem is that if he's incompetent or if  
11 there's a concern about his competency, my thought is  
12 that carries over whether it's a trial or a plea. So  
13 we're still in that position of having to decide whether  
14 or not there's enough there.

15 Certainly in the current record that's a concern, but  
16 if Ms. Samuel in this time has had an opportunity to  
17 determine whether or not there's a greater level of  
18 comprehension, maybe that changes the story a little bit.  
19 But that's our current status. I know it's not as far as  
20 we would all like it to be, but this is how it's been in  
21 this case the entire time.

22 THE COURT: I believe you.

23 MR. RICHEY: So that's the State's current position.

24 THE COURT: Ms. Samuel.

25 MS. SAMUEL: And Your Honor, I talked to Mr. Ortiz for

1 the whole period of time that you were gone, and I went  
2 through the process again, explaining the trial process,  
3 explained to him his options, but kept the SSOSA option  
4 to a minimum, because I don't think it will work in this  
5 case. So I just mentioned that as a treatment option  
6 instead of spending time in jail, and he seems to  
7 understand better, but it's always the same case. He  
8 seems to understand when I finish my conversation. I  
9 don't know if I asked an hour later he'd know, and I go  
10 through it in excruciating detail, and he can repeat.

11 THE COURT: Let me ask you this: Have you been able  
12 to discuss with him the concept of negotiation?

13 MS. SAMUEL: I did, and I did explain -- I know  
14 there's no official offer made, but I just gave him a  
15 hypothetical. I said the State can offer you a lesser  
16 charge. The State can -- perhaps they do one year in  
17 jail instead of the possible jail 15 years to life, you  
18 know. If you plead you could possibly get -- have INS  
19 consequences, I explained to him, and he seemed to  
20 understand what I was saying. Perhaps the court can  
21 inquire, just because when I explain he seems to  
22 understand. That's why I always back away. As soon as I  
23 meet him and start talking to him, I always have the  
24 concerns, then after I go through the whole explanation  
25 and detail again and again and again, he seems to give

1 some of the correct answers. It's just been a difficult  
2 one, and, again, Your Honor, I -- as I said, I was in  
3 mental health court for two years, I'm not stranger to  
4 that. But in this particular situation it's a little  
5 different than a regular mental illness that you come  
6 across and you can tell immediately.

7 THE COURT: It's problematic for a number of reasons,  
8 and I had a chance to review the case law, and, you know,  
9 most of our case law has developed in a mental illness  
10 context, but I did have a chance to review State vs.  
11 Lawrence, which is 108 Wn. App. 226. It was also a sex  
12 case, although it did not involve a child, and apparently  
13 the Court of Appeals sets an extremely low standard,  
14 which is what I remembered, but I kind of wanted to --  
15 it's sort of hard for me to believe, so I went back and  
16 reread it and that's exactly what it says.

17 But I think sort of it would -- although I don't think  
18 the record requires it, I think it's important, just as a  
19 moral matter, to make sure that Mr. Ortiz-Abrego  
20 understands what it is to negotiate and has an  
21 opportunity to make a decision about whether or not he  
22 wants to go to trial. I think that the record that we  
23 have right now probably satisfies State vs. Lawrence, in  
24 terms of his understanding of what a trial is, and if  
25 anything, a decision to plead guilty is more complicated

1           intellectually than a decision to go to trial.

2           Let me make a couple suggestions. Mr. Ortiz-Abrego,  
3           there is an -- you have an opportunity to have Ms. Samuel  
4           and Mr. Richey negotiate, and that's a fancy word for  
5           having a conversation, to see if there is some charge  
6           that you could admit guilt for and receive a much lower  
7           prison sentence than would happen if you were found  
8           guilty of all three counts at trial.

9           Now, I am not advising you what to do, but I would  
10          like to know if you would like to have Ms. Samuel and Mr.  
11          Richey have that conversation and discuss those ideas  
12          with you.

13          Does that seem like a good idea to you?

14          THE DEFENDANT: But what am I offered?

15          THE COURT: I don't think they've had that  
16          conversation yet.

17          So would you like for them to talk about it and come  
18          back and tell you what an offer might be?

19          THE DEFENDANT: Yeah.

20          THE COURT: Okay. Let me just talk, practically  
21          speaking. Barb is in the interpreter services office,  
22          coloring with your son. It has occurred to me that over  
23          the lunch hour we might be able to go by the library and  
24          get him some DVDs. This is why you have a mother for a  
25          judge. But I don't think I can count on the defendant

1           figuring out how to do that.

2           MS. SAMUEL: I can do that.

3           THE COURT: Just go to the library, the children's  
4           librarian can help you find appropriate DVDs, and we can  
5           either borrow a laptop or he can use my computer. Barb  
6           does need to get some real work done today, so perhaps  
7           you can figure out how to get Alex some lunch and get him  
8           some DVDs over the lunch hour.

9           MS. SAMUEL: Yes.

10          THE COURT: I'll tell you what, why don't you all see  
11          if you can have a conversation, and I won't expect to get  
12          back on the bench until at least 2:00, but if we could  
13          make sure everybody's back here by 12:30 or 1:00.

14          MR. RICHEY: I was going to propose that Ms. Samuel  
15          give me 30 minutes to talk to my office a little bit  
16          more, and if she could come by at 12:30.

17          THE COURT: Or whenever she gets back.

18          MR. RICHEY: Or come by at 1:00 or 1:15, before, that  
19          would be great.

20          THE COURT: Mr. Ortiz-Abrego, you need to be back in  
21          this courtroom at 1:30. Ms. Samuel will get some DVDs so  
22          that your son can watch those while we're having our  
23          hearing.

24          So I will call Barb and have her bring Alex back. I  
25          will see -- I will be here, but let's figure I'd like to

1 get started around 2:00. So be here at 1:30, Mr.  
2 Ortiz-Abrego.

3 (Recess)

4 THE COURT: Thank you. Please be seated. Let's take  
5 our first things first. Alex, I understand there are  
6 some DVDs for you to read and to watch. So Barb is going  
7 to get you set up on my computer.

8 We've been in touch with Alex's school, and there are  
9 a number of different childcare options. I've heard  
10 about them all, but I think our most fruitful one is to  
11 get on the phone with Alex's teacher, and so we'll do  
12 that at 2:45. She apparently is willing to take care of  
13 Alex before school starts in the morning, and that would  
14 be -- he could be dropped off at 8:30, on your way to  
15 court, and we're still working on after school, but I  
16 have a feeling that she has some ideas about where we  
17 could put him after school, that would be safe and much  
18 more appropriate than court.

19 So what I would propose is that Barb get on the phone  
20 with Ms. Topper, the teacher, as soon as school gets out,  
21 and if that doesn't work, maybe call the other couple of  
22 options and see what they say. So we'll just go ahead  
23 and figure out what the options are, and then come back  
24 and tell Mr. Ortiz-Abrego.

25 So for now, Alex, why don't you go with Barb and you

1 can sit in my chair in my office and watch the DVD.

2 Where do things stand, now that we can talk?

3 MS. SAMUEL: Your Honor, Anna Samuel from ACA, and Mr.  
4 Richey did convey an offer, which I've communicated to  
5 Mr. Ortiz, and he says that he'd like a trial.

6 THE COURT: All right. What I would propose -- and  
7 let me see if Mr. Richey wouldn't agree with this -- is  
8 let's do some of our other motions before we get to the  
9 motion to amend, and just so he can get a better feel for  
10 what's going on.

11 (Motions in limine)

12 MR. RICHEY: Okay. Your Honor, maybe the first  
13 easiest motion is just a motion to exclude witnesses.

14 THE COURT: That motion is granted.

15 MR. RICHEY: In the State's trial brief and the  
16 defense trial brief there is a motion regarding the  
17 defendant's statements, a 3.5 hearing, the -- there are  
18 two witnesses that the State has for the 3.5 hearing, one  
19 is Jason Brunson, who is the polygrapher, and he is ready  
20 and present. The other is Detective Knudsen, who is not  
21 available for today and tomorrow. So what I might -- my  
22 proposal is that we take Mr. Brunson's testimony this  
23 afternoon, and then we'll have to try to get Detective  
24 Knudsen in here as soon as we can and address it, and  
25 when we can.

1           I've tried to get him in, but the case has been going  
2           on for so long that he's been available and not  
3           available, so -- but I think we can address at least the  
4           first part of that, and then move on to the other  
5           motions.

6           THE COURT: All right, that sounds fine. Just so the  
7           parties are aware for scheduling purposes, Judge Halpert  
8           indicates she's hoping Ms. Samuel can spend a few moments  
9           with her students tomorrow morning.

10          MS. SAMUEL: Yes.

11          THE COURT: So I think we should get started about  
12          9:30 tomorrow, but let's go ahead and drop Alex off at  
13          8:30, as planned. Then there's an all judges meeting all  
14          afternoon on Monday the 17th, so I just want to make sure  
15          that you all plan on that. Other than that, I'm at your  
16          service.

17          MS. SAMUEL: Your Honor, I had another concern, which  
18          is, you know, since they're here, I'm happy to do the  
19          motions, but I'm wondering if we can start his -- give  
20          him till Wednesday, just till his wife comes home. You  
21          know, it's -- I think it's a little too stressful, you  
22          know, your wife's in the hospital, you know, and he  
23          probably wanted to spend time with her.

24          THE COURT: Let's just try to get some motions done,  
25          and hopefully there will be time. This case is just so

1 old that I just don't want to have it drag on too long.

2 MS. SAMUEL: Your Honor, the Detective Brunson, the  
3 State's talking about, my only question is does the State  
4 have any statements or any information about Detective  
5 Brunson, because my understanding was he did the  
6 polygraph, and polygraphs are not admissible.

7 THE COURT: He also conversed with the defendant  
8 afterwards, is that correct?

9 MR. RICHEY: That's correct. We have another  
10 interpreter here. Could you identify yourself.

11 THE INTERPRETER: For the record, Christina  
12 Perez-Lopez, state certified interpreter.

13 (Witness sworn)

14 MR. RICHEY: Your Honor, if it's okay with everybody,  
15 I'd like to call Mr. Brunson.

16 THE COURT: Fair enough.

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## **APPENDIX E**

Reports of Defense Neuropsychologist  
Dr. Tedd Judd,  
May 2010 and September 2012

## **Neuropsychological and Psychoeducational Services**

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5/17/10

### **FORENSIC NEUROPSYCHOLOGICAL REPORT**

*This is a CONFIDENTIAL report which is intended to be used by professionals. It is not to be passed on to others without the permission of the author and the client. The results are not to be released to the client without the permission of the author or other professional trained in the interpretation of neuropsychological test data.*

**IDENTIFICATION AND REFERRAL:** Alexander Ortiz-Abrego is a 35-year-old, cohabiting Salvadoran construction worker with 6 years of education who was referred by his attorney, Anna Samuel, for a neuropsychological assessment of memory loss affecting his collaboration with his attorney with respect to a charge of child molestation.

**SUMMARY:** Mr. Ortiz-Abrego has a borderline mentally retarded intellectual level with concrete thinking. He has a specific learning disability in auditory comprehension and poor quantitative reasoning. He will have great difficulty in tracking, understanding, and remembering courtroom proceedings. I recommend disability accommodations of slow proceedings with frequent breaks for explanations from a Spanish-speaking cognitive aid, simple written memo compensations, meaningful checks on his comprehension during proceedings, and non-judgmental resolution of quantitative discrepancies.



**RECORDS REVIEW:** No medical or educational records were available. The discovery for the current case and for the 6/22/06 investigation were available and these records were reviewed, but are well-known to the readers of this report and for the sake of expediency will not be repeated here.

**INTERVIEWS:** Mr. Ortiz-Abrego was interviewed in Spanish on 5/17/10 by Tedd Judd, PhD, neuropsychologist with the assistance of Diomaris Jurecska, neuropsychology graduate student.

*Neuropsychological Report, Alexander Ortiz-Abrego, 5/19/10, page 1*

**Ethnic/Cultural/Language/Migration Background:** Mr. Ortiz-Abrego was born and partly raised in Cuscatancingo, a neighborhood of San Salvador, the capital of El Salvador, and later moved to the town of Ilobasco, Cabañas, El Salvador.

*(Encyclopedia Britannica: Ilobasco is a town in north-central El Salvador. It is in a rich agricultural area (cattle, coffee, sugarcane, and indigo) but is known primarily for its clay dolls, a major item for sale to tourists, as well as for other types of pottery made from local clays. Since the completion in 1954 of a dam and hydroelectric complex on the Lempa River and the creation nearby of a lake recreation area, Ilobasco's tourist trade has grown. The town's population was swollen by refugees fleeing battles between government troops and leftist guerrillas in the early 1980s. Pop. (2005 est.) urban area, 22,200.)*

He is about the 7<sup>th</sup> of 13 children, but he was not completely sure which number. Two of his siblings were adopted to the U.S. He did not know the size of the town but it has 3 Catholic churches. He was uncertain about his history, especially how long different situations lasted or at what age events happened. His father died when Mr. Ortiz-Abrego was about 6 years old of alcohol abuse, as he understands it. His mother worked at selling fabric in the market. When Mr. Ortiz-Abrego was about 10 his mother had a mental illness which he attributed to her having 13 children and because of the death of her husband. She killed the chickens and ducks she was raising because she thought they were of the devil. He thinks that she saw and heard things that were not there. She went to the Soyapango National Psychiatric Hospital in San Salvador where she was cured. When his mother got sick the family moved to Ilobasco. There was a period of time when the siblings all lived together without parents, then they were distributed to various places and he went for a year his Aunt Elena Ortiz in San Salvador, and then with his Aunt Alicia Abrego for about 7 years, from about age 10 to about age 17. He does not know if his mother is alive or not.

He repeated the first grade. He did not get good grades. He was not good at math. He left school in the 7<sup>th</sup> grade because they could not afford for him to go for longer.

He worked in a hardware store in Ilobasco and had to rely on the register because of his poor math. He worked as a barber in Ilobasco in his house cutting only men's hair. He learned this trade from an uncle. He likes soccer and played on a reserve team and earned a little money that way.

He came to the U.S. in 1999 for economic opportunities. He came into Arizona with his brother, Santiago. He was picked up and taken to the home of his maternal cousin, Orbolina. He did not like it there because they all drank, so he went to Seattle by bus to be with his cousin, Daysi, sister of Orbolina. He was picked up by immigration and sent to jail in Montana for 3 days and then to Seattle for a few days. Daysi paid \$3000 to get him out. He has worked in Safeway, in a hotel, as a dishwasher, and in construction. He worked in office maintenance for a car dealership from 2001 to 2003. His last work was in construction and ended in 2008. He is living on unemployment.

**Spontaneous Complaints:** Mr. Ortiz-Abrego said that he has always been a somewhat anxious person and his hands sweat when his is anxious, but otherwise denied any emotional or behavioral problems. He has found it somewhat difficult to learn English,

although he has not studied consistently. He is poor at math. He otherwise denied cognitive difficulties.

**Current Case:** Mr. Ortiz-Abrego said that Daysi has a daughter named Daysita who says that he touched her when he was living with them. He said that the time is unclear. He went to live with his wife in 2002. He met his "wife" in 2001. They moved in together 12/10/02. They have never married. Daysita was about 6 or 7 at that time. He does not know why this case is coming up now. He remembers one time that he came in and she was asleep and he touched her on the shoulder to wake her up. His cousin, Daysi, came to him and said that Daysita said he was touching her and he said yes, but not sexually.

He said that he does not know what is happening in court or what the defense is.

When asked about any previous legal difficulties he said that he went out with a male friend of Daysi's in 1999 and got arrested. Daysi bailed him out. He paid a fine. He also described the case of 6/22/06 in a manner consistent with the records concerning that investigation.

**Goals for the Evaluation:** Mr. Ortiz-Abrego did not have any understanding of the evaluation other than that it was an examination of his head. He does not feel that he has difficulty in communicating with his attorney.

**History of the Present Illness:** Mr. Ortiz-Abrego said that he was hit in the head with a rock by a friend when he was about 18 or 19. He showed a scar in his left parietal area. He remembers the event and reported that he had no loss of consciousness. He went to the hospital and had stitches and was released the same day. He did not notice any lasting symptoms or change in his abilities.

**Previous Medical History:**

**Pregnancy, birth, and development:** Mr. Ortiz-Abrego was not aware of any problems with his birth, with the pregnancy, or with his childhood development.

**Surgeries:** None.

**Accidents, injuries:** As noted above.

**Major illnesses:** Mr. Ortiz-Abrego said that he had some kind of fever in El Salvador and was unable to walk for a time afterwards but he was unable to identify what kind of fever it was with confidence. He thought it might have been typhoid. A significant minority of patients with typhoid fever have neurologic complications, with encephalitis (brain infection) being the most common.

**Hospitalizations:** None other than as noted above.

**Toxic exposures:** Mr. Ortiz-Abrego reported that at about age 13 his friend challenged him to eat a tempate seed which he did and it made him vomit and they took him to the hospital and they pumped his stomach. Tempate is also known as Jatropha and it is toxic in as small a dose as a single seed in children, producing primarily gastrointestinal symptoms, although neurologic symptoms are also possible.

**Current Medications:** None.

**Mental Health History:** Mr. Ortiz-Abrego denied any significant mental health difficulties. However, he said that he has gone to a support group with Dr. Ayala, a Salvadoran in Seattle, for about 9 years. He finds it supportive and helpful. He said that this group is to help people with addiction problems and, although he has no such problems, it helps him understand others who do.

**Alcohol and Drug Use:** None.

**Psychosocial Situation:** Mr. Ortiz-Abrego lives with his wife and two children, a son of 5 years and a baby of one week.

**Family History:** As noted above. A maternal aunt in the U.S. also had psychiatric problems after developing cancer. She would spend the night trying to chase spirits out of the house.

**Review of Neuropsychological Systems:**

**Sensory:**

**Vision:** Mr. Ortiz-Abrego reported no problems.

**Hearing:** Mr. Ortiz-Abrego reported no problems.

**Vestibular:** Mr. Ortiz-Abrego reported no problems.

**Smell/taste:** Mr. Ortiz-Abrego reported no problems.

**Tactile sensation:** Mr. Ortiz-Abrego reported no problems. He said that his palms sweat easily and that has been true his entire life.

**Pain:** Mr. Ortiz-Abrego reported no problems.

**Oversensitivity:** Mr. Ortiz-Abrego reported no problems.

**Motor:**

**Strength:** Mr. Ortiz-Abrego reported no problems.

**Coordination:** Mr. Ortiz-Abrego reported no problems.

**Tremor, jerking, abnormal movements:** Mr. Ortiz-Abrego reported no problems.

**Language:**

**Word finding:** Mr. Ortiz-Abrego reported no problems.

**Comprehension:** Mr. Ortiz-Abrego reported no problems.

**Reading:** Mr. Ortiz-Abrego reported no problems. He does not particularly like to read and is a bit slow and does not read as a habit.

**Writing/typing/computer use:** Mr. Ortiz-Abrego reported no problems. He has no computer skills.

**Math:** Mr. Ortiz-Abrego said he is weak in math.

**Visual-Spatial Skills (drawing, mechanical skills, way finding):** Mr. Ortiz-Abrego does not know how to draw and is not very good at reading maps or blueprints.

**Attention:** Mr. Ortiz-Abrego reported no problems.

**Memory:** Mr. Ortiz-Abrego reported no problems.

**Executive Functions:**

**Initiation:** Mr. Ortiz-Abrego reported no problems.

**Impulsivity:** Mr. Ortiz-Abrego reported no problems.

**Planning, Organization:** Mr. Ortiz-Abrego reported no problems.

**Emotional Status:**

**Mood:** Mr. Ortiz-Abrego said that his mood is not very good because of stressors that he feels. He is anxious at the moment, but not generally a nervous person.

**Sleep:** Mr. Ortiz-Abrego reported no problems.

**Appetite:** Mr. Ortiz-Abrego reported no problems.

**Fears, anxieties, phobias, panic, obsessions/compulsions:** Mr. Ortiz-Abrego said that he has always been somewhat anxious.

**Anger, Frustration:** Mr. Ortiz-Abrego reported no problems.

**Hallucinations, delusions:** Mr. Ortiz-Abrego reported no problems.

**Review of Functions:**

**Transportation:** Mr. Ortiz-Abrego drives and reported no problems other than an accident in 2000. He got his driver's license on the second try without studying.

**Finances and Money Management:** Mr. Ortiz-Abrego pays the bills and said that he remembers to do so and does so accurately.

**Family Relations:** Mr. Ortiz-Abrego reported no problems with his wife and children. He said things were well with his siblings, as well, except that he does not get along with his brother-in-law.

**Socializing:** Mr. Ortiz-Abrego said that he has many friends.

**Recreation/Exercise:** Mr. Ortiz-Abrego plays soccer regularly.

**Spirituality:** Mr. Ortiz-Abrego is Catholic and attends mass when not playing soccer.

**Informant's perspective:** Mr. Ortiz-Abrego's attorney said that it was extraordinarily difficult to get him to understand and remember information about the U.S. justice system, especially the functions of a jury, and of his case. He would repeatedly ask for things to be explained and then would not remember them at the next meeting. Her

impression was that he was doing his best to understand and was not trying to be difficult.

His sister, Isabel Ortiz-Abrego, was interviewed by phone in Spanish on 5/19/10 by Tedd Judd, PhD. She reported that she lived apart from Mr. Ortiz-Abrego for much of their childhoods and did not know that much about him and his health, and did not know much about him and his life in the U.S. She confirmed that their father died of alcoholism and their mother had psychiatric problems and was in the psychiatric hospital. She also said that his behavior was bad when he was a child and he was often fighting with others. She said that he was not very intelligent. She remembers that her mother told her that he was sick and vomited a lot and almost died and had to take a lot of medication and they took him to the hospital, but she does not recall more than that. She confirmed that he went to 7<sup>th</sup> grade but said that he was kicked out of the 7<sup>th</sup> grade because of problems but she doesn't know what kinds of problems, whether they were behavioral or academic. She has not been very close to him and said that they do not like each other much and there have been difficulties between them, so she has not been in much contact with him.

#### **BEHAVIORAL OBSERVATIONS:**

**Attitude:** Mr. Ortiz-Abrego was mostly attentive and cooperative. Initially he was rather anxious, although he calmed down somewhat after about 10-15 minutes. However, his anxiety persisted at a lower level throughout the interview and testing, and emerged somewhat more during those portions of the testing that he found difficult. His anxiety appeared to interfere with his ability to respond only mildly. He was initially defensive and guarded, and did not want to permit me to talk with others who know him, but when the need for this was explained in more detail and the importance of being cooperative he agreed. Although he had notable difficulty with comprehension, he did not show evidence of delusions, hallucinations, bizarre thinking, or other signs of psychosis.

**Speech, Language:** His speech was normal in articulation, tone, rate, word finding, and coherence. His comprehension of test instructions was impaired. He had difficulty understanding what was expected of him, and even when he understood he often had to have it re-explained for each new item in the same pattern. His handwriting was mostly legible, but printed and labored. When asked to write a sentence describing the weather in Seattle in the winter it took about 6 explanations before he was able to proceed, including explaining what a sentence was. He made homophonic spelling errors even on initial letters typical of Spanish speakers with limited literacy who do not have the habit of reading and therefore do not have stable visual images of common words. For example, he spelled Seattle "Ceattle," although he later corrected this. This pattern of writing is below expectation for his reported level of education and suggests a possible learning disability.

**Motor:** Mr. Ortiz-Abrego had normal movement except that there was some facial droop on the right on spontaneous smile only.

**Self-Awareness:** Mr. Ortiz-Abrego did not seem fully aware of the quality of his test performance and appeared to think that he was doing somewhat better than he was.

**Effort, Validity:** Mr. Ortiz-Abrego gave a good effort on the tests and tolerated

frustration well. This was a valid testing.

**TESTING:** *Testing was carried out in accordance with Judd, et al., (2009) Professional Considerations for Improving the Neuropsychological Evaluation of Hispanics. Hispanic Neuropsychological Society/National Academy of Neuropsychology. [www.hnps.org](http://www.hnps.org). Archives of Clinical Neuropsychology]; the 1990 "Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations" of the American Psychological Association, the International Test Commission's 2000 Test Adaptation Guidelines The Department of Health and Human Services 2002 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, and related guidelines and literature.*

Mr. Ortiz-Abrego was given the following tests on 5/17/10 by Tedd Judd, PhD, neuropsychologist:

## **RESULTS:**

### **Effort, Validity:**

#### **Test of Memory Malingering**

*The TOMM is a 2-alternative forced-choice recognition memory test for simple line drawings of common objects. Performances significantly below a chance level of performance are regarded as evidence of malingering, while performances that fall substantially below that achieved by individuals with significant brain disability and memory impairment are regarded as evidence of suboptimal effort on testing.*

Mr. Ortiz-Abrego had scores of 43, 46, and 50 on the TOMM suggesting good test effort and valid results. His relatively low score and hesitant responding on the unnormed first trial probably reflects test naïveté, while his perfect score and fast responding on the delayed condition suggests good test effort when he fully understood the task.

#### **2-Alternative Forced Choice Informal Memory Measure**

*I have devised a 2-alternative forced choice recognition memory task for the 12 words of the NAM Word Learning List. This task is based upon a similar task for the CVLT-II. No norms exist for this task. However, extreme scores on this test can be taken as evidence relevant to test effort.*

Mr. Ortiz-Abrego had a score of 12/12 correct, suggesting good test effort.

### **General Measures:**

#### **Wechsler Adult Intelligence Scale—3—Spanish**

*The WAIS—3 is a standard, individually-administered intelligence test with 14 subtests. These subtests can be administered alone or in combination to evaluate different aspects of cognitive functioning. Norms are by age. IQs are not reported here because they are of limited usefulness in neuropsychology and can be misleading, but properly trained professionals who may have use for them can derive such scores. The Spanish WAIS—3 was translated, adapted, and renormed in Spain. The non-verbal subtests are the same as the English version, while the verbal subtests have been modified, but are similar to the English versions. The norms from Spain are not appropriate for a Latin American population. For the non-verbal tests, both the English and Spanish norms are presented below to allow for some understanding of performance expectations relative to a U.S. population and to allow for comparisons among subtests. However, interpretation of these scores must be very cautious, and must take into account factors of culture, acculturation, and education.*

*Neuropsychological Report, Alexander Ortiz-Abrego, 5/19/10, page 7*

**VERBAL COMPREHENSION INDEX:***Vocabulary, defining words that are presented both printed and orally**Similarities, saying how two things are alike, such as Carrot and Potato***PERCEPTUAL ORGANIZATION INDEX***Picture Completion, identifying what is missing from drawings, such as a cat with one ear not drawn**Block Design, using red and white blocks to build pictured designs**Matrix Reasoning, selecting the drawing that best completes an abstract array***WORKING MEMORY INDEX***Arithmetic, word problems presented orally are calculated mentally**Digit Span, determining how long a string of digits the person can repeat, and also repeating backwards***PROCESSING SPEED INDEX***Digit Symbol—Coding The printed digits 1-9 are presented with an abstract printed symbol associated with each. Beneath this is a random string of digits and the person must fill in the appropriate symbol for each as rapidly as possible.**Symbol Search, For each item, the person searches for either of 2 abstract symbols in an array of 5 as fast as possible.***OTHER SUBTESTS***Comprehension answering questions of social judgment.*

Subtest	Spain		U.S.	
	Scaled Score	Percentile	Scaled Score	Percentile
Vocabulary	6	9		
Similarities	8	25		
Picture Completion	4	2	4	2
Block Design	6	9	4	2
Matrix Reasoning	7	16	7	16
Arithmetic	7	16		
Digit Span	7	16		
Digit Symbol-Coding	6	9	3	1
Incidental Learning Pairing		30		20
Free Recall		75		50
Copy		9		3
Symbol Search	7	16	5	5
Comprehension	6	9		
<b>Index</b>				
Verbal Comprehension Index	82	12 (prorated)		
Perceptual Organization Index	71	3	70	2
Working Memory Index	79	8 (prorated)		
Processing Speed Index	81	10	69	2
Verbal IQ	77	6 (prorated)		
Performance IQ	71	3	67	1
Full Scale IQ	72	3		

Mr. Ortiz-Abrego performed in the borderline mentally retarded range compared to normative populations from both Spain and the U.S. This is not based upon Salvadoran norms for this test and the test is not based upon culturally typical Salvadoran materials,

ways of thinking, or concepts of intelligence, and so these results may not signify borderline mental retardation relative to his culture of origin. These scores may reflect limited education or an education not oriented towards the skills measured by this test, rather than limited intellectual potential. However, these results do suggest that Mr. Ortiz-Abrego is likely to function intellectually at a level typical of the borderline mentally retarded in the U.S. when it comes to dealing with U.S. formal institutions (child welfare, health care, legal system, education, mainstream employment, worker's compensation, immigration, banking). This functioning may include concrete thinking; difficulty applying abstract concepts, rules, and regulations; difficulty generalizing from one situation to another; difficulty coping with complexity; difficulty following extended arguments or lines of logical reasoning; and difficulty contemplating hypothetical or conditional (if, then) reasoning. His subtest scores were relatively homogeneous, with no consistent areas of notable cognitive strength or weakness.

**Neuropsi Atención y Memoria:**

*The NAM is a neuropsychological screening test in Spanish which includes subtests of*

*Orientation: orientation to time, space, and self*

*Attention: repetition of digits forwards, pointing span forwards, timed visual scanning for a target, vigilance for spoken digits, serial 3s,*

*Memory:*

*Working memory: digit span backward, pointing span backward*

*Encoding: learning a list of 12 words over 3 trials; learning a list of 12 word pairs over 3 trials, with 15 minute recall; immediate recall of two short stories; copy of a semicomplex or complex figure; memory for two faces and names; and*

*Recall: 15-minute delayed recall, category cueing, and multiple choice recognition for word list, with 15-minute delayed recall for word pares, stories, figure, and names, and 15-minute delayed recognition for faces.*

*Executive functions: verbal fluency for animals and words beginning with "P;" non-verbal fluency for line drawings, concept formation; copying complex hand movements and the Stroop test.*

*Norms are from Mexico and Colombia by age and education.*

Subtest	Age & Education-Adjusted	
	Scaled Score	Percentile
<b>Orientation</b>		
Time	11	63
Space	10	50
Person	10	50
<b>Attention &amp; Concentration</b>		
Digits forwards	6	9
Cubes forwards	13	84
Visual Detection	10	50
Digit detection	12	75
Serial 3s	9	37
<b>Memory</b>		
<b>Working memory</b>		
Digits backwards	12	75

Cubes backwards	9	37
<b>Learning</b>		
Word learning	12	75
Paired associates learning	8	25
Story memory	5	5
Figure copy	6	9
Faces	12	75
<b>Delayed recall</b>		
Word delayed recall	11	63
Word cued delayed recall	12	75
Word delayed recognition	11	63
Paired associates recall	12	75
Story recall	2	0.4
Figure recall	7	16
Face recognition	10	50
<b>Executive Functions</b>		
Category formation	8	25
Semantic verbal fluency	8	25
Phonemic verbal fluency	7	16
Non-verbal fluency	9	37
Motor functions	9	37
Stroop interference time	10	50
Stroop interference correct	12	75

Mr. Ortiz-Abrego performed within normal limits for his age and education on most subtests, but had notable difficulties on story memory. He was embarrassed by this. His story memory was furthermore notable not just for failing to recall but for errors in recall, such as getting names wrong, substituting a birthday for a wedding anniversary, saying that the protagonist was buying a cake instead of buying ingredients for a cake, and indicating that they were coming from Acapulco instead of going to Acapulco. His copy of a complex figure was impaired due to poor planning, consistent with his WAIS-III performances. This makes it invalid as a visual memory test.

**Batería Neuropsicológica en Español (Neuropsychological Battery in Spanish):**

*The BNE consists of 8 tests adapted from neuropsychological tests in English. The Visual Memory Test consists of presentation of the 3 cards from the Visual Reproduction Subtest of the Wechsler Memory Scale I for 10 seconds each, followed by an immediate recall of all of the drawings. There are up to 5 successive presentations and recalls, to a criterion of accuracy of reproduction. The Verbal Prose Memory Test consists of up to 5 successive presentations and recalls of a story to a criterion of recall. Both of these tests have a 1 hour delayed recall and a recognition memory trial.*

*The BNE is normed by age, education, and geography (the US-Mexico border, and Spain).*

	<b>T-score</b>	<b>Percentile</b>
<b>Visual Memory</b>		
1 <sup>st</sup> Recall	44	27

Visual Learning	50	50
Delayed Recall	56	73
<b>Verbal Prose Memory</b>		
1 <sup>st</sup> Recall	37	10
Verbal Learning	48	42
Delayed Recall	30	2
Recognition	51	54

Mr. Ortiz-Abrego performed normally on the visual memory test of the BNE, where the simpler drawing figures allowed him to show his memory abilities better than on the NEUROPSI. By contrast, he continued to show impaired performance on story memory, especially for delayed recall and for initial recall. He did relatively better with learning with repetition and his recognition memory was normal. His recalls were again characterized by distortion of the content of the stories.

#### **Woodcock-Muñoz-R Tests of Cognitive Abilities**

*The WM-R is a well-normed and broad-ranging battery of tests of cognitive abilities. Its subtests measure various aspects of visual, auditory, verbal, spatial, and conceptual abilities, along with measures of processing speed, memory, planning, and problem-solving skills. It gives age and grade-equivalent scores equated to U.S. age and educational levels in English. It is NOT, therefore, normed to a Spanish-speaking population and cannot be used for a direct comparison of possible deficits.*

<b>Subtest</b>	<b>Age-Equivalent</b>	<b>Grade-Equivalent</b>
Picture Vocabulary	13-4	8.0

Mr. Ortiz-Abrego's picture vocabulary was at the low end of the normal range, consistent with his achieved IQ.

#### **Word Accentuation Test—Chicago**

*The WAT consists of 40 Spanish words with irregular but unmarked accents to be read aloud. Readers who are familiar with the words will accent them properly, giving an indication of their reading recognition vocabulary and an estimate of pre-illness intellectual level in a manner corresponding to the NART and WTAR tests in English. Provisional norms estimate WAIS-III (Spain) IQ using a regression equation by age, education, and WAT score (JCEN 28:1201-7).*

Mr. Ortiz-Abrego's recognition reading vocabulary and demographics suggested an intellectual level of 70, in the borderline range and consistent with this achieved IQ.

#### **Sensory-Perceptual and Motor Skills:**

##### **Sensory Perceptual Examination**

*On the Sensory-Perceptual Examination the person is stimulated on one side of personal space or on both sides (double simultaneous stimulation) and has to indicate where the stimulation was. This is carried out in the tactile (touch to the back of the hand or the cheek), visual (fingers wiggling in the peripheral visual fields) and auditory (sound of fingers rubbing together) modalities. This test is sensitive to sensory losses and unilateral inattention. The person also must identify fingers by touch, identify numbers traced on the finger tips, and identify geometric shapes by touch. Visual fields are also tested.*

Mr. Ortiz-Abrego's performance on the Sensory Perceptual Examination was normal.

### **Coin Rotation Test**

*In the Coin Rotation Test the person is asked to rotate a nickel 20 times in each hand for 3 trials each. The speed of rotation is a sensitive measure of fine motor dexterity. Preliminary norms are for adult males.*

Mr. Ortiz-Abrego took 13 seconds with his preferred right hand and 14 seconds with his left hand, both in the normal range.

### **Adaptive Functioning:**

#### **The Bidimensional Acculturation Scale for Hispanics**

*The BAS is a 24-item bilingual scale developed for Mexican and Central American immigrants in the U.S. Items are rated on a 4-point scale, with 3 items each for Language Use and for Electronic Media, and 6 items for Language Proficiency. Domains are rated low, moderate, or high with respect to Spanish language and Hispanic identity and also with respect to acculturation to English and U.S. culture.*

<b>Domain</b>	<b>English</b>		<b>Spanish</b>	
	<b>Average</b>	<b>Classification</b>	<b>Average</b>	<b>Classification</b>
Language Use	1.7	low	4.0	high
Language Proficiency	1.5	low	3.3	high
Electronic Media	1.3	low	3.7	high

Mr. Ortiz-Abrego chose to use the Spanish version of this questionnaire to rate himself, suggesting a preference for reading in Spanish. He rated himself in the low range in English and in the high range in Spanish on all dimensions. It is of interest that he rated himself only "good" and not "very good" at reading, writing, and understanding radio programs and music in Spanish, suggesting a possible language disability.

### **CONCLUSIONS:**

#### **Overview:**

Mr. Ortiz-Abrego is functioning at a borderline level of intelligence relative to U.S. expectations, with notably concrete thinking. In addition to this limitation, he has a further impairment in verbal comprehension which further affects his memory for concepts and ideas, although not his memory for specific words. This can be characterized as a specific learning disability in auditory comprehension. He is also weak in math and in quantitative thinking generally. The cause of this disability is unknown, but it is probably lifelong. There is some possibility that it could be due to neurologic complications of traumatic brain injury, typhoid fever, or Jatropha toxicity, although these cannot be confirmed.

#### **Adjudicative Consequences of Disability:**

A specific evaluation of competence to stand trial was not requested and a full evaluation of this capacity was not completed. However, Mr. Ortiz-Abrego's borderline

intelligence, concrete thinking, and auditory comprehension disability will have a substantial impact on his ability to participate in a trial. Most notably, he will have great difficulty in tracking, understanding, and remembering the proceedings. He will do worst with rapid speech, abstract concepts, and unfamiliar material. He will do somewhat better with slower proceedings, repetition, concrete material, and familiar events. He will have a great deal of difficulty responding to questions and will need repetition and simple questioning.

He is likely to be imprecise with any kind of quantitative information such as dates, durations, how long ago something happened, and distances. It is likely that his responses will not "add up" due to this imprecision rather than being due to deception. For example, if he is asked what year something happened in and he ventures an estimation of 2004 and later is asked how long ago that was he could well answer 8 years or 4 years and not recognize the inconsistency.

When comprehension is not involved he is likely to be able to express himself reasonably well, especially when talking about things with which he is familiar. He is able to present a fairly coherent narrative about events he has experienced if he is not interrupted with questions. This is less true of his life in El Salvador, however, for which his memory is rather imprecise and confused.

Because of his concrete thinking and comprehension disability, he will have a great deal of difficulty understanding complex testimony and its consequences and complex and strategic decisions.

#### **Adjudicative Accommodations:**

Mr. Ortiz-Abrego's cognitive impairments can be accommodated in the courtroom by frequent breaks to explain things. This explanation may be most efficiently carried out by a Spanish-speaking assistant who has some understanding of court proceedings, his case, and cognitive limitations. Simple written summaries in Spanish can help with his memory limitations, but direct translations of legal documents will be of limited use because of the limitations in his reading comprehension. Such summaries can be particularly helpful with decision-making, by summarizing the alternatives along with the advantages, disadvantages, and chances of success. To assure his comprehension, he should be asked to explain back what he has been told. If he is unable to explain, then he should be asked short answer, multiple choice or yes/no questions about the content, for example, "If you accept this plea bargain, how long will you go to prison for?" Simply asking him if he has understood something is almost certain to be an inaccurate and ineffective assurance of comprehension.

When he is testifying, questions should be brief, simple, and concrete. Interruptions to his narrative should be minimized. If mathematical precision is required, the numbers should be written down for him and the discrepancies explained, and he should be permitted to revise his responses to try to clarify the situation.

If challenging the testimony of others is an expected function, then there should be a break after the testimony that he could potentially challenge that would allow an assistant to explain the testimony to him and elicit potential challenges.

### **Evaluation of Malingering:**

*Contemporary forensic neuropsychological practice calls for the evaluation of the possibility of malingering. Such inferences are particularly difficult in cross-cultural contexts because of culturally variable means of expressing symptomatology, and because of limited cross cultural data on symptom validity tests. Aspects of test behavior that indicate a valid test protocol was obtained include the following observations of clinical interview and test performance:*

<u>Clinical Variable Assessed</u>	<u>Outcome of this Evaluation</u>
Disability that is disproportionate with severity of the illness or injury.	No
Symptoms/complaints that do not make medical or neuropsychological sense.	No
Claims of remote memory loss.	No
Suppression of first half of items on list learning tasks.	No
Unusually low recognition scores on list learning tasks.	No
Abnormally slowed response latencies.	No
Failing easy or obvious items, passing hard or subtle items.	No
Disproportionately impaired attention relative to vocabulary, learning or memory scores.	No
Absurd or grossly illogical responses and approximate answers.	No
Discrepancies between scores on tests measuring similar processes.	No
Unusual configuration on motor skills.	No
Impaired performance on implicit memory tests.	No

*Slick, Sherman, and Iverson (Clin. Neuropsych, 13, 545-561) have proposed diagnostic criteria now in widespread use which will now be reviewed with respect to this client:*

A. Substantive external incentive	Yes
B1. Definite negative response bias	No
B2. Probable response bias	No
B3. Discrepancy between test data and known patterns of brain functioning	No
B4. Discrepancy between test data and observed behavior	No
B5. Discrepancy between test data and reliable collaborator reports	No
B6. Discrepancy between test data and documented background history	No
C1. Self-reported history is discrepant with documented history	No
C2. Self-reported symptoms are discrepant with known patterns of brain functioning	No
C3. Self-reported symptoms are discrepant with behavioral observations	No
C4. Self-reported symptoms are discrepant with information obtained from collateral informants	No
C5. Evidence of exaggerated or fabricated psychological dysfunction	No
D. Group B and C behaviors not fully accounted for by psychiatric, neurologic or developmental factors	NA

*Definite Malingered Neurocognitive Deficit = A, B1, D*

*Probable Malingered Neurocognitive Deficit = A, 2 or more of B2-6 or one of B2-6 and one or more of C criteria, D*

*Possible Malingered Neurocognitive Deficit = A, one or more C criteria, D; or Definite or Probable criteria without D.*

In reviewing these criteria, Mr. Ortiz-Abrego is judged to have No Malingered Neurocognitive Deficit.

**Cultural/Linguistic Considerations:**

*Neuropsychological evaluation in cases such as this one can be helpful in ruling out major neuropsychological deficits, but it is more difficult to evaluate subtle symptoms with confidence because of limitations of appropriate tests and norms and other limitations of cross-cultural communication. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition of the American Psychiatric Association (DSM—IV) specifies in Appendix I that the cultural formulation of a diagnosis in a multicultural setting should take into account the following:*

- *Cultural identity of the individual*
- *Cultural explanations of the individual's illness*
- *Cultural factors related to psychosocial environment and levels of functioning*
- *Cultural elements of the relationship between the individual and the clinician*
- *Overall cultural assessment for diagnosis and caregiver*

Mr. Ortiz-Abrego identifies as Salvadoran living in the U.S. with the intention to stay and to maintain a Salvadoran identity. He has some desire for acculturation within the U.S., but has not done well at learning English. He does not see himself as having any mental health or cognitive problems other than mild anxiety, and it is likely that his cognitive limitations do not stand out in his Salvadoran immigrant cultural context, although they do stand out relative to U.S. institutions such as the justice system. Overall, Mr. Ortiz-Abrego showed me in interview the anxiety, respect, and deference that is typical of this type of a setting where there is a power differential based on authority, education, institutional power, criminal charges, etc. He appeared motivated to be seen as mentally normal.

I appreciate this opportunity to work with Mr. Ortiz-Abrego and his family. Please feel free to call me with any questions, including any more specific information or opinions concerning forensic issues.

I declare that the information contained within this document was prepared and is the work product of the undersigned, and is true to the best of my knowledge and information.



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Certified Hispanic Mental Health Specialist

Copies sent to:  
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*Neuropsychological Report, Alexander Ortiz-Abrego, 5/19/10, page 15*

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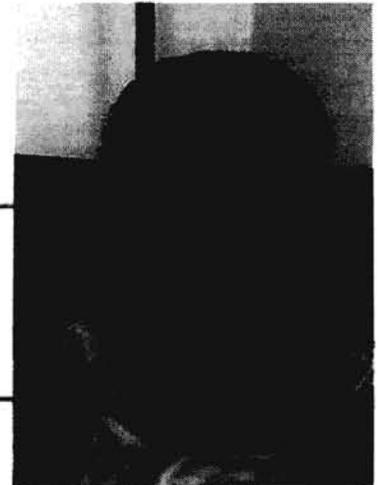
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9/12/12

### FORENSIC NEUROPSYCHOLOGICAL REPORT

*This is a CONFIDENTIAL report which is intended to be used by professionals. It is not to be passed on to others without the permission of the author and the client. The results are not to be released to the client without the permission of the author or other professional trained in the interpretation of neuropsychological test data.*

**IDENTIFICATION AND REFERRAL:** Alexander Ortiz-Abrego is a 37-year-old, partnered Salvadoran construction worker with 6 years of education who was referred by his attorney, James Koenig, for a neuropsychological assessment of a learning disability with respect to his competence to stand trial on a charge of child rape.



**SUMMARY:** Mr. Ortiz-Abrego has a borderline intellectually disabled intellectual level with concrete thinking. He has a specific learning disability in verbal conceptualization, speed of information processing, and quantitative reasoning. He is unable to conceptualize legal strategies or track, understand, and remember courtroom proceedings competently.

#### RECORDS REVIEW:

The discovery for the current case and for the 6/22/06 investigation were reviewed along with records from his 12/1/11 hospitalization at Western State Hospital, but are well-known to the readers of this report and for the sake of expediency will not be repeated here.

I saw Mr. Ortiz-Abrego for an urgent and abbreviated mid-trial evaluation of his ability to collaborate with his attorney on 5/17/10. I found that he had a borderline intellectually disabled (formerly called mentally retarded) intellectual level with concrete thinking. I felt that he had a specific learning disability in auditory comprehension and poor quantitative reasoning. I observed that he would have great difficulty in tracking, understanding, and remembering courtroom proceedings. I recommended disability accommodations of slow proceedings with frequent breaks for explanations from a Spanish-speaking cognitive aide, simple written memory compensations, meaningful checks on his comprehension during proceedings, and non-judgmental resolution of quantitative discrepancies.

I saw Mr. Ortiz-Abrego again on 4/24/11 to attempt to extend my evaluation of him. At that time Mr. Ortiz-Abrego was very emotionally distraught. He also appeared very slow and sluggish, as if possibly

overmedicated. On a measure of test effort he gave a very poor performance, making it clear that testing at that time would not be valid. I made attempts to calm him down and to get him to focus on testing sufficient to allow for valid testing but I was unsuccessful. No further conclusions could be drawn from this encounter.

Mr. Ortiz-Abrego had a 4/4/12 evaluation by Ray Hendrickson, JD, PhD. Dr. Hendrickson reviewed the history of Mr. Ortiz-Abrego's evaluations, competency hearings, and two attempts at competency restoration at Western State Hospital. This history is known to the readers of this report and will not be repeated here. I reviewed the records concerning Mr. Ortiz-Abrego's second admission to Western State Hospital beginning 12/1/11 and compared these to Dr. Hendrickson's account of them in his 4/4/12 evaluation. I noted a number of questionable observations, inferences, discrepancies and omissions worthy of note here. For example, Dr. Hendrickson stated, "Mr. Ortiz-Abrego appeared to have a greater understanding of English than he maintained and appeared to have no significant impairments in comprehension." The evidence he gives for this is that he played BINGO, and that when a psychiatrist asked him to look outside he did so before this request was interpreted. This two pieces of evidence are hardly definitive in demonstrating that Mr. Ortiz-Abrego had no impairment in English comprehension, and I would not recommend that Mr. Ortiz-Abrego be tried without an interpreter on that basis. Dr. Hendrickson did not cite chart notes such as one found further down on the same page as the BINGO note that stated, "Patient unable to converse due to language barrier."

Dr. Hendrickson cites what he describes as discrepancies between Mr. Ortiz-Abrego's stated capacity and his observed functioning. The example he gives is that Mr. Ortiz-Abrego knew the month and year but said that he did not know the date. Given that "the date" is often used in both English and Spanish to refer specifically to the day of the month, I do not understand what the supposed discrepancy is here. The next example he gives is the Mr. Ortiz-Abrego indicated that he did not understand a task, but after a peer both explained step-by-step and demonstrated how to wrap the forks and spoon he was then able to do it. In the original note concerning the episode, it was the instructor who reported that Mr. Ortiz-Abrego did not understand, not Mr. Ortiz-Abrego who claimed not to understand (that is, Dr. Hendrickson misrepresented this note.) I likewise fail to see how this demonstrates a discrepancy. In his conclusions, Dr. Hendrickson misrepresented this episode again by saying that the peer had explained the task, leaving out the step-by-step demonstration part. Dr. Hendrickson also seemed quite impressed that Mr. Ortiz-Abrego was able to explain how soccer is played, and seemed to think that Mr. Ortiz-Abrego's knowledge of how many points a team gets for kicking the ball into the net was important information demonstrating advanced knowledge and cognitive abilities. In his quoted response to a question about soccer Mr. Ortiz-Abrego appeared to confuse the roles of coach and referee, although Dr. Hendrickson later cited this as evidence that Mr. Ortiz-Abrego understood the role of the referee and that this contributed to his competence to stand trial.

Dr. Hendrickson also inferred that Mr. Ortiz-Abrego understood the concept of attorney client communication privilege because in a phone call he suggested to his wife that his letters may be read. That actually suggests an understanding of lack of confidentiality, but does not necessarily indicate any understanding of the privilege of confidentiality with his attorney.

Here are a number of ward notes that Dr. Hendrickson did not choose to cite: 12/9/11 Can speak and understand few English words. Repeatedly noted: "I don't speak English." Repeated notes of being unable to communicate with him due to language barrier. 12/20/11 "Alexander appears to not retain the information provided." 12/23/11 Alex appears to be only able to discuss his needs with an interpreter. 12/28/11 3<sup>rd</sup> week of work group. When writer explained to the group about the job task Alexander could not comprehend the task.

11/12/12 through very broken language pt. told me that white pus came from this area earlier today. 1/28/12 Although broken English he verbalizes his needs without problems (concerning an eye infection). 2/6/12 Misunderstanding in which he thought he had been excused from class.

This selective citing of the record fits with comments from Mr. Ortiz' previous attorney, Ms. Samuels, to me on 2/10/11: "He (Dr. Hendrickson) had previously put up a lot of resistance to having a court certified interpreter and seemed upset about it still. Further, during one of the prior visits, he had made comments such as 'Why do cognitive issues in a client matter if we are to find him competent?' This was before he had done any evaluation. Since I had concerns about his ability to be objective on this case, especially given his prior statements, I asked that it [the evaluation] be videotaped."

In his report Dr. Hendrickson gave a detailed description of his interview of Mr. Ortiz-Abrego regarding how courts operate. The only pieces of accurate information that Mr. Ortiz-Abrego gave from his own knowledge was that the judge is the boss and that if he did not understand something he should ask his attorney. When legal concepts were explained to him he was sometimes able to answer questions about that information accurately and sometimes not. A repeated pattern in this interview was that Dr. Hendrickson would ask Mr. Ortiz-Abrego a very basic legal question that Mr. Ortiz-Abrego had studied extensively in class, Mr. Ortiz-Abrego would give a wrong answer, Dr. Hendrickson would explain the right answer to him (sometimes repeatedly) and ask the question again, Mr. Ortiz-Abrego would give a partially right answer, and Dr. Hendrickson would then conclude that Mr. Ortiz-Abrego understood that concept.

It is also of interest that Dr. Hendrickson chose, in this case, to depart from Western State Hospital's recommended policies and procedures for competence to stand trial evaluations in that no semi-structured interview was used. (Competency To Stand Trial And Conditional Release Evaluations: Current And Potential Role Of Forensic Assessment Instruments, *Washington State Institute For Public Policy, May, 2011*). From his accounting of the competency interview it appears that Dr. Hendrickson may have decided that he would not be able to get through such an interview with Mr. Ortiz-Abrego because of the latter's very limited legal vocabulary and understanding, and his diffuse, disorganized, and off-topic response patterns.

Dr. Hendrickson concluded that Mr. Ortiz-Abrego did not have a major mental illness that significantly interfered with his functioning ability. Dr. Hendrickson seemed to imply that a major mental illness is a necessary condition for someone to be found incompetent to stand trial. This is not the case and was not a requirement in the landmark Dusky decision, nor is it explicitly stated in Washington State law. Washington law does make reference to a mental disease or defect. Dr. Hendrickson gave Mr. Ortiz-Abrego a rule out diagnosis of Cognitive Disorder Not Otherwise Specified and later deferred to neuropsychology in this matter, and also gave him a diagnosis of borderline intellectual functioning. Both of these have been regarded by courts as mental defects. Dr. Hendrickson indicated that he was uncertain of his conclusions, yet concluded that Mr. Ortiz-Abrego met criteria for competence to stand trial.

Mr. Ortiz-Abrego's 4/16/12 discharge summary from Western State Hospital gave him diagnoses of Depressive Disorder, Cognitive Disorder, and Borderline Intellectual Functioning.

In a 4/24/12 supplement to his original report Dr. Hendrickson addressed questions of the court. Dr. Hendrickson reported that Mr. Ortiz-Abrego was able to track, understand, and remember information presented to him in TRC classes and quizzes. As noted above, Dr. Hendrickson was unable to demonstrate that Mr. Ortiz-Abrego had retained any of that information at the time of his 4/4/12 evaluation, but Dr. Hendrickson neglected to mention this. (In my review of the TRC class notes I was unable to find records indicating significant carry-over of legal information from one class to the next. In fact, on 1/20/12 he was stated that he had identified all courtroom personnel and what he did in the courtroom, but by 2/25/12 he

could only identify "some" courtroom personnel) Dr. Hendrickson felt that he was not qualified to answer the court's questions regarding the necessity of cognitive disability accommodations that I had recommended.

Mr. Koenig's declaration to the court concerning his experiences with Mr. Ortiz-Abrego indicated that he had spent at least 46 hours with him trying to explain the nature of his case and of court proceedings. He reported that Mr. Ortiz-Abrego was very slow to process verbal information, especially when it was abstract. He found that Mr. Ortiz-Abrego showed very little carry-over from one session to the next. He described Mr. Ortiz-Abrego as poor at quantitative concepts and understanding of spatial distances. He said that after Judge Craighead's ruling on 7/5/11 Mr. Ortiz-Abrego did not realize that a ruling had taken place and did not understand simple explanations of it. Even after his second period of restoration he would ask, "What is a trial?"

On 10/5/12 psychologist Mark Whitehall, PhD, reported that, on the Vineland Adaptive Behavior Scales-II, Mr. Ortiz-Abrego's partner, Maria Cortez-Barrera, rated Mr. Ortiz-Abrego as having receptive language abilities (in Spanish) at a 3-year-old level and expressive language abilities at a 5-year, 4 month level, overall below the 1<sup>st</sup> percentile (compared to a US population). His communication skills were rated significantly lower than his Daily Living and Socialization skills. These results were limited by considerations of non-standard translation of the Vineland and comparison to US norms. His Adaptive Behavior Composite Index was 38. This is low in the intellectually disabled range and substantially below his tested IQ. This result does not support Dr. Hendrickson's clinical judgment that Mr. Ortiz-Abrego's adaptive behavioral is higher than his intellectual test performance.

The purposes of the current evaluation were to confirm through more detailed testing the learning disability diagnosed at that abbreviated testing, to determine his competence to stand trial following competency restoration at Western State Hospital, and to comment further on possible cognitive accommodations at trial that might enhance his adjudicative competence.

**INTERVIEWS:** Mr. Ortiz-Abrego was interviewed in Spanish on 5/17/10 by Tedd Judd, PhD, neuropsychologist with the assistance of Diomaris Jurecska, neuropsychology graduate student (and native Spanish speaker). Much of the background information below was obtained at the 5/17/10 evaluation. He was interviewed again on 9/12/12 by Dr. Judd.

**Ethnic/Cultural/Language/Migration Background:** Mr. Ortiz-Abrego was born and partly raised in Cuscatancingo, a neighborhood of San Salvador, the capital of El Salvador, and later moved to the town of Ilobasco, Cabañas, El Salvador. (*Encyclopedia Britannica: Ilobasco is a town in north-central El Salvador. It is in a rich agricultural area (cattle, coffee, sugarcane, and indigo) but is known primarily for its clay dolls, a major item for sale to tourists, as well as for other types of pottery made from local clays. Since the completion in 1954 of a dam and hydroelectric complex on the Lempa River and the creation nearby of a lake recreation area, Ilobasco's tourist trade has grown. The town's population was swollen by refugees fleeing battles between government troops and leftist guerrillas in the early 1980s. Pop. (2005 est.) urban area, 22,200.*)

He is about the 7<sup>th</sup> of 13 children, but he was not completely sure which number. Two of his siblings were adopted to the U.S. He did not know the size of the town but it has 3 Catholic churches. He was uncertain about his history, especially how long different situations lasted or at what age events happened. His father died when Mr. Ortiz-Abrego was about 6 years old of alcohol abuse, as he understands it. His mother worked at selling fabric in the market. When Mr. Ortiz-Abrego was about 10 his mother had a mental illness which he attributed to her having 13 children and because of the death of her husband. She killed the chickens and

ducks she was raising because she thought they were of the devil. He thinks that she saw and heard things that were not there. She went to the Soyapango National Psychiatric Hospital in San Salvador where she was cured. When his mother got sick the family moved to Ilobasco. There was a period of time when the siblings all lived together without parents, then they were distributed to various places and he went for a year his Aunt Elena Ortiz in San Salvador, and then with his Aunt Alicia Abrego for about 7 years, from about age 10 to about age 17. He does not know if his mother is alive or not.

He repeated the first grade. He did not get good grades. He was not good at math. It was a one-room schoolhouse with all of the grades in one room. He left school in the 7<sup>th</sup> grade because they could not afford for him to go for longer.

He worked in a hardware store in Ilobasco and had to rely on the register because of his poor math. He worked as a barber in Ilobasco in his house cutting only men's hair. He learned this trade from an uncle. He likes soccer and played on a reserve team and earned a little money that way.

He came to the U.S. in 1999 for economic opportunities. He came into Arizona with his brother, Santiago. He was picked up and taken to the home of his maternal cousin, Orbolina. He did not like it there because they all drank, so he went to Seattle by bus to be with his cousin, Daysi, sister of Orbolina. He was picked up by immigration and sent to jail in Montana for 3 days and then to Seattle for a few days. Daysi paid \$3000 to get him out. He has worked in Safeway, in a hotel, as a dishwasher, and in construction. He worked in office maintenance for a car dealership from 2001 to 2003. His last work was in construction and ended in 2008. He was last living on unemployment.

**Spontaneous Complaints:** Mr. Ortiz-Abrego said that he has always been a somewhat anxious person and his hands sweat when he is anxious, but otherwise denied any emotional or behavioral problems. He has found it somewhat difficult to learn English, although he has not studied consistently. He is poor at math. He otherwise denied cognitive difficulties.

**Current Case:** Mr. Ortiz-Abrego said that Daysi has a daughter named Daysita who says that he touched her when he was living with them. He said that the time is unclear. He went to live with his wife in 2002. He met his "wife" in 2001. They moved in together 12/10/02. They have never married. Daysita was about 6 or 7 at that time. He does not know why this case is coming up now. He remembers one time that he came in and she was asleep and he touched her on the shoulder to wake her up. His cousin, Daysi, came to him and said that Daysita said he was touching her and he said yes, but not sexually.

He said that he does not know what is happening in court or what the defense is.

When asked about any previous legal difficulties he said that he went out with a male friend of Daysi's in 1999 and got arrested. Daysi bailed him out. He paid a fine. He also described the case of 6/22/06 in a manner consistent with the records concerning that investigation.

**Goals for the Evaluation:** Mr. Ortiz-Abrego did not have any understanding of the evaluation other than that it was an examination of his head.

**History of the Present Illness:** Mr. Ortiz-Abrego said that he was hit in the head with a rock by a friend when he was about 18 or 19. He showed a scar in his left parietal area. He remembers the event and reported that he had no loss of consciousness. He went to the hospital and had stitches and was released the same day. He did not notice any lasting symptoms or change in his abilities.

**Previous Medical History:**

**Pregnancy, birth, and development:** Mr. Ortiz-Abrego was not aware of any problems with his birth, with the pregnancy, or with his childhood development.

**Surgeries:** None.

**Accidents, injuries:** As noted above.

**Major illnesses:** Mr. Ortiz-Abrego said that he had some kind of fever in El Salvador and was unable to walk for a time afterwards but he was unable to identify what kind of fever it was with confidence. He thought it might have been typhoid. A significant minority of patients with typhoid fever have neurologic complications, with encephalitis (brain infection) being the most common.

**Hospitalizations:** None other than as noted above.

**Toxic exposures:** Mr. Ortiz-Abrego reported that at about age 13 his friend challenged him to eat a tempate seed which he did and it made him vomit and they took him to the hospital and they pumped his stomach. Tempate is also known as Jatropha and it is toxic in as small a dose as a single seed in children, producing primarily gastrointestinal symptoms, although neurologic symptoms are also possible.

**Mental Health History:** Mr. Ortiz-Abrego denied any significant mental health difficulties. However, he said that he had gone to a support group with Dr. Ayala, a Salvadoran in Seattle, for about 9 years. He found it supportive and helpful. He said that this group is to help people with addiction problems and, although he has no such problems, it helps him understand others who do.

**Alcohol and Drug Use:** None.

**Family History:** As noted above. A maternal aunt in the U.S. also had psychiatric problems after developing cancer. She would spend the night trying to chase spirits out of the house.

**Review of Neuropsychological Systems:**

**Sensory:**

**Vision:** Mr. Ortiz-Abrego reported no problems.

**Hearing:** Mr. Ortiz-Abrego reported no problems.

**Vestibular:** Mr. Ortiz-Abrego reported no problems.

**Smell/taste:** Mr. Ortiz-Abrego reported no problems.

**Tactile sensation:** Mr. Ortiz-Abrego reported no problems. He said that his palms sweat easily and that has been true his entire life.

**Pain:** Mr. Ortiz-Abrego reported no problems.

**Oversensitivity:** Mr. Ortiz-Abrego reported no problems.

**Motor:**

**Strength:** Mr. Ortiz-Abrego reported no problems.

**Coordination:** Mr. Ortiz-Abrego reported no problems.

**Tremor, jerking, abnormal movements:** Mr. Ortiz-Abrego reported no problems.

**Language:**

**Word finding:** Mr. Ortiz-Abrego reported no problems.

**Comprehension:** Mr. Ortiz-Abrego reported no problems.

**Reading:** Mr. Ortiz-Abrego reported no problems. He does not particularly like to read and is a bit slow and does not read as a habit.

**Writing/typing/computer use:** Mr. Ortiz-Abrego reported no problems. He has no computer skills.

**Math:** Mr. Ortiz-Abrego said he is weak in math.

**Visual-Spatial Skills (drawing, mechanical skills, way finding):** Mr. Ortiz-Abrego does not know how to draw and is not very good at reading maps or blueprints.

**Attention:** Mr. Ortiz-Abrego reported no problems.

**Memory:** Mr. Ortiz-Abrego reported no problems.

**Executive Functions:**

**Initiation:** Mr. Ortiz-Abrego reported no problems.

**Impulsivity:** Mr. Ortiz-Abrego reported no problems.

**Planning, Organization:** Mr. Ortiz-Abrego reported no problems.

**Review of Functions:**

**Transportation:** Mr. Ortiz-Abrego drives and reported no problems other than an accident in 2000. He said that he got his driver's license on the second try without studying.

**Finances and Money Management:** Mr. Ortiz-Abrego said that he used to pay the bills and said that he remembered to do so and did so accurately.

**Family Relations:** Mr. Ortiz-Abrego reported no problems with his wife and children. He said things were well with his siblings, as well, except that he did not get along with his brother-in-law.

**Socializing:** Mr. Ortiz-Abrego said that he had many friends.

**Recreation/Exercise:** Mr. Ortiz-Abrego played soccer regularly.

**Spirituality:** Mr. Ortiz-Abrego is Catholic would attend mass.

**Informant's perspective:** Mr. Ortiz-Abrego's first attorney said that it was extraordinarily difficult to get him to understand and remember information about the U.S. justice system, especially the functions of a jury, and of his case. He would repeatedly ask for things to be explained and then would not remember them at the next meeting. Her impression was that he was doing his best to understand and was not trying to be difficult.

His sister, Isabel Ortiz-Abrego, was interviewed by phone in Spanish on 5/19/10 by Tedd Judd, PhD. She reported that she lived apart from Mr. Ortiz-Abrego for much of their childhoods and did not know that much about him and his health, and did not know much about him and his life in the U.S. She confirmed that their father died of alcoholism and their mother had psychiatric problems and was in the psychiatric hospital.

She also said that his behavior was bad when he was a child and he was often fighting with others. She said that he was not very intelligent. She remembers that her mother told her that he was sick and vomited a lot and almost died and had to take a lot of medication and they took him to the hospital, but she does not recall more than that. She confirmed that he went to 7<sup>th</sup> grade but said that he was kicked out of the 7<sup>th</sup> grade because of problems but she doesn't know what kinds of problems, whether they were behavioral or academic. She has not been very close to him and said that they do not like each other much and there have been difficulties between them, so she has not been in much contact with him.

#### **BEHAVIORAL OBSERVATIONS:**

**Attitude:** Mr. Ortiz-Abrego was mostly attentive and cooperative. He appeared mildly anxious much of the time. He was drowsy especially during the TOMM, yawning and rubbing his eyes.

**Speech, Language:** His speech was a bit low in volume and indistinct in articulation. He was slow to respond and slow in his speech. He was vague, with few substantives or names and difficulty expressing ideas clearly. His comprehension of test instructions was impaired. He had difficulty understanding what was expected of him, and even when he understood he often had to have it re-explained for each new item in the same pattern.

**Motor:** Mr. Ortiz-Abrego had normal movement except that there was some facial droop on the right on spontaneous smile only.

**Affect:** Mr. Ortiz-Abrego was acutely tearful near the beginning of the interview, protesting his innocence. This was similar to my previous experience with him. He accepted direction to calm down and did not show this again, although there were several occasions when similar themes were discussed when he appeared to hold back tears.

**Self-Awareness:** Mr. Ortiz-Abrego did not seem fully aware of the quality of his test performance and appeared to think that he was doing somewhat better than he was.

**Effort, Validity:** Mr. Ortiz-Abrego gave a good effort on the tests and tolerated frustration well. This was a valid testing.

**TESTING:** *Testing was carried out in accordance with Judd, et al., (2009) Professional Considerations for Improving the Neuropsychological Evaluation of Hispanics. Hispanic Neuropsychological Society/National Academy of Neuropsychology. [www.hmps.org](http://www.hmps.org), Archives of Clinical Neuropsychology]; the 1990 "Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations" of the American Psychological Association, the International Test Commission's 2000 Test Adaptation Guidelines The Department of Health and Human Services 2002 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, and related guidelines and literature.*

Mr. Ortiz-Abrego was given the following tests on 5/17/10 and 9/12/12 in Spanish by Tedd Judd, PhD, neuropsychologist. This report consolidates two testing sessions two-and-a-half years apart. He has been under continuous observation during that time and there is no medical reason to expect that his cognitive abilities have changed substantially in that time. With the exception of the TOMM, no tests were repeated from the first session at the second session. Nevertheless, many tests probed similar functions at both sessions and the results in those areas were similar. The two testing sessions are combined in this report in order to give a more comprehensive picture of his functioning. The year of administration of each test is identified.

#### **RESULTS:**

##### **Effort, Validity:**

### **Test of Memory Malingering**

*The TOMM is a 2-alternative forced-choice recognition memory test for simple line drawings of common objects. Performances significantly below a chance level of performance are regarded as evidence of malingering, while performances that fall substantially below that achieved by individuals with significant brain disability and memory impairment are regarded as evidence of suboptimal effort on testing.*

Mr. Ortiz-Abrego had scores of 36, 38, and 42 on the TOMM. These scores are below US cut-off scores and below cut-off scores from Spain for a population of young adults with an average of high school education, but these scores are in the normal range for a clinical population of Latinos in the US with an average 9<sup>th</sup> grade education without motivation to malingering. It should be noted, however, that Mr. Ortiz-Abrego had scores of 43, 46, and 50 at the 5/17/10 evaluation, normal by US norms, so that he has been capable of a better performance. These scores are therefore indeterminate with respect Mr. Ortiz-Abrego's test effort, but raise the possibility that his test performance at the current evaluation may not be his optimal performance.

### **General Measures:**

#### **Wechsler Adult Intelligence Scale—3—Spanish**

*The WAIS-3 is a standard, individually-administered intelligence test with 14 subtests. These subtests can be administered alone or in combination to evaluate different aspects of cognitive functioning. Norms are by age. IQs are not reported here because they are of limited usefulness in neuropsychology and can be misleading, but properly trained professionals who may have use for them can derive such scores. The Spanish WAIS-3 was translated, adapted, and renormed in Spain. The non-verbal subtests are the same as the English version, while the verbal subtests have been modified, but are similar to the English versions. The norms from Spain are not appropriate for a Latin American population. For the non-verbal tests, both the English and Spanish norms are presented below to allow for some understanding of performance expectations relative to a U.S. population and to allow for comparisons among subtests. However, interpretation of these scores must be very cautious, and must take into account factors of culture, acculturation, and education.*

#### **VERBAL COMPREHENSION INDEX:**

*Vocabulary, defining words that are presented both printed and orally*  
*Similarities, saying how two things are alike, such as Carrot and Potato*

#### **PERCEPTUAL ORGANIZATION INDEX**

*Picture Completion, identifying what is missing from drawings, such as a cat with one ear not drawn*  
*Block Design, using red and white blocks to build pictured designs*  
*Matrix Reasoning, selecting the drawing that best completes an abstract array*

#### **WORKING MEMORY INDEX**

*Arithmetic, word problems presented orally are calculated mentally*  
*Digit Span, determining how long a string of digits the person can repeat, and also repeating backwards*

#### **PROCESSING SPEED INDEX**

*Digit Symbol—Coding The printed digits 1-9 are presented with an abstract printed symbol associated with each. Beneath this is a random string of digits and the person must fill in the appropriate symbol for each as rapidly as possible.*  
*Symbol Search, For each item, the person searches for either of 2 abstract symbols in an array of 5 as fast as possible.*

#### **OTHER SUBTESTS**

*Comprehension answering questions of social judgment.*

Subtest	Spain		U.S.	
	Age-Adjusted Scaled Score	Percentile	Age-Adjusted Scaled Score	Percentile
Vocabulary	6	9		
Similarities	8	25		
Picture Completion	4	2	4	2

Block Design	6	9	4	2
Matrix Reasoning	7	16	7	16
Arithmetic	7	16		
Digit Span	7	16		
Digit Symbol-Coding	6	9	3	1
Incidental Learning Pairing		30		20
Free Recall		75		50
Copy		9		3
Symbol Search	7	16	5	5
Comprehension	6	9		
<b>Index</b>				
Verbal Comprehension Index	82	12 (prorated)		
Perceptual Organization Index	71	3	70	2
Working Memory Index	79	8 (prorated)		
Processing Speed Index	81	10	69	2
Verbal IQ	77	6 (prorated)		
Performance IQ	71	3	67	1
Full Scale IQ	72	3		

Mr. Ortiz-Abrego performed in 2010 in the borderline intellectually disabled (formerly called mentally retarded) range compared to a normative population from Spain and in the intellectually disabled range compared to the U.S population. This is not based upon Salvadoran norms for this test and the test is not based upon culturally typical Salvadoran materials, ways of thinking, or concepts of intelligence, and so these results may not signify borderline intellectual disability relative to his culture of origin. These scores may reflect limited education or an education not oriented towards the skills measured by this test, rather than limited intellectual potential. However, these results do suggest that Mr. Ortiz-Abrego is likely to function intellectually at a level typical of the borderline intellectually disabled in the U.S. when it comes to dealing with U.S. formal institutions (child welfare, health care, legal system, education, mainstream employment, worker's compensation, immigration, banking). This functioning may include concrete thinking; difficulty applying abstract concepts, rules, and regulations; difficulty generalizing from one situation to another; difficulty coping with complexity; difficulty following extended arguments or lines of logical reasoning; and difficulty contemplating hypothetical or conditional (if, then) reasoning. His subtest scores were relatively homogeneous, with no consistent areas of notable cognitive strength or weakness. Since Mr. Ortiz-Abrego is to be judged in a US court, a comparison to US populations can be considered appropriate for forensic purposes, even though it may be less appropriate for clinical diagnoses.

### **Neuropsi Atención y Memoria:**

*The NAM is a neuropsychological screening test in Spanish which includes subtests of*

***Orientation:*** orientation to time, space, and self

***Attention:*** repetition of digits forwards, pointing span forwards, timed visual scanning for a target, vigilance for spoken digits, serial 3s,

***Memory:***

***Working memory:*** digit span backward, pointing span backward

***Encoding:*** learning a list of 12 words over 3 trials; learning a list of 12 word pairs over 3 trials, with 15 minute recall;

immediate recall of two short stories; copy of a semicomplex or complex figure; memory for two faces and names; and  
*Recall:* 15-minute delayed recall, category cueing, and multiple choice recognition for word list, with 15-minute delayed  
 recall for word pairs, stories, figure, and names, and 15-minute delayed recognition for faces.  
*Executive functions:* verbal fluency for animals and words beginning with "P;" non-verbal fluency for line drawings, concept  
 formation; copying complex hand movements and the Stroop test.  
 Norms are from Mexico and Colombia by age and education.

Subtest	Age & Education-Adjusted	
	Scaled Score	Percentile
<b>Orientation</b>		
Time	11	63
Space	10	50
Person	10	50
<b>Attention &amp; Concentration</b>		
Digits forwards	6	9
Cubes forwards	13	84
Visual Detection	10	50
Digit detection	12	75
Serial 3s	9	37
<b>Memory</b>		
<b>Working memory</b>		
Digits backwards	12	75
Cubes backwards	9	37
<b>Learning</b>		
Word learning	12	75
Paired associates learning	8	25
Story memory	5	5
Figure copy	6	9
Faces	12	75
<b>Delayed recall</b>		
Word delayed recall	11	63
Word cued delayed recall	12	75
Word delayed recognition	11	63
Paired associates recall	12	75
Story recall	2	0.4
Figure recall	7	16
Face recognition	10	50
<b>Executive Functions</b>		
Category formation	8	25
Semantic verbal fluency	8	25
Phonemic verbal fluency	7	16
Non-verbal fluency	9	37
Motor functions	9	37
Stroop interference time	10	50

Mr. Ortiz-Abrego performed in 2010 within normal limits for his age and education on most subtests, but had notable difficulties on story memory. He was embarrassed by this. His story memory was furthermore notable not just for failing to recall but for errors in recall, such as getting names wrong, substituting a birthday for a wedding anniversary, saying that the protagonist was buying a cake instead of buying ingredients for a cake, and indicating that they were coming from Acapulco instead of going to Acapulco. His copy of a complex figure was impaired due to poor planning, consistent with his WAIS-III performances. This makes it invalid as a visual memory test.

### **Batería Neuropsicológica en Español (Neuropsychological Battery in Spanish):**

*The BNE consists of 8 tests adapted from neuropsychological tests in English. The Visual Memory Test consists of presentation of the 3 cards from the Visual Reproduction Subtest of the Wechsler Memory Scale I for 10 seconds each, followed by an immediate recall of all of the drawings. There are up to 5 successive presentations and recalls, to a criterion of accuracy of reproduction. The Verbal Prose Memory Test consists of up to 5 successive presentations and recalls of a story to a criterion of recall. Both of these tests have a 1 hour delayed recall and a recognition memory trial.*

*The BNE is normed by age, education, and geography (the US-Mexico border, and Spain).*

	<b>T-score</b>	<b>Percentile</b>
<b>Visual Memory</b>		
1 <sup>st</sup> Recall	44	27
Visual Learning	50	50
Delayed Recall	56	73
<b>Verbal Prose Memory</b>		
1 <sup>st</sup> Recall	37	10
Verbal Learning	48	42
Delayed Recall	30	2
Recognition	51	54

Mr. Ortiz-Abrego performed normally in 2010 on the visual memory test of the BNE, where the simpler drawing figures allowed him to show his memory abilities better than on the NEUROPSI. By contrast, he continued to show impaired performance on story memory, especially for delayed recall and for initial recall. He did relatively better with learning with repetition and his recognition memory was normal. His recalls were again characterized by distortion of the content of the stories.

### **Woodcock-Muñoz-R Tests of Cognitive Abilities**

*The WM-R is a well-normed and broad-ranging battery of tests of cognitive abilities. Its subtests measure various aspects of visual, auditory, verbal, spatial, and conceptual abilities, along with measures of processing speed, memory, planning, and problem-solving skills. It gives age and grade- equivalent scores equated to U.S. age and educational levels in English. It is NOT, therefore, normed to a Spanish-speaking population and cannot be used for a direct comparison of possible deficits.*

<b>Subtest</b>	<b>Age-Equivalent</b>	<b>Grade-Equivalent</b>
Picture Vocabulary	13-4	8.0

Mr. Ortiz-Abrego's picture vocabulary in 2010 was at the low end of the normal range, consistent with his achieved IQ.

### **Woodcock-Bateria III Spanish Tests of Cognitive Abilities**

*The WB-III is a well-normed and broad-ranging battery of tests of cognitive abilities. Its subtests measure various aspects of visual, auditory, verbal, spatial, and conceptual abilities, along with measures of processing speed, memory, planning, and problem-solving skills.*

The WB-III gives age- and grade- equivalent scores equated to U.S. age and educational levels in English. It is NOT, therefore, normed to a Spanish-speaking population and cannot be used for a direct comparison of possible deficits. Since Mr. Ortiz-Abrego is to be judged in a US court using interpreters and translators, a comparison to US populations using translated tests can be considered appropriate for forensic purposes, even though it may be less appropriate for clinical diagnoses.

<b>Subtest</b>	<b>Age-Equivalent</b>	<b>Scaled Score</b> (comparable to IQs)	<b>Percentile</b>
Verbal Comprehension	8-8	78	7
Visual Matching	6-4	44	<0.1
General Information	8-10	76	5
Auditory Attention	5-1	57	0.2
Decision Speed	5-4	45	<0.1
Memory for Words	5-0	73	4
<b>Clusters</b>			
Comprehension-Knowledge	8-9	74	4
Processing Speed	5-11	43	<0.1
Knowledge	7-3	69	2

On tests of cognitive abilities in 2012 Mr. Ortiz-Abrego's performances ranged from the borderline level of intelligence to extremely low. On one of his best tests, he was able to name pictures of a calculator, a mechanic, and a funnel, but not a pyramid, chess, or clouds. He could give synonyms for *start* and *hide* but not for *send* or *give*. He could give antonyms for *poor* and *much*, but not for *life* or *save*. His auditory attention and speed of information processing were very severely impaired (below the 0.1 percentile).

### **Woodcock-Bateria III Spanish Tests of Achievement**

*The WB-III is a well-normed and broad-ranging battery of tests of academic achievement in Spanish. Its subtests measure various aspects of reading, writing, arithmetic, social studies, science, and humanities achievement, based primarily upon knowledge of content, but also including some writing, conceptual, and problem-solving skills. It gives age and grade- equivalent scores equated to U.S. age and educational levels in English. It is NOT, therefore, normed to a Spanish-speaking population and cannot be used for a direct comparison of possible deficits.*

<b>Subtest</b>	<b>Age-Equivalent</b>	<b>Scaled Score</b> (comparable to IQs)	<b>Percentile</b>
Letter-Word Identification	>30	110	75
Reading Fluency	6-11	63	<1
Story Recall	6-7	73	4

Understanding Directions	4-5	58	0.3
Calculation	7-7	34	<0.1
Passage Comprehension	8-5	80	9
Story Recall—Delayed	3-0	14	<0.1
Oral Comprehension	9-7	86	18
Reading Vocabulary	7-9	74	4
Quantitative Concepts	8-6	70	2
Academic Knowledge	6-1	64	1
<b>Clusters</b>			
Oral Language	4-11	54	<0.1
Oral Comprehension	6-10	77	6
Broad Reading	12-4	86	18
Reading Comprehension	8-1	74	4

Mr. Ortiz-Abrego scored above average in 2012 compared to a US population on Letter-Word Identification. This exception is extremely common in testing with the Woodcock-Bateria and other measures of word reading in Spanish as compared to English. The reason for this is because the Letter-Word Identification subtest in English includes many irregularly spelled words which English speakers learn to read individually as their vocabulary develops, whereas Spanish all words are spelled regularly. Once the Spanish reader learns the phonetic rules of Spanish pronunciation, virtually any word can be read, even if it is not in the reader's vocabulary. It is notable that Mr. Ortiz-Abrego was extremely slow on this test, taking over 7 minutes to read 65 words, or less than 10 words/minute. He used his finger as a guide as he sounded out each word.

By contrast, Mr. Ortiz-Abrego's Spanish reading comprehension speed (Reading Fluency subtest) was below the 1<sup>st</sup> percentile. He was able to complete only 10 true/false sentences in 3 minutes that are of the type: "Dogs have five legs." "People see with their eyes."

Mr. Ortiz-Abrego was very severely impaired in his memory for short, simple, concrete stories, in understanding directions, in calculations, and in his academic knowledge overall. For example, he knows what oceans and skeletons are but could not identify a veterinarian, an earthquake, or the Red Cross.

As was the case at the evaluation two years ago on two different tests, his immediate story memory was moderately impaired, but his recall of those stories after a delayed interval was severely impaired. This is also how he described his difficulties and how he performed on Dr. Hendrickson's evaluation, that is, he was able to comprehend some very basic concepts over the short term after Dr. Hendrickson had explained them, but could not recall those concepts that he had shown some ability to deal with in restoration classes.

#### **Competence Assessment for Standing Trial—Mentally Retarded**

*The CAST-MR is a structured interview regarding knowledge of basic legal concepts, skills to assist defense, and understanding of case events. It is based upon the Dusky case criteria for competence to stand trial. The first two sections involve 3-alternative multiple choice questions. The CAST-MR was normed on mentally retarded criminal defendants who were found competent to stand trial versus those found not competent to stand trial. Recent research suggests that the CAST-MR may overestimate competence, but it is currently the only such available instrument.*

Mr. Ortiz-Abrego was examined using the unresearched Napa Valley Hospital Spanish translation of the CAST-MR. He followed along on the written Spanish version.

Mr. Ortiz-Abrego had scores of 14 and 9 on parts I (25 questions) and II (15 questions). This is slightly better than the average of the mentally retarded group found not competent to stand trial (12.3 and 8.2), substantially worse than the group found competent to stand trial (18.3 and 10.7), and much more substantially worse than the scores of those of normal intelligence (23.4 and 13.1). Overall, then, his scores are quite substandard, and most resemble the scores of mentally retarded defendants found not competent to stand trial.

### **Word Accentuation Test—Chicago**

*The WAT consists of 40 Spanish words with irregular but unmarked accents to be read aloud. Readers who are familiar with the words will accent them properly, giving an indication of their reading recognition vocabulary and an estimate of pre-illness intellectual level in a manner corresponding to the NART and WTAR tests in English. Provisional norms estimate WAIS-III (Spain) IQ using a regression equation by age, education, and WAT score (JCEN 28:1201-7).*

Mr. Ortiz-Abrego's recognition reading vocabulary in 2010 and demographics suggested an intellectual level of 70, in the borderline range and consistent with his achieved IQ.

### **Sensory-Perceptual and Motor Skills:**

#### **Sensory Perceptual Examination**

*On the Sensory-Perceptual Examination the person is stimulated on one side of personal space or on both sides (double simultaneous stimulation) and has to indicate where the stimulation was. This is carried out in the tactile (touch to the back of the hand or the cheek), visual (fingers wiggling in the peripheral visual fields) and auditory (sound of fingers rubbing together) modalities. This test is sensitive to sensory losses and unilateral inattention. The person also must identify fingers by touch, identify numbers traced on the finger tips, and identify geometric shapes by touch. Visual fields are also tested.*

Mr. Ortiz-Abrego's performance on the Sensory Perceptual Examination was normal in 2010.

#### **Coin Rotation Test**

*In the Coin Rotation Test the person is asked to rotate a nickel 20 times in each hand for 3 trials each. The speed of rotation is a sensitive measure of fine motor dexterity. Preliminary norms are for adult males.*

Mr. Ortiz-Abrego took 13 seconds with his preferred right hand and 14 seconds with his left hand, both in the normal range in 2010.

### **Adaptive Functioning:**

#### **The Bidimensional Acculturation Scale for Hispanics**

*The BAS is a 24-item bilingual scale developed for Mexican and Central American immigrants in the U.S. Items are rated on a 4-point scale, with 3 items each for Language Use and for Electronic Media, and 6 items for Language Proficiency. Domains are rated low, moderate, or high with respect to Spanish language and Hispanic identity and also with respect to acculturation to English and U.S. culture.*

Domain	English		Spanish	
	Average	Classification	Average	Classification
Language Use	1.7	low	4.0	high
Language Proficiency	1.5	low	3.3	high
Electronic Media	1.3	low	3.7	high

Mr. Ortiz-Abrego chose to use the Spanish version of this questionnaire in 2010 to rate himself, suggesting a preference for reading in Spanish. He rated himself in the low range in English and in the high range in Spanish on all dimensions. It is of interest that he rated himself only "good" and not "very good" at reading, writing, and understanding radio programs and music in Spanish, suggesting a possible language disability.

## CONCLUSIONS:

### Overview:

Mr. Ortiz-Abrego is functioning at a borderline level of intelligence relative to U.S. expectations, with notably concrete thinking. In addition to this limitation, he has a further impairment in verbal comprehension which further affects his memory for concepts, ideas, narratives, and names. This can be characterized as a specific learning disability in verbal conceptualization and particularly in the speed of his processing of information. He is also weak in math and in quantitative thinking generally. The cause of this disability is unknown, but it is probably lifelong. There is some possibility that it could be due to neurologic complications of traumatic brain injury, typhoid fever, and/or *Jatropha* toxicity, although none of these can be confirmed.

### Evaluation of Malingering:

*Contemporary forensic neuropsychological practice calls for the evaluation of the possibility of malingering. Such inferences are particularly difficult in cross-cultural contexts because of culturally variable means of expressing symptomatology, and because of limited cross cultural data on symptom validity tests. Aspects of test behavior that indicate a valid test protocol was obtained include the following observations of clinical interview and test performance:*

*Slick, Sherman, and Iverson (Clin. Neuropsych, 13, 545-561) have proposed diagnostic criteria now in widespread use which will now be reviewed with respect to this client:*

A. Substantive external incentive	Yes
B1. Definite negative response bias	No
B2. Probable response bias	No
B3. Discrepancy between test data and known patterns of brain functioning	No
B4. Discrepancy between test data and observed behavior	No
B5. Discrepancy between test data and reliable collaborator reports	No
B6. Discrepancy between test data and documented background history	No
C1. Self-reported history is discrepant with documented history	No
C2. Self-reported symptoms are discrepant with known patterns of brain functioning	No
C3. Self-reported symptoms are discrepant with behavioral observations	No
C4. Self-reported symptoms are discrepant with information obtained from collateral informants	No
C5. Evidence of exaggerated or fabricated psychological dysfunction	No
D. Group B and C behaviors not fully accounted for by psychiatric, neurologic or developmental factors	NA

*Definite Malingered Neurocognitive Deficit = A, B1, D*

*Probable Malingered Neurocognitive Deficit = A, 2 or more of B2-6 or one of B2-6 and one or more of C criteria, D*

*Possible Malingered Neurocognitive Deficit = A, one or more C criteria, D; or Definite or Probable criteria without D.*

In reviewing these criteria, Mr. Ortiz-Abrego is judged to have No Malingered Neurocognitive Deficit.

### **Competence To Stand Trial (CST):**

*The 1959 Supreme Court Dusky decision set a minimum standard for CST or adjudicative competence. Courts are free to set a higher standard. The Dusky standard is a standard of capacities, and is independent of mental health diagnoses and disabilities (Timothy J. v. Superior Court, supra, 150 Cal.App.4<sup>th</sup> 847). Washington state RCW 10.77.060 specifies that "If the defendant suffers from a mental disease or defect, or has a developmental disability, [the evaluation shall include] an opinion as to competency." However, it does not require a diagnosis for a ruling of incompetence to stand trial. According to Dusky, the defendant must have a rational as well as factual understanding of the charges against him or her and the penalties associated with them. Second, the defendant must have the ability to cooperate with an attorney in his or her own defense. The defendant must also be able to assist in preparing a defense (Drope) and participate in legal decisions required as the case unfolds (Godinez). Adjudicative competence is a decision of the court based upon the totality of its evidence, only some of which I have access to, and also upon legal standards and societal values. My required opinion regarding adjudicative competence is advisory only.*

Practice has established 14 pertinent domains of competence, reflected in the categories of the Revised Competency Assessment Instrument. I will summarize Mr. Ortiz-Abrego's capacities, as determined by my evaluation, according to these domains below.

#### **1. Understanding/Appreciation Of Charges**

Mr. Ortiz-Abrego understands the nature of the act that he is charged with and has some appreciation of the seriousness of the charge. He is likely to be unreliable in naming the specific charge.

#### **2. Appreciation Of The Range And Nature Of The Penalties**

Mr. Ortiz-Abrego understands that he faces a possible long prison term. He is generally weak in his understanding of quantitative concepts and passage of time and in this way is somewhat limited in his appreciation of the range and nature of the penalties. While this limitation is not sufficient to render him incompetent, it does mean that he will need extra explanation and illustration of possible sentences in any decisions such as a plea bargain.

#### **3. Appraisal Of Available Legal Defenses**

Mr. Ortiz-Abrego has a primitive grasp of the nature of a legal defense in that he claims that he is falsely accused. He has very little idea of how to assemble or present evidence to this effect.

#### **4. Appraisal Of Functions Of Courtroom Participants**

Mr. Ortiz-Abrego has an unstable sense of the roles of courtroom participants. He was apparently able to demonstrate such knowledge briefly at some level at Western State Hospital immediately following intensive instruction, but he has not retained that information to be able to demonstrate it for Dr. Hendrickson, Mr. Koenig, or myself. On the CAST-MR he showed confusion regarding the roles of the judge, jury, and his attorney, particularly with respect to their allegiances. This is similar to his confusion regarding the roles of coach and referee in soccer. It appears that he tends to see all of them as allied authority figures.

#### **5. Understanding The Court Procedures**

Mr. Ortiz-Abrego has some dim understanding that evidence is presented in court, but has no significant appreciation of who presents what evidence when or towards what ends. He has no appreciable understanding of rules of evidence, rights of the defendant, or the sequence of events. He has no stable concept of who makes which decisions.

#### **6. Motivation To Help Self In The Legal Process**

Mr. Ortiz-Abrego is very motivated to help himself.

#### **7. Appraisal Of Likely Outcome**

I have not seen evidence that Mr. Ortiz-Abrego has even the prerequisites of understanding the decision-making process of the court in order to be able to understand a likely outcome. That is, he does not understand how decisions are made in court and by whom, so he is unable to judge the likelihood that any particular legal strategy might succeed.

#### **8. Planning Of Legal Strategies**

Mr. Ortiz-Abrego asserts that he is not guilty. Beyond that assertion, I have not seen evidence that he is capable of planning a legal strategy. He does not grasp the concept of a plea bargain.

#### **9. Ability To Cooperate Rationally With Counsel**

Mr. Ortiz-Abrego trusts his attorney and wants to cooperate with him. He is not hampered by psychotic thoughts or departures from reality. However, he is extremely limited in his ability to follow rational thought processes to a degree that renders him, in my opinion, incompetent to stand trial.

#### **10. Capacity To Disclose Pertinent Information To Counsel**

Mr. Ortiz-Abrego is quite willing to disclose information to counsel. He is exceptionally inarticulate in being unable to describe specific people, times, and events. He is probably capable of describing the events surround the alleged crime in a manner that his attorney, a judge, and jury could make some sense of, but his ability to place other events and people in a comprehensible time and place is doubtful. If the information that he needs to disclose is largely confined to the events of the alleged crime then he is probably barely acceptably capable of such disclosure.

#### **11. Capacity To Testify**

Mr. Ortiz-Abrego's capacity to testify is similar to his capacity to disclose information to counsel, except that multiple emotional breakdowns on the stand are likely.

#### **12. Capacity To Realistically Challenge Prosecution Witnesses**

Mr. Ortiz-Abrego is not capable of realistically challenging witnesses in the real time of a trial. If his attorney were to work with him with a transcript of testimony I estimate that it could take from 30 minutes to 2 hours for him to review each minute of live testimony and express his challenge. For specific types of testimony he may not be capable of comprehending the implications under any circumstances.

#### **13. Ability To Manifest Appropriate Courtroom Behavior**

Mr. Ortiz-Abrego is likely to have tearful emotional breakdowns on the stand or at other times when something is asked of him, including when his attorney consults him. Otherwise he is likely to be very passive.

#### **14. Capacity To Cope With The Stress Of Incarceration Awaiting Trial**

I do not expect this capacity to change from what it has been over the past 2 years.

### Conclusions

Mr. Ortiz-Abrego is not competent to stand trial due to his lack of understanding of the nature of trials, of courtroom proceedings, rules, and participants, and his inability to track those events so as to participate meaningfully in decisions about his case.

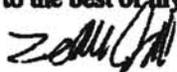
### Remediation

At my 2010 evaluation I had some optimism that disability accommodations might allow Mr. Ortiz-Abrego to participate competently in his trial. The events of the past 2 years have dashed that optimism. Mr.

Ortiz-Abrego has had two lengthy and intensive efforts at competency restoration with good cooperation and participation and with the best instruction and interpretation that the State has been able to provide. These have failed. Attempts to implement my recommended accommodations have produced very modest improvement in communication between Mr. Ortiz-Abrego and his attorney and at Western State Hospital. I cannot foresee any other restoration effort that could have a different outcome.

I appreciate this opportunity to work with Mr. Ortiz-Abrego and his family. Please feel free to call me with any questions, including any more specific information or opinions concerning forensic issues.

I declare that the information contained within this document was prepared and is the work product of the undersigned, and is true to the best of my knowledge and information.



**Tedd Judd, PhD, ABPP**  
Diplomate in Clinical Neuropsychology  
Certified Hispanic Mental Health Specialist

Copies sent to:  
James Koenig

# **APPENDIX F**

Video transcription of forensic interview  
at Western State Hospital

March 2012

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, )  
Plaintiff, )  
 ) No 08-1-12172-7 SEA  
Vs )  
 )  
ALEXANDER ORTIZ-ABREGO, )  
Defendant. )

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INTERVIEW OF ALEXANDER ORTIZ-ABREGO  
CONDUCTED BY DR. RAY HENDRICKSON  
March 6 and 14, 2012

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Western State Hospital  
Tacoma, Washington

APPEARANCES:

DR. RAY HENDRICKSON  
JAMES E. KOENIG, Attorney at Law  
KAREN HORN, Interpreter  
VERLA VIERA  
DRS. BLOSSOM and BAIN (March 6)  
MS. HALL (March 6)

1 March 6, 2012

2 EXAMINATION

3 BY DR. HENDRICKSON:

4 Q Good morning, Mr. Ortiz-Abrego.

5 A Good morning.

6 Q And I'm Dr. Hendrickson, as you may remember.

7 A Yes.

8 Q I want to introduce --

9 A I have seen you, but I didn't know your name.

10 Q Okay. I'm going to ask the people in the room to introduce  
11 themselves. We'll just start with Dr. Bain.

12 DR. BAIN: I'm Dr. Bain, a postdoctoral fellow working  
13 with Dr. Hendrickson.

14 DR. BLOSSOM: My name is Dr. Julia Blossom. I'm also  
15 a postdoctoral fellow working with Dr. Hendrickson.

16 MR. KOENIG: Jim Koenig.

17 MS. VIERA: Verla Viera.

18 MS. HALL: Ms. Hall, predoctoral practicum resident  
19 with Dr. Hendrickson.

20 Q (By Dr. Hendrickson()) Okay. Mr. Ortiz-Abrego, today we're  
21 going to be talking about a couple different things. First  
22 we're going to be talking about how you are doing today and  
23 how you're functioning. Then we'll talk a little bit later  
24 about the charges that you're facing and what the police say  
25 you did to get those charges and how the court functions.

1           The court has asked us to do this and to write a report,  
2           which we'll send to your attorney, to the prosecuting  
3           attorney, the judge, and some others. Because the court has  
4           asked us to do this evaluation and to write the report and  
5           send it to those people, what we're doing today is not  
6           secret or confidential. You don't have to talk to us at all  
7           today, and if you feel uncomfortable about answering any  
8           questions, just tell us. However, we'd like to have your  
9           best response because we don't want to guess how you're  
10          doing.

11         A     Yes.

12         Q     You have a right to your attorney, and of course your  
13               attorney is here to assist you. He can't answer questions  
14               for you, but maybe we will ask you to ask him questions  
15               sometimes.

16         A     What do you mean by that? I've already asked him  
17               questions.

18         Q     Okay. I may ask you, if you don't know the answer to a  
19               question that I ask, for example, I might ask you to ask  
20               your attorney.

21         A     Okay.

22         Q     So with that understanding, do you understand that today's  
23               proceeding is not secret or confidential?

24         A     Yes.

25         Q     What does that mean, that it's not confidential?

1 A I don't know. I don't know what that means. If you could  
2 explain it to me in Spanish.

3 Q Well, do you know what it means to be--to have things be  
4 secret?

5 A What do you mean? A secret about what?

6 Q Anything.

7 A A secret would be when someone speaks secretly like in a  
8 low voice.

9 Q Okay. What we're doing today is not secret because it will  
10 be put into a report, which goes to those people I mentioned  
11 the judge, the prosecutor and the court.

12 A Yeah.

13 Q Does that make sense to you?

14 A It doesn't matter, you know.

15 Q All right. What's your date of birth?

16 A I actually don't know.

17 Q How old are you?

18 A Thirty-five, I think.

19 Q I meant to tell you one more thing. We have been asked to  
20 video record this with a video camera, and a copy of the  
21 recording will be provided to your attorney, to the  
22 prosecutor in this case. Are you okay with that recording?

23 A I don't know. That's something for you guys. I don't have  
24 a problem with it.

25 Q Okay. Thank you very much. Now, if you were born in

1 1935 -- I'm sorry-- if you are 35 years of age, what do you  
2 think that makes your birth date?

3 A At Christmastime. And my wife always remembers that for  
4 me.

5 Q What's your wife's birthday?

6 A I don't know.

7 Q How long have you been married?

8 A I'm not married. We weren't married, but we've been  
9 together for about ten years. I don't remember exactly. It  
10 would be more or less ten years.

11 Q Are your parents alive?

12 A No.

13 Q When did they die?

14 A When I was little.

15 Q Okay. How is your mood? How is your mood today?

16 A Not so good. I'm feeling kind of discombobulated.

17 Q I'm sorry?

18 A I'm kind of dizzy.

19 Q How long have you been dizzy?

20 A I don't really know how long it's been. It's been days  
21 now, I don't -- it's been -- I don't remember the date, but  
22 it's been some time. My wife tells me I've been here for  
23 two years now.

24 Q My question was how long have you been dizzy?

25 A I haven't really paid attention.

1 Q So it doesn't sound like it's bothering you very much?

2 A I feel kind of badly, but --

3 Q Are you taking any medication?

4 A Yes.

5 Q What kind of medication?

6 A I take -- I take four. One of them is Celexa. There is  
7 another one for my blood, at least that's what the doctor  
8 says. I don't know myself. There is another one for pain,  
9 and then there is a little red one for my stomach.

10 Q What's the Celexa for?

11 A They say that it's for depression. That's what they say.

12 Q Who says that?

13 A In the jail the doctor told me that that's what it was  
14 for. That's what he said it was for. I don't know.

15 Q Okay. Is it helping it?

16 A I take it. They say it's good for me. I take it.

17 Q How have you been sleeping?

18 A I sleep a little bit. But they give me a pill so that I  
19 can sleep.

20 Q So how many hours of sleep do you get a day?

21 A I haven't paid attention. Well, I take it, and I couldn't  
22 tell you how many hours, but I take it and then I sleep.  
23 And then once I wake up, I can't go back to sleep anymore,  
24 and I just lay there in bed. Maybe it's four hours, or  
25 maybe five.

- 1 Q Is that enough for you?
- 2 A That's all that I'm able to sleep.
- 3 Q What time do you go to bed?
- 4 A Sometimes it's around ten or eleven, I think.
- 5 Q And what time do you get up in the morning?
- 6 A I really haven't paid a lot of attention. Sometimes it's
- 7 later.
- 8 Q How's is your appetite?
- 9 A Yes, I eat.
- 10 Q Well my question is --
- 11 A Sometimes I don't.
- 12 Q Is your appetite -- do you get enough food or do you need
- 13 more food? Too much food?
- 14 A The food is good. It's good.
- 15 Q How is your energy level?
- 16 A I don't know about energy.
- 17 Q Do you go out to the yard for exercise?
- 18 A Sometimes I go out. I did go out.
- 19 Q What do you do when you go out to the yard?
- 20 A Walk. Sometimes I sit down over there.
- 21 Q Do you go to the gym?
- 22 A No.
- 23 Q Why not?
- 24 A I just don't.
- 25 Q Do they offer it to you?

1 A Sometimes I go, but we go in to clean. Sometimes I work in  
2 there doing cleaning, with a towel is all.

3 Q All right. Are you having any thoughts of hurting yourself  
4 or committing suicide?

5 A No.

6 Q Have you ever attempted suicide?

7 A No.

8 Q Are you having thoughts of hurting other people?

9 A No.

10 Q Are you having thoughts of people are following you or  
11 trying to hurt you or come after you, interfere with your  
12 life?

13 A For instance?

14 Q Well, if somebody -- you think someone is after you, trying  
15 to kill you.

16 A No.

17 Q Okay. When you watch television does the television speak  
18 to you, send you messages?

19 A One time I thought it might be, this loud buzzing in my  
20 ears, I thought it might be coming from the television, but  
21 it wasn't. Even the television, once it was turned off, the  
22 sound continued. It was a buzzing in my ears. Loud squeak

23 Q When was the last time that you had that buzzing in your  
24 ears?

25 A It sometimes goes on for days, but I've been told that

1           maybe that's something that goes along with depression.

2       Q     Who told you that?

3       A     The doctor in the jail told me that that's why it was  
4           happening.

5       Q     Did you discuss that with the doctor here?

6       A     I haven't seen a doctor here. I did tell them at the  
7           school that my -- there is buzzing going on in my head.

8       Q     Are you saying that you've never seen a doctor here since  
9           you've been to the hospital?

10      A     One time I did go for my teeth. I have seen a lot of  
11          doctors here. I've been sent here quite a few times.

12      Q     What kind of doctors have you seen here?

13      A     There was a real tall guy. There was another one.

14      Q     What did these doctors do or what's he --

15      A     He said he was a doctor.

16      Q     What kind of doctors? Are these medical doctors,  
17          psychiatrists?

18      A     There's plenty of doctors. Some of them are regular  
19          doctors.

20      Q     How do you know that?

21      A     They tell me that they're doctors.

22      Q     When was the last time you saw a doctor here?

23      A     When they brought me here, a doctor saw me, I was told.

24      Q     All right. When was that?

25      A     It's been -- I think it's been about three months now.

1 Q Sounds about right. Do you have any special powers like  
2 reading people's minds or doing things other people can't  
3 do?

4 A I don't have any powers. What do you mean by powers?

5 Q Do you think people are stealing your thoughts from your  
6 head or trying to control your thoughts in some way?

7 THE INTERPRETER: What was the second thing, stealing  
8 or --

9 Q Controlling.

10 THE INTERPRETER: Controlling.

11 A I don't understand much about thoughts, what people think  
12 and that kind of thing.

13 Q Do you hear people's voices when you're by yourself in your  
14 room when there is no one else around?

15 A Sometimes. Mostly when I can't sleep, like after a few  
16 days of not sleeping well, I do. And sometimes days go by  
17 when I can't sleep at all. And that's when I do think that  
18 I'm hearing things.

19 Q Well, tell us about those things. What do you hear?

20 A Sometimes it's like somebody's laughing.

21 Q Male or female?

22 A I haven't really paid attention to who it was. It isn't  
23 all the time, it's just sometimes.

24 Q How often?

25 A When I don't sleep well, I get a little bit that way.

- 1 Q When was the last time that happened?
- 2 A It's been several days ago now.
- 3 Q Do they do anything besides laughing? Do they talk to you  
4 and tell you things to do?
- 5 A No.
- 6 Q I'm going to give you three things to remember, and then  
7 I'm going to ask you in a few minutes to tell me what they  
8 are, so try to remember them.
- 9 A Yes.
- 10 Q House, purple and airplane. can you say those three  
11 things?
- 12 A Could you tell me that again?
- 13 Q House, purple, airplane. Repeat it, please.
- 14 A House -- it was house and airplane. The other one I  
15 forgot. Could you tell me that one again?
- 16 Q Purple.
- 17 A Could you say all three again for me?
- 18 THE INTERPRETER: I can. You don't have to repeat  
19 them again.
- 20 Q House, purple, airplane.
- 21 Can you say it one more time?
- 22 A House, purple and airplane.
- 23 Q All right, thank you. What's today's date?
- 24 A I didn't pay attention to that.
- 25 Q What's your best guess?

- 1 A I didn't notice. I don't know.
- 2 Q Well, is it --
- 3 A They put it up there. I could go look.
- 4 Q No, I want your to tell me what you think it is. Do you  
5 think it's summer, winter, spring, or fall?
- 6 A I don't know. Maybe winter, but I don't know.
- 7 Q What makes you think it's winter?
- 8 A Because it's cold out.
- 9 Q Okay. So what months could it be if it were wintertime?
- 10 A I couldn't tell you that. I never learned the months. I  
11 don't know what those months would be.
- 12 Q You don't know any of the months of the year?
- 13 A What school?
- 14 THE INTERPRETER: My question, I altered some of what  
15 you said, did they teach you in school the months of the  
16 year, and he said, "Which school?"
- 17 Q Well, any school or anyplace else, did you ever learn the  
18 months of the year?
- 19 A I don't know. I never was able to learn that.
- 20 Q Okay. Do you know what year this is?
- 21 A I think it's 2012, I'm not sure, but I think so.
- 22 Q How do you know that?
- 23 A They put it up here. I remember that it was up there.
- 24 Q Do you know the days of the week?
- 25 A Yes, more or less.

1 Q Okay. Why don't you tell me the days of the week.

2 A Monday, Wednesday, Saturday and Sunday, and I think

3 Friday's the other one.

4 Q So how many days of the week are there?

5 A About five -- I think it's six. Seems like it's six.

6 Q Well, I think you missed one. I think there's -- I think

7 you missed Thursday. Does that sound right?

8 A There is that one, Thursday, too.

9 Q What about Tuesday?

10 A What happens on Tuesday?

11 Q I don't know. What do you think happens on Tuesdays? Is

12 Tuesday the end of the week?

13 A Yes.

14 Q All right. What's this place called where we are today?

15 A The hospital.

16 Q What is the name of the hospital?

17 A Western State.

18 Q Okay. What city are we in?

19 A My wife says we're in Tacoma here, but I don't really know

20 myself.

21 Q Do you think she's right?

22 A She says it's Tacoma, it must be.

23 Q She'd never lie to you, right?

24 A Well, sometimes she might.

25 Q Why did the court send you here?

1 A I don't know why they sent me here.

2 Q What kind of hospital is this?

3 A It's for crazy people, from what she say, but I'm not  
4 crazy.

5 Q Okay. So if it's a place for crazy people, why would the  
6 court send you here?

7 A I don't know. They sent me here, they must know, 'cause I  
8 don't know. Are you asking me -- they pick me up and they  
9 forcibly bring me here. And like I told them, I haven't  
10 done anything. And they bring me here and I don't know  
11 why. I tell them I'm not crazy and I haven't done anything,  
12 either.

13 Q Mr. Ortiz-Abrego, if you wanted to find out why they sent  
14 you here, who could you ask?

15 A The school people tell me that I need to ask him.

16 Q Ask who?

17 A To him, to the attorney, that good attorney.

18 Q Okay. Could you do that right now, ask your attorney?

19 THE INTERPRETER: Could I ask, what's the attorney's  
20 name? Because he might have said abogado and he might have  
21 said your last name, and I don't remember your last name.

22 MR. KOENIG: It's my preference that you don't ask  
23 any attorney questions to me.

24 DR. HENDRICKSON: I think we're entitled to ask you  
25 whether or not Mr. Ortiz-Abrego is able to ask questions of

1 his lawyer and to understand responses that he might get.

2 MR. KOENIG: I'm not going to give him any responses.

3 DR. HENDRICKSON: Well, I think we're entitled to.

4 THE INTERPRETER: Well, that was my question. Don't  
5 worry about it. I was not sure what he said, I just thought  
6 he said my good lawyer, but I could have been wrong, it was  
7 a last name.

8 Q Mr. Ortiz-Abrego, I'd like you to ask your attorney right  
9 now why you are here in the hospital.

10 A Why am I here?

11 MR. KOENIG: I can't answer that question in this  
12 setting.

13 DR. HENDRICKSON: I'm going to say for the record that  
14 I think we're entitled to observe and to draw inferences  
15 from the questions and responses that take place between the  
16 attorney and the client during this evaluation. I  
17 understand that, Mr. Koenig, you do not want to answer any  
18 questions. It certainly makes our job more difficult, and  
19 we'll see what happens after that.

20 Q I'll tell you what the court has indicated and why the  
21 court has sent you here. Are you okay with that?

22 A I don't know. You say what you'd like to say. I haven't  
23 done anything to anyone.

24 Q Would you like me to tell you what the court says why the  
25 court sent you here?

1 A Yes.

2 Q Okay. The court has indicated to us, to your attorney, to  
3 the prosecuting attorney, and to this mental health staff  
4 that you are unable to understand what goes on in court, and  
5 that this lack of understanding is due to a mental illness  
6 or defect, a mental disorder.

7 A I don't know.

8 Q You don't know what?

9 A About what you are saying.

10 Q Well, tell me what I just told you.

11 A I didn't really get it, what you were saying.

12 Q Which part didn't you get?

13 A Could you say it again to me?

14 Q Okay. Sure.

15 THE INTERPRETER: I can say it without you having to  
16 repeat.

17 DR. HENDRICKSON: Okay.

18 A I don't know why. I don't understand, but I don't know why  
19 they keep doing what they're doing. I don't know why I  
20 don't understand. But I'm not crazy.

21 Q Okay.

22 A It's just that I don't understand things.

23 Q Okay. Do you remember those three words I gave you to  
24 remember?

25 A No, I don't remember them. That's my problem.

1 Q One was a place where people live.

2 A Not really, no, but if you tell me, it will bring it back.

3 Q Was it a truck, a movie theater or a house, which one of  
4 those three?

5 A I don't remember.

6 Q Second word, what word was a color?

7 A What do you mean by color?

8 Q One of the things I asked you to remember was a color.

9 A Why the don't you ask me that right after you say it,  
10 because after a while I don't remember?

11 Q That's the whole idea. I mean, if you don't remember,  
12 that's fine, okay? I don't care. See, I just want your  
13 best answer.

14 The third word was something that you could use to go  
15 from place to place traveling, where people travel.

16 A What do you mean by travel, transportation?

17 Q Well, the word was -- let's say -- I'm going to give you  
18 three things. Was it a truck, a bus or an airplane?

19 A You mean which one what?

20 Q Are you asking me a question?

21 A No.

22 Q Okay. Of those three words, which one was the one I gave  
23 to you to remember?

24 A I think it was airplane. I'm not sure. I think it was  
25 that one.

1 Q It indeed was. I'm going to ask you to repeat these  
2 numbers after me, okay? Three, nine, five.  
3 A Three, nine, five.  
4 Q Okay. Can you say that backwards?  
5 A I can't backwards.  
6 Q Can you say this number after me, nine, two, seven, four?  
7 THE INTERPRETER: I forgot already. Nine, two--  
8 Q Nine, two, seven, four.  
9 THE INTERPRETER: Seven, four. Thank you.  
10 A Nine, two, seven, four.  
11 Q Okay. Let's try this number. Six, one, seven, three,  
12 eight.  
13 A It went too fast.  
14 Q I'll go slower then.  
15 A Six, one, seven, eight.  
16 Q What's three plus four?  
17 A I can't do that very well. Three plus four -- three plus  
18 four? Seven.  
19 Q Good. How about seven plus three?  
20 A Sixteen  
21 Q Can you count backwards from 25?  
22 A No, I can't do that.  
23 Q What is one less than 25?  
24 A You mean take one away?  
25 Q Yes.

1 A Twenty-four.

2 Q Keep going down by one each time.

3 A What do you mean, subtract? Going down, you mean?

4 Q Yes.

5 A Starting from where?

6 Q I think we're at 24.

7 A Twenty-three.

8 Q Okay. Keep going.

9 A Twenty-two, 21, 21, 20, 19, 17, 16. After that, 14, 15 --

10 no, no. 13, 12, 10, 11, 9, 8.

11 Q All right. That's good. Can you spell the word -- I'm

12 going to get it in Spanish -- gato?

13 A What do you mean spell?

14 THE INTERPRETER: I can put it in a simpler way.

15 Q Okay.

16 A I don't know much about that. Gato or Gata?

17 Q I think you said gata, right?

18 THE INTERPRETER: Oh, I said lady. That would be

19 Gata. I thought you said gata. It's gato. Sorry.

20 Q Let's spell gato, then.

21 A I think there's an S, an A, a T, and an O.

22 Q Okay. How are an apple and a banana similar, how are they

23 alike?

24 A What do you mean? What do you mean, how are they alike?

25 They aren't. I'm not -- they're not the same. One is long

1 and the other one is round.

2 Q Okay. How about a car and a truck, how are they alike?

3 A They both run, and they transport people.

4 Q How about a dollar and a dime, how are they alike?

5 A How do they look like each other or how --

6 Q How are they similar in any way?

7 A You mean do they look alike?

8 Q Okay. Let's start there. Do they look alike?

9 A No, they don't look alike. One is metal and the other one  
10 is of paper.

11 Q Well, would they be similar in any other way, like the way  
12 they're used?

13 A You buy things with them.

14 Q Good. What's going on in the world today? What kind of  
15 things are happening in the world, do you know?

16 A I don't know what's happening. I haven't paid attention  
17 about -- to what's happening.

18 Q Are we at war anyplace?

19 A I really don't know if there is a war.

20 Q I'm going to ask you some questions now about some matters  
21 in court. What are you charged with?

22 A Well, they say here that I raped three children, but it's a  
23 lie. I didn't rape anyone. Adriana says that I have raped  
24 three children, and it's a lie.

25 (END OF DISK ONE)

- 1 A They just keep screwing me over every day at school, they  
2 keep asking me, talking about that I raped three children.  
3 I didn't do anything. It's a lie. I tell them that that's  
4 a lie, and they tell me that I'm lying.
- 5 Q Who tells you that?
- 6 A The interpreter is always saying that. But he says that he  
7 is saying what the other people say to him.
- 8 Q Who is Adriana?
- 9 A The girl that works here. She says she's a social worker.
- 10 Q Do you know what a social worker's job is?
- 11 A I don't know. To see, they go and they talk about things  
12 in there. But I don't know.
- 13 Q How often do you do that?
- 14 A About what?
- 15 Q You said the social worker talks about things in there.
- 16 A And other things. But they speak in English. They tell me  
17 to take a bath. Because people here don't like to bathe.
- 18 Q Tell me again what you just said.
- 19 A Everybody gets seated in the morning and they tell them  
20 that they should take baths, they should bathe.
- 21 Q They tell everybody that, they don't tell just you that; is  
22 that right?
- 23 A You're going to get hosed down. It doesn't use anything,  
24 it's a lie.
- 25 Q Somebody said you'd get hosed down if you didn't take a

- 1 bath; is that right?
- 2 A Yeah.
- 3 Q Guess they haven't done that, though, have they?
- 4 A No.
- 5 Q Good. Okay. You mentioned that you are charged, that  
6 people say that you have raped three children. You use the  
7 word rape. Tell me what that means.
- 8 A I don't know for sure about that. I see it on the  
9 television, it's mentioned that children are raped. I don't  
10 understand. Does that mean that you kill them? I don't  
11 know.
- 12 Q Mr. Ortiz-Abrego, you said that you didn't do this crime.  
13 So if you don't know what it means, how can you say you  
14 didn't do it?
- 15 A They say I raped three children, is what they say.
- 16 Q What does that mean?
- 17 A The interpreter says that it's grabbing a hold of someone.  
18 I haven't done anything to anyone and I haven't touched  
19 anyone.
- 20 Q So tell me more about this, the idea grabbing a hold of  
21 someone. That's a rape?
- 22 A But it's what they say is that means when you grab somebody  
23 by force. I have not done anything to anyone, is what I  
24 tell them.
- 25 Q So if you were to grab your child -- you have children,

1 right?

2 A Yes.

3 Q If you were to grab your child by force to discipline the  
4 child, would that be rape?

5 A I wouldn't be grabbing them by force. From what I  
6 understand, it's grabbing somebody and by force having sex  
7 with them. That's how I understand it. That's what I  
8 understand by the word rape, but the rest I don't  
9 understand.

10 Q For the first time, though, you mentioned it was grabbing  
11 someone by force and having sex with them. Is that what  
12 your understanding of rape is?

13 A Yes, that's what I think about when I think of rape.

14 Q Okay. Good. Is this what the police say that you did,  
15 then?

16 A That's what they say. Adriana said that that was. Yes,  
17 she got a book out and read from it that I was accused of  
18 raping three children.

19 Q Okay.

20 A I haven't done anything to anyone, I told her. She is  
21 lying. Or they are lying.

22 Q So who decides, then, if you did this thing or did not do  
23 this thing?

24 A I don't know who decides that.

25 Q So does someone decide?

1 A I do not understand who it is that decides that.

2 Q So what do you think is going to happen? Do you stay here  
3 forever and no one decides?

4 A I don't know. He knows more about it.

5 Q Who is he?

6 A The attorney. He has to know more about. I don't know  
7 everything. They do everything over there in the court.

8 Q They do what in the court?

9 A They take a person to the court, and that's where they  
10 decide if somebody did something. Or that's what I'm told  
11 that. They asked me who was the one who sent you here. I  
12 told them I don't know, when someone else -- someone put me  
13 in jail over there, too, or sent me over there, too, I don't  
14 know who it was. Those twelve people, the attorney tells me  
15 that it's those twelve people. I can't say why, because I  
16 haven't done anything.

17 Q Well, if you haven't done anything, there should be nothing  
18 to worry about, then, right?

19 A I am worried because I've been here two years now and  
20 nobody does anything to get me out.

21 Q I would think this --

22 A I don't understand all of this.

23 Q Okay. How do you think this should be resolved then?

24 A I don't know. I want them to get me out of here. I  
25 haven't done anything to anyone. I want them to get me out

1 of here. I haven't done anything to anyone.

2 Q How do you think that will happen, to get out of here?

3 A That's what I mean, how can I get out of here? I can't get  
4 out of here, I'm locked in here, I don't know how to get  
5 out.

6 Q How would you find out how to get out?

7 A They tell me out there that I just need to tell the truth,  
8 that's it. I am telling them the truth.

9 Q Let's go back to what you said. You said that they do  
10 everything in the court, right?

11 A That's what they say in the school, that's where it is  
12 looked at.

13 Q What does that mean?

14 A They do all those things, that's what they say.

15 Q They do all what things?

16 A They do a lot of paperwork. They use a lot of paperwork, I  
17 see that. I don't know what they write down, but they write  
18 so much down.

19 Q Who are they?

20 A Those people there that are doing their paperwork.

21 Q And who was that? I don't understand.

22 A He is there.

23 Q Who is he?

24 A The attorney.

25 Q Okay. You mentioned that something about twelve people,

1           those twelve people do something. What twelve people are  
2           those?

3       A     I was facing them there, but I don't know what they do.  
4           When I was seated, I saw them all there. I saw them all  
5           seated there, but I don't know what they were doing.

6       Q     Well, I think you've talked about this in the classes you  
7           go to, don't you. Here?

8       A     Sometimes we do.

9       Q     Okay. So what do they tell you in class?

10      A     They tell me that those people sent you here.

11      Q     What people?

12      A     Those twelve people sent me. And I said why? I haven't  
13           done anything, I don't understand. They're telling lies and  
14           then they put someone in jail.

15      Q     So if you --

16      A     I'm not lying. I'm telling the truth. I'm not like that.

17      Q     All right. So how would you find out more about what  
18           happened that caused you to be here?

19      A     What do you mean? What do you mean?

20      Q     What?

21      A     How would I find out what again?

22      Q     You mentioned that you wanted to get out of here, you  
23           wanted to find out more about what happened, why you're  
24           here. So how would you find out about that? How would you  
25           find out about what's going on? Who would you ask?

1 A They tell me that the attorney.

2 Q Your attorney can tell you what's going on?

3 A Yes, that's what they say. They say they don't know  
4 anything.

5 Q Do you talk to your lawyer about your case?

6 A When he asks me things, I tell him the answer to what he  
7 asks me.

8 Q Do you understand what he tells you?

9 A Some things I understand. He tells me things. What the  
10 other ones are doing, I don't know.

11 Q When your attorney tells you something you don't  
12 understand, what do you do?

13 A Nothing. What can I do? I don't know. I don't know what  
14 to do.

15 THE INTERPRETER: The interpreter would like to  
16 request a repetition.

17 A My wife tells me let them take care of it, you haven't done  
18 a thing. And I don't even think she understands, because  
19 she didn't go to school. She doesn't even know how to read.

20 Q When your wife tells you something and you don't understand  
21 her, what do you do?

22 A Nothing.

23 Q You don't do anything?

24 A Being in here, what could I do?

25 Q You talk to your wife on the phone sometimes, right?

- 1 A We always do.
- 2 Q Okay. So if she tells you on the phone something that,  
3 wow, I don't understand what she said, what do you do?
- 4 A I don't -- nothing. She knows what she's saying. Neither  
5 one of us know anything about this. She says that the only  
6 ones who know about this are the other folks.
- 7 Q If your wife tells you that you she bought a new car, what  
8 would you tell her?
- 9 A I'd say that is good that you bought one.
- 10 Q You wouldn't be concerned about where she got the money?
- 11 A No. Why would I?
- 12 Q I don't know why you would.
- 13 A It's her thing.
- 14 Q Is she working?
- 15 A Not right now.
- 16 Q Oh. So who is supporting your family?
- 17 A Her brother works. And maybe she works sometimes. And she  
18 gets something for food, too.
- 19 Q Explain that.
- 20 A She tells me that they give her -- she calls them stamps  
21 and -- or I don't know, maybe it's coupon. But they give  
22 her something so she can buy food.
- 23 Q Who gives her that?
- 24 A She says she goes to some office.
- 25 Q Did you ask her about it?

1 A I don't remember if I asked her any more about that.

2 Q Would you like me to try to explain to you why the court  
3 sent you, what's involved in your legal case today?

4 I gather if I say something wrong, your attorney will  
5 correct me. Or you can ask your lawyer if in fact that is  
6 true. Would you like me to tell you? Or do you care?

7 A I don't know. I don't know. If he wants to tell me, go  
8 ahead and tell me.

9 Q It's up to you, it's your prerogative, it's you make the  
10 decision, not me.

11 A That would be fine.

12 Q Some time ago you were in trial. You had a jury trial.  
13 And you were charged with the rape. The jury heard  
14 evidence, they heard people testify, and the jury found you  
15 guilty.

16 A I never did anything. I'm telling the truth. I haven't  
17 done anything.

18 Q Well, I'm just telling you what happened. And then you  
19 were sent to the hospital to see if you had problems so you  
20 couldn't be sentenced.

21 A I don't know why they sent me here. They sent me here. I  
22 don't know why they sent me here.

23 Q Do you understand what I just told you?

24 A No.

25 Q Want me to say it again?

1 A Yes.

2 Q Some time ago you were arrested and charged with the rape.  
3 Three counts of rape, three counts of rape of a child.

4 A But I haven't done anything -- I am telling the truth, I  
5 haven't done a thing to anyone.

6 Q That's something you should talk to your lawyer about.

7 The jury then heard evidence, testimony. And the jury  
8 said -- they -- they said you did it.

9 A I've not done something like that. It's a lie.

10 Q I'm sure that you at the time said the same thing. My  
11 job is not to determine whether you did this thing or not,  
12 my job is only to talk to you to see if you understand.  
13 Okay. Let me continue. Your attorney I believe now says  
14 that the trial was not fair because you didn't understand  
15 what was going on.

16 A I had another lady attorney, not this attorney, but I had a  
17 lady attorney, and she said come, everything will be okay if  
18 you come, you know, but if you don't come they are going to  
19 put you in jail. So they said if I didn't come, they were  
20 going to put me in jail. Why would I have to come, I didn't  
21 do anything? And no, she kept saying you have to come. And  
22 I kept saying why, I didn't do anything. And she kept  
23 saying if you don't come, they are going to put you in  
24 jail. Well, I was going, and they put me in jail anyway.

25 Q Mr. Ortiz-Abrego, I understand you say that you did not do

1           these things. And the people you need to convince of that  
2           is the jury, the court, not me.

3       A     I don't understand about that, how they could put someone  
4           in jail if he didn't do it. I'm telling the truth. I  
5           haven't done anything to anyone.

6       Q     Well, it's good point, Mr. Ortiz-Abrego, it would not be  
7           good for someone to be put in jail if they didn't commit the  
8           crime.

9       A     That's what I was telling them. He was asking me how come  
10          you landed here. I tell them, well, they put me in jail  
11          over here. And I don't know what I did. My female cousin  
12          is telling lies. I didn't do any of that.

13      Q     Your female cousin is one of the people that said this  
14          happened?

15      A     My female cousin was the one who told the lady that charged  
16          me. But it's a lie. I didn't do any of that. She's a  
17          liar.

18      Q     Okay. So how do you think this could be resolved?

19      A     I don't know how. I don't know how.

20      Q     Well, should we just wait here and see what happens or how  
21          do we-- what would you like to see happen?

22      A     I want to go home. I haven't done anything to anybody.  
23          What they're saying is a lie.

24      Q     Who do you suppose could decide or had the power to send  
25          you home?

1 A I don't know who would have the power to do that.

2 Q Do I have the power?

3 A I do not know.

4 Q I don't. Does your attorney have that power?

5 A I don't know.

6 Q He does not. Somebody in court has that power.

7 A I don't know who that would be.

8 Q Who would you see in court? What people are there that  
9 would could make that decision?

10 A I don't know who the ones --

11 Q You think the judge might?

12 A Well, that's what they tell me here, that the judge  
13 dictates. Well, the lady that's there, she is dressed in  
14 black and they call her the judge.

15 Q Who calls her the judge?

16 A The professors tell me that the person in black would be  
17 called the judge.

18 Q What's the judge's job then?

19 A I don't know. They're sitting up there.

20 Q That's it, just sitting there?

21 A I saw her seated up there.

22 Q That's all she does is sit there, nothing else?

23 A I don't see her doing anything.

24 Q I'm confused then. Why would the judge -- what's the  
25 judges job, then?

1 A I don't know what she does. She is seated up there. She  
2 was even drinking coffee one day.

3 Q What do the people here in the hospital tell you the judge  
4 does?

5 A They say that she rules, but she makes decisions, she  
6 dictates. She's in charge. She's in charge.

7 Q Okay. Good. We're someplace now. Do you think they're  
8 telling you the truth about what the judge does?

9 A I don't know if they're telling me the truth or not.

10 Q Well, you said that they told you the judge is in charge,  
11 makes the decisions. Do you think that's true?

12 A I don't know if they're in charge or not. They say that.  
13 They did tell me they know who is in charge and sometimes  
14 they say the judge is in charge.

15 Q You play soccer, right, or football?

16 A Yeah.

17 Q Okay. So who's the judge in the football game?

18 A The judge?

19 Q Don't they have judges in football games, referees?

20 A The guy with the whistle.

21 Q Okay. The guy with the whistle, what's his job?

22 A They whistle.

23 Q About what? I mean, why do they whistle, just for fun?

24 A They entertain themselves and allow us to play.

25 Q But when does he blow his whistle?

- 1 A When someone hits someone else.
- 2 Q Okay. So there's a foul or an infraction?
- 3 A Yes.
- 4 Q Okay. So they really will then control to see that there  
5 is no infractions?
- 6 A Yeah.
- 7 Q Okay. So does this sound a little bit like what goes on in  
8 court, where someone makes decisions about people doing  
9 wrong things?
- 10 A It isn't the same.
- 11 Q Well, you don't get put in jail, I guess, if you hit  
12 somebody in the soccer field, do you?
- 13 A No.
- 14 Q But you could get a penalty?
- 15 A Yeah, they whistle.
- 16 Q Then what happens?
- 17 A Then somebody else gets to throw it in where it went out.  
18 But they don't do anything to it. Only if you hit somebody  
19 too hard, they do.
- 20 Q What happens when you hit someone too hard?
- 21 A They take them out of the game.
- 22 Q Who decides that?
- 23 A The referee. He doesn't even talk to anybody else, he just  
24 throws them out.
- 25 Q So the referee kind of enforces the rules of the game?

1 A Yeah.

2 Q How many people on a team, on a soccer--on a football team?

3 A I think maybe it's either -- either 11 or 12, I don't  
4 remember. It seems like it's 11. Eleven.

5 Q You played in this country or in El Salvador?

6 A Here and there. Not big time or anything.

7 Q Not professional?

8 A No, no.

9 Q All right.

10 \*\*\*

11 I think we better stop here.

12 (INTERVIEW RECESSED TO MARCH 14, 2012)

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MARCH 14, 2012

3

DR. HENDRICKSON: And we're back on the record here.

4

Its now March 14th, 2012, and it's approximately 1:40.

5

Let's go around the room and identify each other. First of

6

all, I'm Dr. Hendrickson. And we're going to resume the

7

evaluation that we started on -- was it last week -- March

8

6th. So let's just go around the room.

9

MR. KOENIG: Jim Koenig.

10

MS. VIERA: Verla Viera.

11

MS. HORN: Karen Horn, interpreting.

12

DR. HENDRICKSON: What's your last name again?

13

MS. VIERA: V as in Victor, I-E-R-A

14

EXAMINATION

15

BY DR. HENDRICKSON:

16

Q Let me just go through a couple of things that we talked

17

about last time, just to make sure that you know what is

18

happening today. And I'll just give you the standard

19

notification that we have. The court has asked me to talk

20

to you to see how you're doing and to see what your

21

understanding of the court procedures are. And at the

22

conclusion of this evaluation, I will be writing a report,

23

which I will send to your attorney, the prosecuting

24

attorney, the judge, jail mental health staff, and county

25

mental health professional in King County.

1           I'll try to keep my sentences down a little shorter  
2 next because that was pretty long.

3           THE INTERPRETER: That's okay.

4   Q    You don't have to answer any of my questions today if you  
5 don't want to, but it makes my job a whole lot more  
6 difficult. I'm not going to ask you any questions about  
7 what happened when you got -- when these charges arose, but  
8 I will ask you possibly from time to time about what the  
9 police say you did. You have brought your lawyer, and of  
10 course your lawyer is here. He can't answer questions for  
11 you, but I may ask you from time to time to ask him  
12 questions. Okay. Do you understand those, what I just told  
13 you, Mr. Ortiz-Abrego?

14   A    Well, not all of it.

15   Q    Okay. What part did you not understand, do, you know? Can  
16 you tell me?

17   A    All of it. I don't remember all of the things you told  
18 me. There's a lot. I can't learn all of that.

19   Q    Okay. Let me ask you, first of all, what's your  
20 understanding of why you're here. That is, to this  
21 particular -- our discussion today, why are you here for  
22 this discussion?

23   A    He told me it was for an evaluation, that's what he said.

24   Q    When you say he, who are you referring to?

25   A    The attorney over there.

1 Q Okay. So an evaluation for what?

2 A I don't know what they're for. For the mind, I think. I  
3 am not totally sure I know what the reason is. And if I'm  
4 crazy.

5 Q Well, did your attorney explain to you what the evaluation  
6 is all about?

7 A No.

8 Q Well, let me explain again why we're doing this. The court  
9 has asked me to talk to you to see if you understand what  
10 goes on in court and to ask you what you might do if you  
11 don't understand.

12 A I don't know all that, I don't understand all that. I  
13 can't do anything.

14 Q Can't do anything? Tell me more about that.

15 A They bring me here, and then they bring me back there.  
16 There is nothing I can do.

17 Q What would you like to do?

18 A I want them to send me home. I haven't done anything.

19 Q Well, how do you think that could happen?

20 A I do not know how to do -- how to manage. They tell me in  
21 there that I need to learn, but I can't learn everything.

22 Q Well, can you learn little pieces of everything?

23 A Yes.

24 Q Okay. Well, that's all, I think all we're looking for, is  
25 to take a little step at a time. For example, you know how

1 to play football, right?

2 A Not a lot, but --

3 Q Well, you play football?

4 A Yes. That's all we play back there in my group. And where  
5 we were, there wasn't a television or anything like that.  
6 We didn't even have lights.

7 Q Well, Mr. Ortiz-Abrego, how did you learn how to play  
8 football?

9 A You don't really learn that, you just play.

10 Q Well, I'm sure that I would not be able to play football.  
11 Absolutely sure. But I'll bet you could teach me how to do  
12 it, and I could learn.

13 A Yeah.

14 Q So would it be correct to say that you, either people told  
15 you how to play the game or you watched other people play to  
16 learn how to play?

17 A Yeah, I've always played, ever since I was little. We  
18 played at the school and in the street. All of us children  
19 played. And there was a little school, with two small  
20 rooms. All -- since I was little, all my life I've played  
21 ball since I was little.

22 Q Okay. Let me ask you a question about football then. Now,  
23 what's the object of playing the game? How do you win to  
24 play the game?

25 A No, you play because you enjoy it. Just because -- you

1 play because you like it. People that don't like it, don't  
2 play.

3 Q Do you play to score points, or what's the object of the  
4 game?

5 A The ones who like it, play it and like to win.

6 Q Win. How does one win at football?

7 A You make more goals than the other one.

8 Q What's a goal?

9 A You get the ball into the target. Into the net.

10 Q So how does one get the ball to the net, tell me how that's  
11 done.

12 A With your foot.

13 Q Oh. Tell me more about that, with your foot, what do you  
14 mean by that?

15 A The foot.

16 Q Well, I can do a lot of things with my foot, including  
17 walking. I guess there's more than walking.

18 A You are playing, and you get the goal with your foot. But  
19 sometimes with your head, too.

20 Q Oh, okay. So are there teams that play this game?

21 A Yeah.

22 Q So let's see if I understand it correctly. With your foot  
23 you try to get the ball into the net, correct?

24 A Yes.

25 Q That sounds pretty easy then. Is that an easy thing to do?

1 A Yes, as you're playing, I don't know. Yeah, it's easy.

2 Q It's easy. Okay. So when you're kicking -- and I use the  
3 word kick, is that what you are doing, kicking the ball?

4 A Yes.

5 Q Okay. When you're kicking the ball, what is the other team  
6 doing?

7 A They goes after you, marks you.

8 Q I'm sorry, what was the word that you used?

9 THE INTERPRETER: He used mark, and I probably don't  
10 have my good sports vocabulary on me. Does anybody know  
11 what that means? I've been listening to soccer, I heard  
12 mark, but I don't know what it is.

13 Q Can you describe what mark means?

14 A He tries to take that ball away from you.

15 Q Oh, okay. Is that what they call mark, marking?

16 A We used to call it. I don't know what they call it in  
17 other parts. They do say that in English, too, yeah, mark.

18 Q Is there a particular person that is trying to prevent you  
19 from getting the ball into the net?

20 A Yeah.

21 Q Who is that person?

22 A The other guy who is playing with the other side.

23 Q Does that position have a name for it?

24 A Just plays there. Maybe sometimes it isn't a net, it's  
25 --they have rocks that are in a shape, which is the goal,

1           it's the other equipment. Something made out of plastic,  
2           too.

3       Q     Okay. Well I've heard a name, I think it's called a  
4           goalie. Maybe I'm thinking of some other game, but is there  
5           a person called a goalie in football?

6       A     His name in Spanish is portero.

7       Q     Portero. What is this person, the portero, what is his job  
8           on the team?

9       A     He has to be the one that doesn't let the goal be made.

10      Q     Okay. How many points does the team get for making this  
11           goal then?

12      A     One goal is one.

13      Q     Okay. See, in American football is different, I think the  
14           goal in football is seven points -- six points, excuse me --  
15           in American football. Unless they kick the ball for a field  
16           goal, and then it's three points. It's all pretty  
17           confusing, but you have done an excellent job of describing  
18           and teaching me about football. So it sounds like you have  
19           some ability to learn things. And I think when I said  
20           earlier take one thing at a time to learn, you can do that,  
21           and I'm sure did you with football.

22                   Okay. We talked earlier about what the purpose of  
23           this evaluation is, and you said you didn't remember what I  
24           told you. Maybe you said you didn't know what I said, I'm  
25           not sure. I don't know if you used the word remember or

1 not.

2 A What?

3 Q When I said to you, asked you, I told you what the purpose  
4 of the evaluation was, to see if you understand about court.

5 A No, I don't understand that.

6 Q Okay. So how do you find out what the evaluation is about?

7 A What do you mean?

8 Q What do I mean about what?

9 A What did he say about the evaluation?

10 Q What did I say?

11 A Yeah.

12 Q My question was how would you find out if you wanted to  
13 know more about the evaluation, what it--what it means?

14 A I don't know what to say about that. I don't know what you  
15 mean by how would I find out or what steps would I take to  
16 find out.

17 Q In the game of football, is there a coach?

18 A On the big scale there are, but when you play in the street  
19 there isn't. Like up here there are. Up here there would  
20 be somebody who runs the team. I don't know what you'd call  
21 them.

22 Q This person that runs the team, have you played in a team  
23 where that happens, where there is a person running the  
24 team?

25 A Yes.

1 Q What's the name of this person?

2 A He's the one that takes the money. If you want to play,  
3 you have to pay the money. I think they only let you play  
4 on Sundays. Maybe Saturdays or Sundays.

5 Q Well, is this person a member of the team?

6 A He's the one that's in charge of the game. If you want to  
7 play, you tell him and you have to pay. Pay him.

8 Q So how much do you have to pay to play football?

9 A I think it was ten dollars. I don't remember very well,  
10 but I think it was about ten dollars. And they pay the  
11 referees with that.

12 Q Well, let's say that a referee told you, Mr. Ortiz-Abrego,  
13 that you did something wrong and you didn't understand what  
14 he was talking about, what would you do?

15 A What do you mean?

16 Q If the referee said, Mr. Ortiz-Abrego, you committed a  
17 foul, and you didn't know what he was talking about, you  
18 said what the heck is this guy talking about, what would you  
19 do?

20 A Well, depends on whether you did something. You can be  
21 sent out of the game or, you know, if there was a whistle or  
22 something.

23 Q What if you just didn't know what the heck he was talking  
24 about, what would you do?

25 A Nothing. What can you do if he's in charge?

- 1 Q But you don't understand anything, you don't know whether  
2 you're supposed to walk here, walk there, go off the game,  
3 do something, you just don't know what he's talking about.  
4 What do you do?
- 5 A I don't know what to -- what to tell him. They will put  
6 you out or they don't. They can put you out of the game.
- 7 Q You don't care why they put you out?
- 8 A I don't know. I don't remember that I have been sent out  
9 of the game. That's what they tell you if you get somewhere  
10 else or someone hits you.
- 11 Q Let's say the referee said you hit somebody and you didn't,  
12 what would you do?
- 13 A He's watching there. He saw it, if someone hit another  
14 person, and if he didn't hit him, he wouldn't blow the  
15 whistle. And if he did hit him, he blows the whistle.
- 16 Q I'm talking about hitting you, Mr. Ortiz-Abrego, and you  
17 knew that you didn't do anything, what would you do?
- 18 A I would tell them I hadn't hit anyone. If I hadn't hit  
19 somebody, I hadn't hit somebody. And he blows the whistle,  
20 they only blow the whistle if somebody hits somebody else.  
21 And if there wasn't someone hit someone else, they don't  
22 blow the whistle. They don't just on a whim blow the  
23 whistle.
- 24 Q Okay. So it sounds like you have a pretty good  
25 understanding of what a referee does.

- 1 A Yeah.
- 2 Q And it sounds like if you don't agree with what the referee  
3 said, you would at least say that you didn't do it; is that  
4 right?
- 5 A Yes.
- 6 Q Okay. So let's say that you went to court and you didn't  
7 agree with what happened, what would you do?
- 8 A I don't know. They do -- they do everything there. They  
9 seat me there, but they don't tell me everything.
- 10 Q So if you don't understand in court, who would you ask?
- 11 A I think they've been telling me that I should ask the  
12 attorney.
- 13 Q Is that a good idea?
- 14 A Yes.
- 15 Q Who's been telling you that?
- 16 A In school, they tell me that here.
- 17 Q Okay. So if your attorney were talking to you and asked --  
18 and gave you a suggestion and you didn't understand what he  
19 was talking about, what would you do?
- 20 A Nothing. If I don't understand it, what can I do?
- 21 Q If you don't understand what's going on in a football game,  
22 do you just say okay, or do you ask somebody what happened?
- 23 A Football is different because you're playing that yourself.  
24 here they put you in jail.
- 25 Q Well, would it be more important to your life playing a

1 game like football or being -- possibly facing jail?

2 A I don't know which one would be better. Football is played  
3 to -- football is played -- soccer is played to have fun,  
4 but here, they put you in jail whether you want to or not.

5 Q Why do they put you in jail?

6 A Because my girl cousin is telling lies. Telling things  
7 about me.

8 Q Well, so what happened after your girl cousin said things  
9 about you, what was the next thing that happened?

10 A Well, the attorney, lady attorney, she kept saying come,  
11 come and they won't put you in jail. And I said why should  
12 I come? I didn't do anything. And she responded that your  
13 girl cousin is saying things about you. And I said no, I  
14 haven't done anything. She kept saying yes. But later they  
15 did put me in jail. And she wanted me to come every day,  
16 every day.

17 Q So what happened after that?

18 A They put me in jail over there.

19 Q Well, were you in jail the whole time or did you go  
20 someplace else?

21 A From there they brought me here.

22 Q So what you are saying is that your cousin said something,  
23 you went to jail, and then you went here?

24 A Yes, I remember they brought me here, then they brought me  
25 back there again. And then they brought me here again.

1 Q Well, I'm confused, Mr. Ortiz-Abrego. I thought that at  
2 one point that you'd been to court for trial.

3 A I don't know. I don't understand those things. I don't  
4 know what that means. They are saying come, come, sit right  
5 here. I said why, I haven't done a thing.

6 Q Sit where?

7 A You have to come, she said.

8 Q Sit where?

9 A There in the court.

10 Q Oh. So what happened in court?

11 A Well, people from the court were saying things.

12 Q Who was saying things?

13 A I don't remember who they were. A lot of people. And my  
14 girl cousin, I think she got there, too. And her husband  
15 came, too. His name is Francisco.

16 Q What else happened in court?

17 A I don't know everything that they were saying, I was --  
18 they were just saying things, and I didn't understand  
19 everything. And I don't remember all of it now that they  
20 were talking about.

21 Q So let's start out with the fact that you said you didn't  
22 understand what was going on.

23 A I don't know what they do there, but I told them I didn't  
24 do anything, I didn't do anything. And she kept saying  
25 come. She said come again tomorrow. I don't know what

1 things they did in court there.

2 Q Did you ask your attorney what was going on?

3 A I asked him, I said to him what's happening. And I told  
4 him in the afternoon I'm going home now. And she said,  
5 yeah, go ahead, but come back tomorrow. And she said that  
6 you have to keep coming until I tell you, otherwise you'll  
7 be locked up. That's why I kept going back. And that if I  
8 didn't, they would lock me up. And then after all, they did  
9 lock me up.

10 Q So during this when you were going to court and sitting  
11 next to your lawyer, at night after the court you would go  
12 home; is that right?

13 A I even brought my little child with me because at that time  
14 my wife was in the hospital, as I remember. The rest of the  
15 days, I don't remember. There were several days.

16 Q When was your wife in the hospital?

17 A She was going to have a little daughter, have a baby.

18 Q Well, my question to you earlier was at the end of that day  
19 when you would go sit next to your lawyer, did you go home?

20 A Yes. Then I came back. According to my wife, a couple of  
21 weeks went by. I kept coming back. And that's because the  
22 lady attorney kept saying come back. I always tell her --  
23 and she said because you don't want them to put you in jail.

24 Q What did you think was going on when you were there every  
25 day in this court?

1 A I don't know. It seems like a policeman came, other people  
2 that were there.

3 Q Did they have an interpreter for you in court?

4 A Yes.

5 Q Did you understand what the interpreter was telling you?

6 A He said -- of course, she said so much, I didn't remember  
7 it later, so many things were said in there, the next day I  
8 couldn't remember.

9 Q Did you remember at the time what she was saying?

10 A Well, there are some things that you do understand, and  
11 then there's some things that you don't understand. They  
12 tell you to sit down, I understand that. But some of the  
13 other things that were said, I didn't. I do understand when  
14 they tell me come back tomorrow, I understand those things.  
15 So many things they said.

16 Q What did you do when they told you things you didn't  
17 understand?

18 A Nothing. I was just sitting there.

19 Q What if they told you, Mr. Ortiz-Abrego, and when you come  
20 back tomorrow I want you to wear a pancho and a ten-gallon  
21 hat. What would you do?

22 THE INTERPRETER: I forget what your question was  
23 about that. I'm sorry. Interpreter.

24 Q What would you do if somebody told you to come back to  
25 court wearing a pancho and a ten-gallon hat?

1           Are you asking the interpreter what a pancho is?

2           THE INTERPRETER: Yes, he is. And that might be a  
3 Mexican word. And I don't know what that is from El --  
4 You're from El Salvador, right? Maybe they don't use that  
5 word.

6   Q    Okay. So it sounds like --that was a good question,  
7 Mr. Ortiz--Abrego. I would do the same thing if someone  
8 told me to wear a dictator, for example. I would say what the  
9 heck are you talking about, I don't know what that means.

10           I made that up.

11           So you went to this place where you sat next to your  
12 lawyer, and I think you said it was a court, for about two  
13 weeks?

14   A    It was a lot of days. I don't remember how many. A lot of  
15 days.

16   Q    Well, you told us your wife said it was about two weeks.

17   A    I don't remember now. She said it was plenty of days, it  
18 was a week, but I don't know how many days. I don't  
19 remember that I told you that, but it was a lot of days.

20   Q    Do you remember telling us just a few minutes ago that she  
21 said you were there two weeks?

22   A    I don't remember if I told you that or not.

23   Q    Well, let's assume it was two weeks, okay? What happened  
24 at the end of that period?

25   A    A day later they put me in jail.

1 Q Who put you in jail?

2 A I think it was that lady attorney.

3 Q Your attorney put you in jail?

4 A I don't know who it was that put me in jail. I told her  
5 why did you me in jail, I told my attorney that. She didn't  
6 say anything.

7 Q So you didn't understand what was going on. Let me see if  
8 I understand what you're saying. You didn't understand why  
9 you were going to jail and you asked your lawyer why did she  
10 put you in jail; is that right?

11 A I told her why did you put me in jail, and she said I  
12 didn't put you in jail.

13 Q Did she say who put you in jail?

14 A My wife told me later it's because of my color. The whole  
15 thing was very confusing. I was really sick when they put  
16 me in.

17 Q Explain to me what your wife meant by -- if you know --  
18 what your wife meant by they put you in jail because of your  
19 color?

20 A My wife didn't know anything about it, either. She's  
21 afraid she'd be locked up, too. According to my wife, she  
22 told the attorney that -- she kept telling me that I needed  
23 to go, that's why I did go.

24 Q But I didn't get what you said. According to your wife --

25 A The wife had said -- my wife said a lot of things to the

1 lady attorney.

2 Q Well, I'm still trying to understand where this color thing  
3 comes up. What was the color thing about?

4 A I don't know. My wife said that might be the reason they  
5 put me in jail, because of my color.

6 Q What about your color?

7 A I don't know. That's what she said.

8 Q Did you ask her what she meant by that?

9 A I asked the attorney, too. I've been here because of my  
10 color? She said no, it's not discrimination.

11 Q What did she mean by discrimination?

12 A I don't know. I didn't ask her.

13 Q Well, did you ever during this time you were in court see a  
14 bunch of people sitting in a box that were not talking to  
15 anybody?

16 A Yeah, they were there. They were seated.

17 Q What were they doing there?

18 A I don't know. They were seated up there, but I don't know  
19 what they do.

20 Q Did you ever ask anybody what they do?

21 A No, I didn't have any idea about what was happening. I  
22 never asked that.

23 Q Why not?

24 A I don't know. I don't remember why.

25 Q Well, those people are called the jury. Did you ever hear

1           that? The jury.

2       A     That's what the professor here says that they're called,  
3           but I didn't know that.

4       Q     What does this professor say that the jury does?

5       A     They're there. They're just there. They are there  
6           watching.

7       Q     What's their job?

8       A     I don't know. I never saw them do anything. They were up  
9           there, seated up there.

10      Q     You've been going to classes, right? You've been going to  
11         classes, right, Mr. Ortiz-Abrego?

12      A     Yes.

13      Q     What does your professor say that the jury does?

14      A     That they're there, they're watching.

15      Q     Just watching?

16      A     Yes.

17      Q     Why do you think they're watching?

18      A     I don't know why that would be.

19      Q     Are you curious?

20      A     I don't know. I saw there were people there, but I don't  
21         know. They never said anything to me.

22      Q     Did you ever wonder why they were there?

23      A     Never occurred to me.

24      Q     Well, if you knew that these people were deciding whether  
25         you were guilty or not guilty, would that be important to



- 1 don't remember how long it's been.
- 2 Q Well, did you get together with your wife before you came  
3 here or after you came here?
- 4 A Here.
- 5 Q So if you met your wife here, correct?
- 6 A Yes.
- 7 Q Okay. And your wife says that you've been together ten  
8 years. How long have you-- what's the approximate length of  
9 time you've been here in the United States?
- 10 A I don't remember. I think it had been three years -- two  
11 years. I don't remember. I've always been here. It's  
12 probably -- I've only lived in this area, I haven't lived  
13 anywhere else. When I got here, I came from Denver, but I  
14 only spent a couple days there, but then I came out here.  
15 And I've never moved to any other place since then. The  
16 whole time I've lived here.
- 17 Q Why did you come here from Denver?
- 18 A What happened is that when I got here, I got here because  
19 my girl cousin had come to pick me up where I had been  
20 dropped off.
- 21 Q Why did you come here from Denver?
- 22 A Because there was no work there. I didn't have any papers,  
23 nothing. And they said there was more work here.
- 24 Q Okay.
- 25 A I was just there a few days and came right here.

1 Q Okay. You said something about no papers. What do you  
2 mean by that?

3 A I had no ID.

4 Q Do you need that?

5 A Yes, or they won't give you a job.

6 Q Well, I guess you eventually got a job here in this area,  
7 right, in Seattle?

8 A I always worked, but I don't remember what was my first  
9 job.

10 Q But you did work when you were here?

11 A Yes.

12 Q Do they have people called judges in El Salvador?

13 A I really don't know. I've never seen anything like that.  
14 I have never seen judges.

15 Q Well, again, you've been taking classes here, right?

16 A They tell me that that's what the lady who is called.

17 Q Who's the lady?

18 A I didn't know that lady there was called the judge.

19 Q Which lady is that?

20 A That lady that they -- she's the one dressed in black and  
21 she's the lady judge, they say.

22 Q Who told you that?

23 A Here in school they tell me that's what she's called.

24 Q Okay. So what does this lady who is called the judge do in  
25 court?

- 1 A I don't know. She's seated up there.
- 2 Q Well, when she's sitting up there, what's her job?
- 3 A Well, I haven't seen her do anything up there.
- 4 Q Did she say anything to you?
- 5 A I don't remember that she said anything. Maybe once she  
6 asked me what kind of job did I have. And I said I don't  
7 know. I didn't know.
- 8 Q She asked you what kind of job you did?
- 9 A Seemed like I remember her asking me what is your job, and  
10 I told her I don't know.
- 11 Q You don't know what your job was?
- 12 A Oh. She asked me what her job was.
- 13 Q Did she explain what her job was?
- 14 A Well, I don't remember, no.
- 15 Q They've been telling you here in the class that you go to  
16 what the judge does, haven't they?
- 17 A They said she's the boss. I don't know.
- 18 Q Boss of what?
- 19 A Who knows?
- 20 Q Well, is she the boss here?
- 21 A No, they said for -- of that place. The one here is  
22 another lady. She wears white.
- 23 Q When you said that they said that she was the boss of that  
24 place, what place are you referring to?
- 25 A They say the court.

- 1 Q Okay. So she's the boss in court?
- 2 A That's what they tell me, but I don't know.
- 3 Q And who tells you that?
- 4 A The professor. Well, it's the interpreter who tells me.  
5 And I don't know who tells him.
- 6 Q Well, what other things-- let me ask it a different way.  
7 This lady who is the boss of court, what else do they say  
8 that she does in the court?
- 9 A I don't remember what she does.
- 10 Q Well, does your professor or the interpreter tell you what  
11 the judge does?
- 12 A Sometimes they tell me, but it's so much, I can't hear so  
13 much. I don't remember what they told me about that. They  
14 do talk sometimes, but it's a lot. Sometimes it doesn't  
15 stay with me. It's every day they spend telling me that.  
16 Every day the same thing, same thing. And I don't remember  
17 what that lady's name is. Oh, they asked me. They asked me  
18 that question, now, what is that lady dressed in black  
19 called, that's what they ask me.
- 20 Q Well, if you wanted to find out more about what this lady  
21 in black does, who would you ask?
- 22 A I don't know.
- 23 Q Who would know about what the judge does, these guys, these  
24 other patients or, let's say, the person who takes care of  
25 garbage at your house, or your attorney, which one would

1 have a better idea?

2 A I'd say it's the attorney. They tell me that the attorney  
3 would be.

4 Q Okay. I would like you to ask right now your attorney what  
5 the judge does in court.

6 A Why should I do that?

7 Q Because I'm asking you.

8 A What does a lady judge do?

9 MR. KOENIG: And I respectfully can't answer that  
10 question in this setting.

11 Q Would you ask your attorney why he won't answer the  
12 question?

13 A I don't know. What?

14 Q Did you understand my question?

15 A Yes.

16 Q Okay. Would you ask your attorney why he won't answer that  
17 question in this setting?

18 MR. KOENIG: Because of all the other people around  
19 here.

20 Q Do you understand that?

21 A What?

22 Q What your attorney just said to you, do you understand what  
23 he said?

24 A Like what? He didn't say anything to me.

25 Q I heard him say something.

1 A Yes. He said -- he said no.

2 Q He said no what?

3 A I don't remember what.

4 Q Well, why don't you ask it again.

5 A What should I ask him?

6 Q Why he won't answer your question.

7 MR. KOENIG: I can't answer the question with all the  
8 other people here.

9 Q So what did he tell you?

10 A He can't answer because there's a lot of people.

11 Q What does that mean?

12 A I don't know. He doesn't want to.

13 Q Who doesn't want to?

14 A He.

15 Q Why not?

16 A I don't know.

17 Q Well, what did he mean by all the other people here? What  
18 difference does that make?

19 A I don't know why.

20 Q Why don't you ask him?

21 A Why?

22 Q Por que what?

23 A Why what?

24 Q Well, I was asking you to ask your attorney why it would  
25 be -- what's the deal with the other people being here?

1                   MR. KOENIG:  It's because of rules of privilege.

2       Q       What does that mean?

3       A       I don't know.  I don't know those kind of things.  When

4       people talk like that, I don't know what that is.

5       Q       Well, okay.  How do you find out what he's talking about?

6       A       I'm not interested in finding out about those things.

7       Q       Well, Mr. Ortiz-Abrego, I'm interested.  Okay?  And that's

8       my job.  Okay.

9       A       Why doesn't he ask it?  Why don't you ask it?

10      Q       Because my job is to ask you questions, not to ask your

11      attorney questions.

12      A       If he doesn't want to tell me, what can I do about that?

13      Q       I don't know; what can you do?

14      A       Nothing.

15      Q       Well, he mentioned something about privilege.  Did you know

16      what he meant by that?

17      A       I don't know what that means.

18      Q       Okay.  How are you going to find out?

19      A       I don't know.

20      Q       Well, he mentioned rules of privilege, rules regarding

21      privilege.  Why don't we ask him-- why don't you ask him

22      what he meant by that?

23      A       What phrase again?

24      Q       Rules of privilege.

25      A       What does that mean?

1 Q What does what mean?

2 A What you just said.

3 Q I want you to tell me what I just said.

4 A Tell me again.

5 Q Your attorney used the phrase rules of privilege. I would  
6 like you to ask your attorney what he means by rules of  
7 privilege.

8 MR. KOENIG: It's the rules about how you and I talk  
9 together.

10 A I still don't understand. I think I'm ending up more  
11 confused than I was before.

12 Q I'll try to paraphrase what your attorney says. Your  
13 attorney says that there are rules of privilege that apply  
14 to when you and your attorney talk. Now, because your  
15 attorney won't talk, won't answer your questions, I'm put in  
16 the unenviable position of having to answer your questions  
17 and having to explain to you things that go on in court,  
18 legal matters. So rules of privilege mean that what you and  
19 your attorney talk about privately cannot be -- your  
20 attorney cannot tell other people what you talk about. Now,  
21 if there are other people in the room, it's no longer  
22 private, so there's no privilege at that point. Now,  
23 explain to me what you understand I just told you.

24 A I don't understand that, that he talks to me in that way.

25 I --

1 Q What don't you understand?

2 A Everything you said. I don't know what that's about.

3 Q When you talk to your lawyer in private, can he tell other  
4 people what you talk about?

5 A I don't know.

6 Q Well, the answer is no. The rules say you can't. And you  
7 can be in serious trouble if you did. But if you're not  
8 alone with him, it's not private. In other words, if there  
9 are other people there, then there is no privacy.

10 A When it comes out like that, I get a headache. I want to  
11 capture it all, and I can't. There's just a lot of things I  
12 don't understand all of it well.

13 Q Okay. I'll ask again. When you are talking to your lawyer  
14 in private, just the two of you, can your lawyer tell other  
15 people what you talk about?

16 A I don't know. He probably knows. If he wants to, he'll  
17 tell, he'll say it.

18 Q Mr. Ortiz-Abrego, he can't. That's your right, not his  
19 right. Your right. Only you can say to your attorney yes,  
20 you can tell somebody else.

21 A I don't understand.

22 Q Did you understand what I just told you about the fact that  
23 it's your right?

24 A A little bit, not much.

25 Q Okay, but it's your right. You have a lot of rights. This

1 is a country that's founded in rights. Freedom of religion,  
2 freedom of speech, when the police ask you questions, you  
3 have the right to remain silent, you don't have to talk to  
4 them at all. When they ask you questions, you have the  
5 right to a lawyer. When you go to trial, you have a right  
6 to a jury trial. Many people think those rights are very  
7 important. They come to this country because of those  
8 rights.

9 A I don't know about those things.

10 Q Well, I'm telling you about those things.

11 A What things?

12 Q Freedom of religion. Do you know what that means?

13 A Religion, that's Catholic.

14 Q Well, Catholic is one religion. In this country, the  
15 government cannot tell you what religion to be. You want to  
16 be Catholic, Jewish or Mormon, or atheist, no problem. I  
17 probably left out a bunch of them, too. I know I did. Like  
18 the Muslim, the Islamic religion and Hindu. But the  
19 government can't tell you what to do about religion. Also,  
20 you have the right, you have freedom of speech. The  
21 government can't tell you what to say or not say, with some  
22 exceptions. You can't go around telling people you're going  
23 to kill somebody. That would be a bad thing. But if you  
24 want to yell at somebody or talk to somebody, the government  
25 can't tell you what to say or what not to say. So can the

1 government here in the United States tell you what religion  
2 to practice?

3 A You said they couldn't.

4 Q That's right. Can they tell you what to say or not to say?

5 A What to say. What do you mean by that?

6 Q Well, can the government stop you from saying something?

7 A I don't know.

8 Q Well, let's say this. Let's say that I said I don't like  
9 President Bush, or I don't like President Obama. Can the  
10 government stop me and say don't say that?

11 A Don't they put you in jail?

12 Q Okay. I'm going to say it again, Mr. Ortiz-Abrego. The  
13 government cannot tell you what to say. You can't say that  
14 you're going to kill somebody, but you can say I don't like  
15 that, I don't like that person, I don't like that president,  
16 or that other president. In fact, we're encouraged to be  
17 critical of our public officials. They can't put you in  
18 jail for saying you don't like a politician.

19 Okay. So I'll ask you again. Can the government tell  
20 you what not to say or what you should say?

21 A Like what things?

22 Q I don't like Bush, I don't like Obama.

23 A No, you said that they can't.

24 Q That's right. Freedom of speech. It's a very important  
25 thing in this country.

1           Can the police, if you don't want to talk to the  
2           police, can they force you to talk to you?

3       A     Yes.

4       Q     Well, no.  If the police are talking to you about what they  
5           think is a crime that you may have committed, they cannot  
6           force you to talk to them.  If you say I'm not talking to  
7           you, that's a right that is guaranteed by the Constitution.  
8           So if the police ask you questions about what happened when  
9           you got arrested, can you tell them no, I'm not going to  
10          talk to you?

11      A     You mean if they tell you need to talk to them?

12      Q     Yes.

13      A     If they ask you, you do.

14      Q     No.  They can ask your name, possibly where you live.

15      A     They really talk grumpy to the person, they sound like  
16          they're mad.

17      Q     They do, they do.  Okay.  But you have the right to remain  
18          silent.  Did you ever hear that?

19      A     No.

20      Q     Okay.  Well, I'm telling you.  That's a right you have,  
21          guaranteed by our Constitution.

22      A     So they're screwing around and saying that you did  
23          something that you didn't do, what can they do about that?  
24          So they look at you, ah, you're laughing, I think that shows  
25          you did it.  Or if you're sad, oh, just shows that you did

1           it. That's how they --

2       Q     That's not very fair, is it?

3       A     I'm going to tell them I didn't do it. They just do the  
4           same thing every day. They say everybody else admitted what  
5           they did. I haven't done anything, and they say, well, then  
6           why are you here then? I don't know. I'm here, my cousin  
7           is telling lies. They say that you raped some children,  
8           they say. I haven't done that, either, not even one of  
9           them. They're doing the same thing every single day. They  
10          don't do anything but that, screwing me over.

11       Q     I understand and that's sometimes what they try to do. But  
12          you have the right, when the police ask a question, to say  
13          no, I'm not going to talk to you.

14       A     I didn't know that.

15       Q     Okay. But you know it now, right?

16       A     Yes.

17       Q     Okay. So if the police start asking you questions, what do  
18          you do? What can you do?

19       A     But it seems like they're always mad when they're asking  
20          questions. How can you keep quiet in the face of that, in  
21          the face of me going on here. And you can't even be quiet  
22          here when they ask you questions. They ask you questions.  
23          And that they are telling you to answer them.

24       Q     Well, do you have the right to say no, I'm not talking to  
25          you when the police ask you questions?

1 A Yeah.

2 Q Pardon me?

3 A Yeah.

4 Q Yes. Okay. All right. So one other thing, one other right  
5 you have is when the police start asking you questions is  
6 you have the right to a lawyer. So that generally makes  
7 them very quiet. So if they start asking questions, you say  
8 I'm not answering any questions until my attorney is here,  
9 they stop. They may not like that, but they have to stop,  
10 because that's your right. Just like you had the right to  
11 not say anything, you have the right to have your lawyer  
12 there when the police ask you questions.

13 So if the police started asking you questions, what  
14 can you do?

15 A Well, at that moment I don't know, because they get -- they  
16 get angry.

17 Q Well, what right do you have at that point?

18 A Right. What do you mean by that?

19 Q When they are asking you questions, what rights do you  
20 have?

21 A That I don't have to say anything.

22 Q Exactly.

23 A They yell at you and they say that you have to answer  
24 them.

25 Q But you could say one more thing besides you don't have to

1 talk to me. You could ask for your lawyer. And they can't  
2 ask any more questions until your lawyer is there. So what  
3 can you do? If the police ask you questions, what can you  
4 do?

5 A I don't know. A person can't just keep quiet.

6 Q Why not?

7 A Because they tell you you have to talk to them. Of course,  
8 you can't be quiet.

9 Q Mr. Ortiz-Abrego, we talked about the right you can say no,  
10 I'm not talking to you.

11 A Here they get really angry, they don't want you to be  
12 quiet.

13 Q What do you mean, here?

14 A If you stay quiet, they say I'm going to do something.

15 Q What do you mean here, in the hospital?

16 A They just say that the person who keeps quiet, that's just  
17 like admitting guilt. They keep saying the same thing to me  
18 over and over, and I keep telling them I didn't do it, I'm  
19 telling you the truth. They tell me that I raped them,  
20 that's what they said. They asked me how you do you feel.  
21 Yeah, but I didn't do anything, that's the truth. It's the  
22 same thing day after day, they say the same things to me.

23 Q Who?

24 A The interpreter says that to me every day.

25 Q Here in this hospital?

1 A There at the school.

2 Q In the school they ask you to tell the police what  
3 happened?

4 A They didn't say that, no. I don't remember that they said  
5 that to me.

6 Q Well, what did they say to you?

7 A They haven't said anything to me.

8 Q You said that here in the hospital they tell you to answer  
9 questions about what?

10 A They want me to tell her what I did. That's what they say,  
11 tell me. And they say how did you rape three children.

12 Q The people here in the school ask you these questions?

13 A They say yes, you're guilty, because you raped three  
14 children. Three children, your cousin, you raped them. I  
15 said I remember well, I have not done anything. I didn't do  
16 that to them, I tell them. But your female cousin says that  
17 you raped your children. I didn't rape anyone.

18 Q Well, that's unfortunate if that's your understanding,  
19 Mr. Ortiz-Abrego, because they clearly should not be asking  
20 you about what--that you should tell them what happened.

21 A I start laughing. They say you're acting like some hot  
22 shot here, you're some great person, laughing. And I said  
23 I'm not some hot guy, I just want to go home.

24 Q So from what you've said today, you said that your cousin  
25 says you did some things, right, your female cousin?

1 A Yes.

2 Q Okay. And you say as strongly that you did not do that?

3 A I don't even know what they're talking about. I thought  
4 before, I thought that they were saying I had touched  
5 something. When I came here today, they said that you raped  
6 three children. I said I didn't rape anybody.

7 Q So there are two versions of what happened, what your  
8 cousin says and what you say. Is that a correct statement?

9 A I don't know what they're -- that's what they tell me,  
10 yeah.

11 Q Okay. Focus on what I'm saying to you now. As I  
12 understand it, your cousin says one thing and you say  
13 something else happened.

14 A I don't even know what she said. She hasn't said anything  
15 to me. She should be talking to me about that, she has  
16 never told me anything. She said it to the attorney, but  
17 she never said anything to me.

18 Q She says one thing to the attorney and you say that didn't  
19 happen?

20 A Because I haven't done anything.

21 Q Okay. Listen to my question, Mr. Ortiz-Abrego. Your  
22 cousin says one thing, and you say that didn't happen.

23 A That's why, that's why, that's the truth, nothing happened.

24 Q Okay. So who decides if what your cousin says is true or  
25 what you say is true?

- 1 A I don't know who decided. The police.
- 2 Q You think the police did?
- 3 A They're the ones who have to see who is the one who's  
4 lying.
- 5 Q Well, Mr. Ortiz-Abrego, if the police decide what is right  
6 or wrong or who says what is true, then I think we're all in  
7 trouble. In this country, the police do not say what's true  
8 or not true. Only the court decides that. Does that make  
9 sense to you?
- 10 A If you say so.
- 11 Q No, not because I say, okay. If you don't believe, if you  
12 doubt what I'm saying, who would you ask?
- 13 A I don't know about that because they've locked me up and I  
14 didn't do anything. And I haven't done anything. I haven't  
15 done anything, and I would remember if I had done something.
- 16 Q So who do you ask? Who do you ask to find out who makes  
17 the decision about truth?
- 18 A Who knows?
- 19 Q Well, you could ask me, but I already told you. So who  
20 would know more about the law than me?
- 21 A You said in the court, right?
- 22 Q The court decides, that's right.
- 23 A What is court? I don't know what that is. Is it, that  
24 whole thing is the court or is it a person called the  
25 court?

1 Q What do you think?

2 A The whole place is called the court, but I don't know. I  
3 think it's that big house is called that. It's a building.

4 Q Okay. Let's narrow it down to more specific then. When  
5 you go back to court, who is that person sitting up there  
6 with the black robe?

7 A The judge, lady judge.

8 Q Sure. And so when you go to court, that court, that  
9 there's the judge with the black robe and there's a jury.

10 (END OF DISK 2 FOR 3-14-12)

11 Twelve people.

12 A Yes.

13 Q So depending on whether you have a jury trial or have the  
14 judge decide, they make the decision what's true and not  
15 true about the charges.

16 A I am telling the truth. So I don't understand why they put  
17 me in jail. The one who is telling lies is my cousin.  
18 She's lying. Because I haven't done a thing.

19 Q So I understand that you're saying you didn't do anything.  
20 Your cousin said you did. So who decides? Who decides  
21 what's true?

22 A Well, there, I don't know who.

23 Q What have we just been talking about?

24 A My cousin has to start telling the truth. I haven't done  
25 anything, because that is the truth.

- 1 Q Mr. Ortiz-Abrego, most people who go to trial, most  
2 defendants who go to trial, say they did not do the crime,  
3 but just because they say I didn't do it doesn't mean they  
4 go home. Someone has to decide if they're guilty or not  
5 guilty. So someone has to decide what's the truth.
- 6 A Yeah.
- 7 Q So who is that? Who decides?
- 8 A They were all there, but he wasn't there, it was another  
9 lady. There was a lot of other people there, too.
- 10 Q Mr. Ortiz-Abrego, when someone is charged with a crime, who  
11 decides if that person's guilty or not guilty?
- 12 A The judge decides.
- 13 Q Okay. Yeah. Or it could be the jury, if you have a jury  
14 trial, those twelve people could decide. Remember, we  
15 talked about the jury? You have the right to -- well, you  
16 have a right to a jury trial, meaning instead of the judge  
17 deciding the case, what's true, you have a jury decide.
- 18 A There's so much.
- 19 Q There's a lot. But there is somebody who can help you.  
20 There is somebody who can explain that to you, somebody who  
21 understands the law, someone you could ask questions of. So  
22 who is it that's helping you?
- 23 A In what?
- 24 Q In court, when you go back to court, who is helping you?
- 25 A The attorney, I'm told.

1 Q Oh. Do you believe that?

2 A Yes.

3 Q Okay.

4 A My wife told me that, that, yes.

5 Q Your wife told you that, but what about you, what do you  
6 think?

7 A I think so.

8 Q Okay. Good. So is your attorney a person that you could  
9 ask questions about what goes on in court?

10 A I don't know.

11 Q What don't you know?

12 A If he answers.

13 Q Well, okay. Well, that's a good point. Okay. I mean,  
14 obviously, if he doesn't answer, then you don't have any  
15 information, but I suspect that when you are talking to him  
16 in private, he answers your questions.

17 A No, because he doesn't know Spanish.

18 Q Oh. Well, what could you do about that?

19 A I don't know.

20 Q I'll tell you what you can do. You have a right to have an  
21 interpreter when you're talking to your lawyer, whether it's  
22 here, in court or in jail. And if that doesn't happen, I  
23 will personally report it to the judge.

24 A She can, she takes Spanish.

25 Q Okay. Then your problem's solved. I didn't know that.

1           Sorry. Okay. Good.

2                       So does that help you when you have an interpreter  
3 when you talk to your lawyer?

4    A    It's good, but I don't understand everything, that's the  
5 problem.

6    Q    Well, if I were --

7    A    All the things you've said here today, I won't remember it  
8 tomorrow. Some things, but not everything.

9    Q    There's a lot to remember, Mr. Ortiz-Abrego, and if I were  
10 in El Salvador I would need an interpreter, also.

11                   When you're with your lawyer, do you think are you  
12 able to talk to him about your case?

13    A    A little, a little my own, but I don't understand all  
14 that. I haven't done anything wrong. I can't say anything  
15 about what I've done. I don't understand how I'm supposed  
16 to say anything about that if I haven't done anything.

17    Q    Okay. Remember, we talked about when two people disagree  
18 in court? For example, your cousin says one thing and you  
19 say it's not true. I'm going to ask you again, who decides  
20 which person is correct, your cousin or you?

21    A    Well, I don't really understand all that. If that's the  
22 case, and she's telling a lie, but I land in jail, how can  
23 that be?

24    Q    Who decides if she's telling a lie?

25    A    The judge, I think. They tell me here that she's the one

1           who decides. They all say it's the lady judge.

2       Q     Okay. That's true if you have a judge trial where you do  
3           not have a jury. If you have a jury trial, the jury decides  
4           who's lying.

5                    THE INTERPRETER: He wonders what my word, if you  
6           choose to have a jury trial, I used choose, but he doesn't  
7           know what choose means. I can use a different word.

8       A     Yes, that can be, because if they're deciding, they need to  
9           start going after her, but I didn't do anything, she's the  
10          one that is inventing things. How can I say something that  
11          I don't know anything about? I don't even know what they're  
12          charging me with.

13      Q     Well, you told us last week what you're charged with, and  
14          you've mentioned it today several times.

15      A     They say that that was said here, but it's not the truth.  
16          They said I had raped three children, but I haven't done  
17          anything.

18      Q     Okay. The police say that you did this, that you raped  
19          children, or you did something wrong. You say you did not.  
20          You said you did nothing wrong.

21      A     Which police are saying that?

22      Q     The police in Seattle.

23      A     No, I haven't done anything to anyone.

24      Q     Okay. Mr. Ortiz-Abrego, your cousin says you did  
25          something. Correct?

1 A Yeah, that's what she says, but she is lying.

2 Q Let me finish, okay? All right? Listen to what I'm  
3 saying. Your cousin says you did something. You say you  
4 didn't do it. So who decides who's telling the truth?

5 A They tell me here that it's the judge who decides, but I  
6 don't know. That's what they tell me here.

7 Q Yes. We've talked about that, about the judge deciding.  
8 But if you have a jury trial, then the jury decides who's  
9 telling the truth. So tell me what you know about the jury?

10 A Two people -- twelve people, but I don't know who they are.

11 Q Well, we don't know who they are because they haven't been  
12 chosen. Okay? But when a person goes to trial and they  
13 have a jury trial, those twelve people -- and you're  
14 right -- twelve people are selected, sit down and listen to  
15 what happened. They listen to whatever -- what your cousin  
16 says, what the police say, and they decide, and they can  
17 listen to you, what you say, they decide who's telling the  
18 truth.

19 A Yeah.

20 Q So in fact, those twelve people all have to agree, every  
21 one of those twelve agree, yes, that person is guilty or no,  
22 not guilty. So if you don't have a jury decide, what other  
23 choice could you have? Who would decide if someone's guilty  
24 or not guilty? I think I screwed up that question.

25 THE INTERPRETER: Okay.

1 Q If you don't have the judge decide, who could decide  
2 whether someone is guilty or not guilty?

3 A I don't know.

4 Q Well, what about those twelve people we've been talking  
5 about?

6 A I don't understand. I think -- I don't understand. One or  
7 the other is in charge, but I don't know which one. I don't  
8 know.

9 Q One of the rights that you have being in the United States  
10 is the right to a jury trial in a criminal case. And what  
11 that means is that you have a right to have those twelve  
12 people decide whether you're guilty or not guilty.

13 A If I haven't done anything, I don't understand how that  
14 goes. What does a person have to do?

15 Q Go to trial.

16 A Pardon me?

17 Q You asked what a person has to do. A person has to go to  
18 trial.

19 A Yeah.

20 Q And when you go to trial, you can have a judge decide the  
21 case or you can have a jury decide the case, your choice.

22 A I don't know how that goes. I don't understand things like  
23 that.

24 Q Who would you ask to explain it to you?

25 A The professor.

1 Q Somebody that's here in this room, who would you ask?

2 A Oh, yeah, the attorney.

3 Q Do you have any questions for me?

4 THE INTERPRETER: I'm sorry?

5 Q Do you have any questions for me?

6 A No, I don't know what to say.

7 Q Okay. Anything at all?

8 A I don't know 'cause I don't understand all of this. I've  
9 been two years now on this, and I don't understand at all.  
10 They bring me here, then they bring me back.

11 Q Two years on -- two years, what happened?

12 A Back and forth, here and there.

13 DR. HENDRICKSON: Okay. Well, it's now 4:08 p.m..  
14 We're going to terminate the session today.

15 And I forgot to ask you if we have permission to  
16 videotape this, a little late, but are you okay with that?

17 A I have no problem with that.

18 DR. HENDRICKSON: Well, if you weren't, I would just  
19 take it and destroy it, so it's your choice. Actually, I  
20 guess I can't, because the court has asked us to do it. All  
21 right.

22 Well, I'm going to try to turn this thing off, and I  
23 will make a copy for the attorneys on this case.

24

25

## **APPENDIX G**

Forensic interview by Dr. Brian Judd  
January 19, 2013

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INTERVIEW OF ALEXANDER ORTIZ-ABREGO

January 19, 2013

In re: State of Washington vs. Alexander Ortiz-Abrego

King County Cause No. 08-1-12172-7 SEA

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Present at Interview:

Dr. Brian Judd, Interviewer

Dr. Mark Whitehill, Observer

Gabriela De Castro, Spanish Interpreter

\*\*\*\*\*

Official Transcript of Recording

Reed Jackson Watkins

Court Certified Transcription

[www.rjwtranscripts.com](http://www.rjwtranscripts.com)

206.624.3005

1 January 19, 2013

2 -o0o-

3  
4 JUDD: Okay. Today is January 19th, 3:13 in the  
5 afternoon. And my name is Brian Judd. I'm here at the King  
6 County jail for continuation of the interview with  
7 Mr. Ortiz-Abrego. I have several people here with me.

8 And first of all, Mr. Ortiz-Abrego, do I have your  
9 permission to record this?

10 ORTIZ-ABREGO: That's fine.

11 JUDD: Okay. Thank you, sir. And then could I have the  
12 other people identify themselves, please?

13 WHITEHILL: Mark Whitehill. I am an observer.

14 INTERPRETER: Gabriela De Castro, Spanish interpreter.

15  
16 (All questions and answers were translated by the interpreter,  
17 and all answers given were through the interpreter, unless  
18 otherwise noted.)

19  
20 JUDD: Okay. Thank you. Now, if you will remember from  
21 when I last talked to you, I will be taking notes, and  
22 everything that we talk about can be included in these notes  
23 or on this recording.

24 ORTIZ-ABREGO: Yeah.

25 JUDD: Okay? And that if I write a report, this report

1 may be going to your attorney, the prosecutor and the judge.

2 ORTIZ-ABREGO: Yeah.

3 JUDD: Okay. Additionally, Dr. Whitehill and Dr. Ted  
4 Judd would likely see my report as well.

5 ORTIZ-ABREGO: Yeah.

6 JUDD: Okay? Now, as I've told you before, you don't  
7 need to talk to me if you don't want to. If there is any  
8 question that I ask that you don't understand, I want you to  
9 tell me so I can explain it to you.

10 ORTIZ-ABREGO: Yeah.

11 JUDD: Okay? In addition, if there is something you  
12 don't want to answer, just tell me.

13 ORTIZ-ABREGO: Yeah.

14 JUDD: Okay? If you want to take a break at any time,  
15 just tell me.

16 ORTIZ-ABREGO: How long will we be here for?

17 JUDD: Oh, probably not more than two hours.

18 ORTIZ-ABREGO: Yeah.

19 JUDD: And if you want to stop talking to me at any point  
20 and leave, just tell me.

21 ORTIZ-ABREGO: Yeah.

22 JUDD: Okay? Good. How are you today?

23 ORTIZ-ABREGO: So-so. Not that great.

24 JUDD: Not that great? I'm sorry to hear that.

25 ORTIZ-ABREGO: I'm not that ill either.

1           JUDD: Okay. Just a second here. Do you -- what  
2 medications are you on?

3           ORTIZ-ABREGO: One, for my blood. That's what they say.

4           JUDD: Okay.

5           ORTIZ-ABREGO: The other one for depression..

6           JUDD: Okay.

7           ORTIZ-ABREGO: One doctor said it was for me to  
8 understand, and the other one said it was for depression.  
9 Here, they say it's for depression.

10          JUDD: Okay. So the same medications as you were on when  
11 I saw you on January 9th?

12          ORTIZ-ABREGO: When was January 9th? That's the day you  
13 came to see me?

14          JUDD: Yes.

15          ORTIZ-ABREGO: Yeah, the same.

16          JUDD: Okay, same. Okay, good. So no changes. How's  
17 your appetite?

18          ORTIZ-ABREGO: I always eat.

19          JUDD: Okay. Any change in your weight?

20          ORTIZ-ABREGO: I haven't really noticed.

21          JUDD: Okay. Haven't noticed any changes?

22          ORTIZ-ABREGO: Let's see. I don't know if I've gone  
23 down.

24          JUDD: Okay.

25          ORTIZ-ABREGO: I went downstairs but it's been a while

1 that they weighed me, but they didn't tell me how much.

2 JUDD: Okay. Okay. How much sleep are you getting?

3 ORTIZ-ABREGO: I haven't noticed how many hours, but I'm  
4 sleeping.

5 JUDD: What time do you normally go to bed?

6 ORTIZ-ABREGO: Two or one.

7 JUDD: Okay. And what time do you wake up?

8 ORTIZ-ABREGO: In the morning when they are giving food,  
9 but then I go back to bed.

10 JUDD: Okay. What time is breakfast?

11 ORTIZ-ABREGO: At around six, I think.

12 JUDD: Okay. And then you sleep after breakfast?

13 ORTIZ-ABREGO: Yeah.

14 JUDD: For how long?

15 ORTIZ-ABREGO: For a while, yeah, or maybe more.

16 JUDD: Okay.

17 ORTIZ-ABREGO: Sometimes I get really sleepy; sometimes I  
18 don't.

19 JUDD: Yeah. Do you sleep in the afternoon?

20 ORTIZ-ABREGO: No. There's a lot of noise in there.

21 JUDD: Yeah.

22 ORTIZ-ABREGO: There's a lot of people there.

23 JUDD: How many people?

24 ORTIZ-ABREGO: 19 -- and sometimes they put someone on  
25 the floor, so it's 20.

1 JUDD: Are there other Spanish-speaking inmates?

2 ORTIZ-ABREGO: Not right now. Just one.

3 JUDD: Just one.

4 ORTIZ-ABREGO: Yeah. Another one. Just two of us.

5 JUDD: Okay. How is your -- how is your energy?

6 ORTIZ-ABREGO: I don't feel good, so I don't feel like I  
7 want to do anything.

8 JUDD: Yeah.

9 ORTIZ-ABREGO: I just feel I want to be lying down.

10 JUDD: And has the Celexa helped your mood?

11 ORTIZ-ABREGO: Well, that one, I take it but my head  
12 hurts in the afternoon. My head hurts when I take it.

13 JUDD: Do you take it in the morning or at night?

14 ORTIZ-ABREGO: In the morning.

15 JUDD: Okay.

16 ORTIZ-ABREGO: After they leave the food, then they come  
17 by at eight or nine.

18 JUDD: Okay. At one point you said that you had heard  
19 voices.

20 ORTIZ-ABREGO: Not right now. That was before, one time,  
21 when I went to Western State.

22 JUDD: Okay.

23 ORTIZ-ABREGO: Sometimes I couldn't sleep a lot and  
24 sometimes they would give me this pink pill. And when I had  
25 that one, I can't remember anything. Here, sometimes they

1 give it to me, too, but it's been days since they have given  
2 me that.

3 JUDD: So you would have problems with hearing a voice  
4 when you didn't sleep?

5 ORTIZ-ABREGO: No, sometimes during the day. Sometimes I  
6 would think it was the TV, but no, it wasn't. But it was  
7 when I couldn't sleep. There were days I wouldn't sleep, I  
8 wouldn't get sleepy. Now I feel really sleepy, like tired.  
9 Before, I didn't get sleepy.

10 JUDD: Okay. So no problem with the voice or anything  
11 now?

12 ORTIZ-ABREGO: No. Sometimes when it's quiet I hear this  
13 beep (makes beeping noise), or when it's just quiet and  
14 nobody is making noise, I hear this beep (makes beeping  
15 noise) but that's it.

16 JUDD: Okay. Do you ever see anything that's not really  
17 there?

18 ORTIZ-ABREGO: Not so far, I haven't seen anything.

19 JUDD: So just the voice that you had at one point?

20 ORTIZ-ABREGO: Yes. But that's been a long time. Not  
21 right now..

22 JUDD: Okay, good. I'm glad to hear that.

23 Do you feel nervous a lot?

24 ORTIZ-ABREGO: The pills make me nervous. The pills,  
25 they make you nervous. Before I wasn't like that, but now

1 here my fingers shake. You know, for being here over  
2 nothing, you know, I have been here for three years over  
3 nothing. And they take me to Western State and they bring  
4 me back.

5 JUDD: That must be confusing.

6 ORTIZ-ABREGO: Yeah. And then they say sometimes that  
7 you're going to go home now, but they never take me out.  
8 They say that it's the pills that make you like that. The  
9 hospital at the school, they say your hands do that if you  
10 take pills. They can tell when you have been taking pills.

11 JUDD: Okay. Can you tell me what the month, day and  
12 year is right now?

13 ORTIZ-ABREGO: The year is 2013. The month, I can't  
14 remember. I haven't really looked.

15 JUDD: Okay.

16 ORTIZ-ABREGO: I think the day is -- today is Saturday.  
17 Yeah, because the attorney came yesterday and said that you  
18 were coming Saturday.

19 JUDD: Okay, good. What city are you in?

20 ORTIZ-ABREGO: In Seattle.

21 JUDD: And do you know what state this is?

22 ORTIZ-ABREGO: Yes, Washington.

23 JUDD: Okay, good. Do you get a chance to watch much TV?

24 ORTIZ-ABREGO: I just -- I can't. I don't understand  
25 English. They only put stuff in English.

1           JUDD: Okay, so...

2           ORTIZ-ABREGO: I don't understand what they're saying on  
3 TV. They're speaking very fast.

4           JUDD: Sure, I understand. Can -- do you know anything  
5 that's going -- can you tell me anything that's going on in  
6 the world, any kind of news or anything?

7           ORTIZ-ABREGO: No, I don't know about that, what's  
8 happening.

9           JUDD: Okay. All right. You haven't heard anything,  
10 huh?

11          ORTIZ-ABREGO: No, I don't know what's going on.

12          JUDD: Okay, got it. I'm going to ask him to repeat  
13 three words for me. This will be the hardest question I  
14 give you today. The words are: Fruit, comb and justice.

15          ORTIZ-ABREGO: Yeah..

16          JUDD: Can you repeat those back?

17          ORTIZ-ABREGO: Fruit, comb and justice.

18          JUDD: Good. I'm going to ask for them a little bit  
19 later so try to remember them.

20          ORTIZ-ABREGO: Yeah.

21          JUDD: Okay, thank you. But not too long.

22          ORTIZ-ABREGO: Yeah.

23          JUDD: Okay, good. How is Cora doing.

24          ORTIZ-ABREGO: My wife?

25          JUDD: Yes.

1 . ORTIZ-ABREGO: Well, she's not well.

2 JUDD: Okay. I'm sorry to hear that. How often do you  
3 talk to her?

4 ORTIZ-ABREGO: She always comes in.

5 JUDD: Okay.

6 ORTIZ-ABREGO: On Sundays only.

7 JUDD: On Sundays?

8 ORTIZ-ABREGO: Yeah.

9 JUDD: Okay. Do you talk to her on the telephone also?

10 ORTIZ-ABREGO: Sometimes, not all the time.

11 JUDD: Okay. And you said she's not well. What's  
12 happening?

13 ORTIZ-ABREGO: She's not well because I'm here and she's  
14 alone with the kids.

15 JUDD: How are the kids doing?

16 ORTIZ-ABREGO: They seem to be okay -- it's the boy that  
17 doesn't seem to be okay.

18 JUDD: Alexander?

19 ORTIZ-ABREGO: Yeah.

20 JUDD: Yeah.

21 ORTIZ-ABREGO: No, it was better before when we were  
22 together. And every time he comes, he starts crying.

23 JUDD: He misses his dad.

24 ORTIZ-ABREGO: Yeah.

25 JUDD: Yeah. So she comes every Sunday?

1           ORTIZ-ABREGO: Yeah.

2           JUDD: Okay. And what's your daughter's name?

3           ORTIZ-ABREGO: Alexa.

4           JUDD: Alexa.

5           ORTIZ-ABREGO: I have a picture here.

6           JUDD: Really?

7           ORTIZ-ABREGO: Yeah.

8           JUDD: How old is Alexa now?

9           ORTIZ-ABREGO: As long as I have been here, that's how  
10           old she is. And I told the attorney to come, you know, and  
11           my wife was at the hospital, and they cut her open right  
12           here.

13          JUDD: Okay. So about three?

14          ORTIZ-ABREGO: Yeah.

15          JUDD: Okay. How's Alexa doing?

16          ORTIZ-ABREGO: Well, she looks fine.

17          JUDD: She looks fine. Is Cora working now?

18          ORTIZ-ABREGO: At the time when she came, she said she  
19           wasn't working. Right now, I don't know.

20          JUDD: Okay.

21          ORTIZ-ABREGO: She will come tomorrow.

22          JUDD: Because I remember in the past that she was  
23           working, I believe at Swedish hospital?

24          ORTIZ-ABREGO: Who?

25          JUDD: Cora.

1           ORTIZ-ABREGO: What do you mean, working?

2           JUDD: She had a -- I remember that -- I believe she had  
3 gotten a job.

4           ORTIZ-ABREGO: Where?

5           JUDD: At Swedish hospital.

6           ORTIZ-ABREGO: No.

7           JUDD: No?

8           ORTIZ-ABREGO: No, she has never worked there.

9           JUDD: Okay, maybe I'm mistaken.

10          ORTIZ-ABREGO: Yeah.

11          JUDD: Okay.

12          ORTIZ-ABREGO: She worked, but at a gym.

13          JUDD: Oh, at -- when was --

14          ORTIZ-ABREGO: She would clean the gym.

15          JUDD: When was that?

16          ORTIZ-ABREGO: She has always worked there.

17          JUDD: Oh, really?

18          ORTIZ-ABREGO: For many years.

19          JUDD: Okay.

20          ORTIZ-ABREGO: And then she didn't work there anymore  
21 because they wanted her to work nights, and then she didn't  
22 work anymore.

23          ORTIZ-ABREGO: Okay.

24          ORTIZ-ABREGO: Because she has the kids.

25          JUDD: Yeah, yeah, of course. So do you know when she

1 stopped working at the gym?

2 ORTIZ-ABREGO: I was out until she had my daughter. And  
3 she was pregnant, that's when she didn't go anymore.

4 JUDD: Okay. So what happened that you're here in jail?

5 ORTIZ-ABREGO: Because my cousin is telling lies.

6 JUDD: Okay. Which cousin?

7 ORTIZ-ABREGO: A cousin named Daisy.

8 JUDD: Okay. What are the lies that she is saying?

9 ORTIZ-ABREGO: Who knows? Some people say one thing;  
10 others say other things. I think before they were saying  
11 that I had touched her, but then some other people say that  
12 I raped her, but then other people say that I raped three  
13 kids in Western State. I don't know what -- I have never  
14 done anything to anybody. Raped three cousins -- or your  
15 cousin, that's what they say. Every day, they were  
16 bothering me every day for months. And I kept saying, no, I  
17 don't understand [inaudible].

18 You know, and then they say, no, you did it, you're  
19 laughing. That's why you did it. And then if I cry, then  
20 they say, you did it because you're crying. You know, so  
21 you can't do anything because anything you say they will say  
22 you did it because you're laughing, anything.

23 And I said, I didn't do anything, nor do I know what  
24 you're talking about because it's the truth. I have never  
25 done anything to anybody.

1           JUDD: Who is "they"?

2           ORTIZ-ABREGO: Who?

3           JUDD: Well, you said "they" say I raped --

4           ORTIZ-ABREGO: So at the hospital, they said say that I  
5 raped three of my cousin's kids.

6           JUDD: Okay. So it was Western State.

7           ORTIZ-ABREGO: Si [speaking directly].

8           JUDD: Okay, okay. That's what I was trying to  
9 understand.

10          ORTIZ-ABREGO: Who put you here, they said, how did you  
11 get here?

12          Well, the attorney was the one who told me to come, you  
13 need to come. Otherwise, they're going to put you in jail.

14          And I said, well, why? I haven't done anything, I don't  
15 understand.

16          And they would say, if you haven't done anything, then  
17 come, don't be scared.

18          JUDD: Okay.

19          ORTIZ-ABREGO: So I came with my kids, my with my  
20 daughter. I haven't done anything to anybody. So they were  
21 sitting there, you know, that lady, the judge is the same --  
22 and the other man, the other man, he is the same one, too.  
23 This is the other attorney, the one they say is mine?  
24 That's another one, because before it was a woman. And her  
25 name was Anna Samuel. And she would call my wife, she's the

1 one who called my wife, because one day we were eating and  
2 she called her and she said asked if I was there.

3 And she said, yes, he's here, why? And then she just  
4 said that and then she hung up.

5 JUDD: Okay. So I need you to slow down for just a  
6 moment. Yeah, I know it's pretty emotional for you. So you  
7 need to help me understand.

8 So who is your attorney now?

9 ORTIZ-ABREGO: I don't know the name because it's in  
10 English, I haven't been able to learn it. I just can't  
11 retain his name.

12 JUDD: Okay, but he came --

13 ORTIZ-ABREGO: But I have a card here.

14 JUDD: Okay. He came to see you yesterday.

15 ORTIZ-ABREGO: Yeah.

16 JUDD: And now, is he -- is he trying to help you?

17 ORTIZ-ABREGO: Well, he says he's good, that he can help  
18 me.

19 JUDD: Okay.

20 ORTIZ-ABREGO: But who knows? I don't know who's helping  
21 me or who is not. They don't get me out, so I don't know.  
22 One time, the attorney, woman, said, you're going to be here  
23 for a year. Then she said two years I will be here. Now  
24 it's been three years. Nobody gets me out. Nobody says  
25 any -- nobody says anything. I don't know what to do. What

1 can I do? They say I'm crazy. I'm not crazy.

2 JUDD: No, I don't think anybody thinks you're crazy.

3 ORTIZ-ABREGO: I told everybody that I'm not crazy. That  
4 I don't understand, that's something else. Because of where  
5 I grew up, not because I'm crazy.

6 JUDD: Yeah.

7 ORTIZ-ABREGO: And how I grew up, that's why. There was  
8 no light where I grew up, nothing. There is no TV or  
9 anything. That's why I don't understand it. It's not  
10 because I'm crazy.

11 JUDD: Okay. So are they saying that this occurred when  
12 you lived with Daisy?

13 ORTIZ-ABREGO: Yeah, that's what they say.

14 JUDD: Okay. So this has been a long time ago.

15 ORTIZ-ABREGO: From what?

16 JUDD: Well, when they say that he touched one of his  
17 cousins or raped one of his cousins.

18 ORTIZ-ABREGO: I haven't raped anybody. That's a lie. I  
19 haven't touched anybody or anything, not even touched or  
20 anything. I'm not like that. I haven't been raised like  
21 that.

22 JUDD: Yeah.

23 ORTIZ-ABREGO: I have never been touching anybody.

24 JUDD: No, I understand that. I'm just trying to  
25 understand when you said that they lied about you, when

1 was -- when did they say that it occurred?

2 ORTIZ-ABREGO: I don't know what they said.

3 JUDD: Okay.

4 ORTIZ-ABREGO: They say it was when I lived there, that's  
5 what they say.

6 JUDD: Okay.

7 ORTIZ-ABREGO: Many years ago, they say.

8 JUDD: Yeah.

9 ORTIZ-ABREGO: I haven't done anything to anybody. They  
10 say that I left because of that. I didn't leave because of  
11 that. I left because I got together with my wife, but I  
12 didn't go for any other reason. You know, you can ask my  
13 wife. She's the one who knows well. She knows. She's not  
14 lying either. If she knew, she would have told them  
15 already. But she knows it's a lie. She knows everything is  
16 a lie.

17 Me too, if I had done anything, I would have said  
18 something already.

19 JUDD: Sure. So when you -- they say that you left  
20 because of this.

21 ORTIZ-ABREGO: That's what the attorney said. Or this  
22 attorney, I don't remember.

23 JUDD: Okay.

24 ORTIZ-ABREGO: They told me so many things, I don't know  
25 who said it, but somebody said --

1 JUDD: Somebody said that.

2 ORTIZ-ABREGO: I think it was this attorney, but I don't  
3 remember.

4 JUDD: Didn't you move back in at some point, also?

5 ORTIZ-ABREGO: Where?

6 JUDD: With Daisy.

7 ORTIZ-ABREGO: Not since I left for my wife. I have been  
8 [inaudible] until they put me here in jail. I was still  
9 living with my wife always. We have never left each other.

10 JUDD: Yeah. No, I thought that you and your wife moved  
11 back in for a short period of time after you initially left.

12 ORTIZ-ABREGO: Where?

13 JUDD: With Daisy.

14 ORTIZ-ABREGO: No.

15 JUDD: No, okay, so I'm mistaken. So you met your wife  
16 about that time?

17 ORTIZ-ABREGO: When I was living at Daisy's, I already  
18 met my wife.

19 JUDD: Okay.

20 ORTIZ-ABREGO: And she would go visit me over there,  
21 because I was living there with my brother. But Daisy  
22 didn't want her to come over.

23 JUDD: Okay.

24 ORTIZ-ABREGO: And then after that, I was there for a few  
25 days, and then I left.

1           JUDD: Okay.

2           ORTIZ-ABREGO: With my wife, she took me to a room in  
3 this house where she was living at --

4           JUDD: Right.

5           ORTIZ-ABREGO: Where, I think with her boss that she  
6 worked for.

7           JUDD: That was in Wallingford.

8           ORTIZ-ABREGO: Yeah.

9           JUDD: Do you have any idea why Daisy would say something  
10 like this?

11          ORTIZ-ABREGO: I don't know why. I never told anything;  
12 that's what's weird. They never said anything [inaudible].  
13 So I don't understand. You know, that's because I don't  
14 understand what they're asking me. I have no idea. I have  
15 never been told anything, and I have gone by there with my  
16 wife, you know. They never said anything.

17          JUDD: So no idea why she might say something like this?

18          ORTIZ-ABREGO: No.

19          JUDD: Okay. Do you remember talking to the police at  
20 all?

21          ORTIZ-ABREGO: Which police.

22          JUDD: When they talked to you about what Daisy said.

23          ORTIZ-ABREGO: Well, one time, one claimed to be a police  
24 officer, came to the house. And he said -- well, that day I  
25 had lost a child, and we were going to bury him. And he

1 arrived and he said he wanted to see me.

2 And I said, what for?

3 I have to talk to you.

4 About what, I said. Why don't you tell me right now?

5 He said, no, and then he left, and he gave me a card and  
6 he said to go there. I remember that's what he said. And I  
7 went.

8 JUDD: Did you have to take time off from work?

9 ORTIZ-ABREGO: Yes, I didn't go to work one time, and I  
10 went to him to see what was going on.

11 JUDD: I'm sorry. You said you lost a child?

12 ORTIZ-ABREGO: Yeah.

13 JUDD: You had a child that passed away?

14 ORTIZ-ABREGO: Yes, because it died in my wife's tummy.

15 JUDD: Oh, I'm sorry to hear that.

16 ORTIZ-ABREGO: It was really little still. Who knows  
17 why?

18 JUDD: So this was -- she was pregnant after Alexander  
19 but before Alexa?

20 ORTIZ-ABREGO: Yeah.

21 JUDD: Okay, okay. I'm sorry to hear that.

22 ORTIZ-ABREGO: Yeah.

23 JUDD: That must have been very painful for you.

24 ORTIZ-ABREGO: Oh, he was really small, not that much.  
25 He wasn't alive yet.

1           JUDD: You went to -- so you went to see the police the  
2 next day?

3           ORTIZ-ABREGO: I don't remember the day.

4           JUDD: Yeah.

5           ORTIZ-ABREGO: I don't remember anymore, but did I go see  
6 him? Yeah.

7           JUDD: Do you remember what you talked about?

8           ORTIZ-ABREGO: Everything? I don't remember everything,  
9 but he did say a few things. He went inside like that, and  
10 he put some wires like that, like that right there, wires.  
11 And then he put one on my finger like that. I remember  
12 that.

13          JUDD: Mm-hmm.

14          ORTIZ-ABREGO: And he was asking many things.

15          JUDD: Did they speak to you in Spanish?

16          ORTIZ-ABREGO: Si [speaking directly]. Yeah.

17          JUDD: Si? Okay. And did you go home that night?

18          ORTIZ-ABREGO: Yeah.

19          JUDD: Okay. At some point then you started going to  
20 court?

21          ORTIZ-ABREGO: Well, they were sending paper and that, a  
22 green paper. And they would, "Come." A month later they  
23 would tell me to come on the paper, but it isn't that place  
24 they take to me to today. It's farther up, it was the 12th  
25 floor, I recall. There was another attorney there, a lady.

1 And I would come, because they would say I should come and  
2 they wouldn't put me in jail so I would come.

3 And later, like a year later, I kept coming and then they  
4 asked -- assigned me another attorney, so I came for a  
5 another whole year. And I kept saying, why do I need to  
6 keep coming? I've told you I haven't done anything.

7 And they kept saying, you must come, they're going to put  
8 you in jail otherwise.

9 One time, they put me in here for a little bit and then  
10 they took me through a door later, so I don't understand.  
11 They just made me put my fingers down like that and then  
12 they took me out through a door that was there. And then I  
13 think I kept coming after, but I don't remember anymore.

14 JUDD: Were the -- were the green papers or the sheets  
15 that they gave you in Spanish?

16 ORTIZ-ABREGO: No.

17 JUDD: No.

18 ORTIZ-ABREGO: No, they were in English.

19 JUDD: English?

20 ORTIZ-ABREGO: It would just show a date when I needed to  
21 come.

22 JUDD: Okay, okay. So nothing else other than just a  
23 date and time?

24 ORTIZ-ABREGO: Yeah, just a little paper.

25 JUDD: How did you get from home to the courthouse?

1           ORTIZ-ABREGO: I think that Cora would drop me off. I  
2 don't remember. I would come --

3           JUDD: You were dropped --

4           ORTIZ-ABREGO: Or maybe a bus, I don't remember.

5           JUDD: You were driving?

6           ORTIZ-ABREGO: But I came, I came.

7           JUDD: Okay, okay. And do you remember a lady wearing a  
8 black robe?

9           ORTIZ-ABREGO: The lady they call "judge"?

10          JUDD: Yes.

11          ORTIZ-ABREGO: Yeah, there was one of them here.

12          JUDD: One of them here, okay. What --

13          ORTIZ-ABREGO: But it wasn't that lady. It was another  
14 lady.

15          JUDD: Okay. And what did -- do you remember what she  
16 did?

17          ORTIZ-ABREGO: Well, they would never tell me anything,  
18 you know, and sometimes I wouldn't even go in. And I would  
19 just be given this paper, and then it would say I need to  
20 come this day, and I would ask again, but why? I kept  
21 asking.

22                 They kept saying, you've got to come back, otherwise they  
23 go get you at home.

24                 And I would say, well, why? And then, you know, I just  
25 said -- they told me I had to come so I kept coming for two

1 years, I kept coming and coming, and they didn't even --  
2 every month.

3 JUDD: So you had an attorney?

4 ORTIZ-ABREGO: It was a woman.

5 JUDD: It was a woman. That was Anna Samuel.

6 ORTIZ-ABREGO: Before I had another lady, but I don't  
7 remember her name.

8 JUDD: And then now you have got a male attorney.

9 ORTIZ-ABREGO: Si [speaking directly]. Yeah.

10 JUDD: Si, okay. So did -- what did they try to do?

11 ORTIZ-ABREGO: Like what?

12 JUDD: Well, so, were they there to help you? Were they  
13 there to -- what were they doing?

14 ORTIZ-ABREGO: You know, I don't know what they were  
15 doing. They would just tell me to come and I would come.  
16 You know, they would just say, come; otherwise they're going  
17 to put you in jail.

18 And I would say, but why, I never did anything.

19 And they would say, if you didn't do anything, then come.  
20 So I would come.

21 JUDD: Okay.

22 ORTIZ-ABREGO: And one time I came and they took me to  
23 the other court and they sat me there. I came with my son  
24 because my wife was at the hospital then. They were just  
25 talking and they did some things, but I don't understand

1 about those things. What were they doing? I don't know.

2 JUDD: But you went through a trial.

3 ORTIZ-ABREGO: They say it's a trial where there's those  
4 12 people?

5 JUDD: Yeah. Okay. Tell me about that. Tell me what  
6 you remember about that.

7 ORTIZ-ABREGO: Well, there were 12 people there. I  
8 didn't count them, but they say it's 12 people.

9 JUDD: Okay.

10 ORTIZ-ABREGO: And then there was that same man from  
11 before, that man that they say that he's an attorney but  
12 he's bad. And my attorney who they say was my attorney.  
13 And the lady, the judge, she has always been the same one.

14 JUDD: Okay.

15 ORTIZ-ABREGO: You know, and then I went there every day  
16 for like three weeks [inaudible] pick me up, and I would ask  
17 them, why do I need to come every day?

18 And then, you know, they said, you must come, come  
19 tomorrow, come tomorrow, every day. So I would come.

20 JUDD: Okay. So you said that there was an attorney  
21 there. And you said he was a bad attorney.

22 ORTIZ-ABREGO: They say he's bad. At the hospital they  
23 also say there's a good one and a bad one.

24 JUDD: A good one and a bad one. What did the bad one do  
25 or --

1           ORTIZ-ABREGO: I didn't really pay attention to what they  
2 were saying.

3           JUDD: Why do you -- why is he -- what makes you think  
4 that he is bad?

5           ORTIZ-ABREGO: Well, I don't know. I don't know if he's  
6 bad. Everybody says he's bad.

7           JUDD: Why do they say he's bad?

8           ORTIZ-ABREGO: Because everybody says they put you -- he  
9 puts you in jail.

10          JUDD: Ah. And then you have your attorney.

11          ORTIZ-ABREGO: Yeah.

12          JUDD: And she or he was good?

13          ORTIZ-ABREGO: Who knows? I don't know. They didn't  
14 tell me anything. They were just doing things there. And I  
15 told them, I don't know about these things. Many people  
16 were there and --

17          JUDD: Yeah, it's confusing, I know. What did -- why did  
18 they say that the attorney was good?

19          ORTIZ-ABREGO: You know, the hospital they say there's a  
20 good one and a bad one. The good one is the one who's there  
21 with you, they say.

22          JUDD: Okay. So the good one is supposed to help you?

23          ORTIZ-ABREGO: Yeah, that's what they say.

24          JUDD: And you said there was a judge who was the same.

25          ORTIZ-ABREGO: Yeah.

1 JUDD: Was she good or bad?

2 ORTIZ-ABREGO: I don't know that.

3 JUDD: Okay. What did she do?

4 ORTIZ-ABREGO: Nothing. She was just sitting there.

5 JUDD: Okay.

6 ORTIZ-ABREGO: I never saw her doing anything. She was  
7 just sitting there.

8 JUDD: Okay.

9 ORTIZ-ABREGO: Then she would talk there with the others.

10 JUDD: Okay. When you were at the hospital, what did  
11 they say the judge did?

12 ORTIZ-ABREGO: He said, like, well -- he said to me that  
13 he is the one that is in charge.

14 JUDD: Okay.

15 ORTIZ-ABREGO: That she's the one in charge there.

16 JUDD: Okay. Can you tell me in charge of what?

17 ORTIZ-ABREGO: Well, she is in charge of everybody  
18 [inaudible].

19 JUDD: Okay.

20 ORTIZ-ABREGO: And all of that. You have got to be  
21 sitting there. If you talk, they're going to get you out of  
22 there, they say.

23 JUDD: Yeah, yeah. And then the 12 people?

24 ORTIZ-ABREGO: Well, they were sitting there. They  
25 weren't doing anything. They were just looking. They were

1 just sitting.

2 JUDD: Just sitting there. What did they say the 12  
3 people did when you were at the hospital?

4 ORTIZ-ABREGO: They say that they decide if you did  
5 something or if you didn't.

6 JUDD: Okay. So they're the ones that decide if you did  
7 something or didn't do something?

8 ORTIZ-ABREGO: Yeah, that's what they say.

9 JUDD: Okay.

10 ORTIZ-ABREGO: But they don't know anything. They don't  
11 know lies they're being told, because I didn't do anything.  
12 I know I didn't do anything. The attorney said they were  
13 [inaudible]. And then, why, because I didn't -- and they  
14 say because of your color, they put you there. I don't  
15 know. That's what she says. I don't know. That's what she  
16 said when they put me in here.

17 I asked, why did you put me in here? Because I didn't  
18 know about all of that.

19 And she said, the 12 people put you in here, and it  
20 wasn't me.

21 And why, you know, why? I didn't do anything. You told  
22 me that I was going to go home, that to come here.

23 Yes, but because of your color they put you there.  
24 That's what she said.

25 JUDD: Is that Ms. --

1           ORTIZ-ABREGO: And then after that, I went to the  
2 hospital and I told the judge I wasn't crazy. I didn't even  
3 know what the hospital was. And she said, you're going to  
4 the hospital where there's, you know, crazy people, and then  
5 they took me there. They took me several times. I don't  
6 even remember how many times, three or four times, but I did  
7 go several times.

8           JUDD: That must have been really confusing.

9           ORTIZ-ABREGO: I don't understand. I don't understand.  
10 I don't feel crazy. If I don't understand, that's something  
11 different but I'm not crazy. My mother was crazy, but you  
12 couldn't get close to her because she would just hit you.

13          JUDD: And she --

14          ORTIZ-ABREGO: That's a real crazy person.

15          JUDD: And she killed all the ducks.

16          ORTIZ-ABREGO: Yeah.

17          JUDD: Yeah.

18          ORTIZ-ABREGO: She would take them outside. And they  
19 would take us outside for us not to sleep there. One time  
20 she hit me with a bonk right here. She said that I was the  
21 devil. That's why we didn't sleep there. We would go out  
22 to the woods and sleep under the coffee plants.

23          JUDD: It's safer.

24          ORTIZ-ABREGO: Yeah.

25          JUDD: Okay. I forgot the next question I was going to

1 ask. Give me just -- give me just a moment.

2 Okay. So the 12 people sent you here.

3 ORTIZ-ABREGO: That's what the attorney says. I don't  
4 really know.

5 JUDD: Okay.

6 ORTIZ-ABREGO: That's what she says.

7 JUDD: Okay. So they think -- they must have thought  
8 that you did something to your cousin.

9 ORTIZ-ABREGO: Who knows? I don't know what they  
10 thought.

11 JUDD: Okay. And you have been here for three years?

12 ORTIZ-ABREGO: Yeah.

13 JUDD: And then at the hospital, also?

14 ORTIZ-ABREGO: They take me there and they bring me here,  
15 you know, here and there and here and there.

16 JUDD: Did they talk to you -- so you're saying that you  
17 didn't do it.

18 ORTIZ-ABREGO: No.

19 JUDD: Okay. You are saying that you did not touch  
20 anybody or rape anybody.

21 ORTIZ-ABREGO: No, I haven't raped or touched anyone.

22 JUDD: Okay, okay. And so did you -- do you understand  
23 that that means that you're saying that you are not guilty?

24 ORTIZ-ABREGO: Yeah.

25 JUDD: Okay. And if you were to say that you were

1 guilty, what would that mean?

2 ORTIZ-ABREGO: Guilty means that you did it. That's what  
3 the hospital said. They always ask me that, too: Are you  
4 guilty or not guilty?

5 JUDD: Okay.

6 ORTIZ-ABREGO: And they say you're guilty because you're  
7 here. And I say, why? Guilty of what? I don't know.  
8 That's what I don't understand. But they put me in here  
9 based on a bunch of lies because I [inaudible] the people  
10 who are lying is them, and then they put me in here. I  
11 don't understand.

12 Maybe other people did things, but not me. I haven't  
13 been raised like that, grown up like that. You can ask  
14 anybody, anybody who knows me. I never drank. To say that  
15 I was drinking, I never do drink. No drugs, I've never used  
16 drugs. I don't use cigarettes, either. I don't smoke.

17 JUDD: So because they thought you were guilty, is  
18 that -- I'm sorry. Because they thought you were guilty, is  
19 that why you came to jail?

20 ORTIZ-ABREGO: The attorney says it's because of my  
21 color, that's what she says. They put you in there because  
22 of your color, she said. But I don't know. They didn't say  
23 anything. They just took me from there and they brought me  
24 in here.

25 JUDD: Okay.

1           ORTIZ-ABREGO: What I remember is that from there they  
2 brought me in here. That's what I remember.

3           JUDD: Okay. What did they teach you at Western State  
4 about what happens to somebody who is guilty?

5           ORTIZ-ABREGO: They say that if you do something, they  
6 put you in jail, they say.

7           JUDD: Okay.

8           ORTIZ-ABREGO: You know, I haven't done anything and I'm  
9 in here, in jail, and that's what I don't understand. How?  
10 How is that? I'm telling them I'm not lying.

11          JUDD: No, I understand that. And if you are found not  
12 guilty, what did they say happens?

13          ORTIZ-ABREGO: Then you go home, they say.

14          JUDD: Okay. Are you okay?

15          ORTIZ-ABREGO: Yeah.

16          JUDD: Okay. I know this is hard.

17          ORTIZ-ABREGO: I also have a cold.

18          JUDD: Oh, I'm sorry to hear that. I think we all have  
19 had colds.

20          Okay. So if you are found not guilty, you go home?

21          ORTIZ-ABREGO: Yeah, that's what they say.

22          JUDD: And they say that if you're found guilty, what  
23 happens?

24          ORTIZ-ABREGO: That they take you to jail, they say.

25          JUDD: Jail. Do you get along with your attorney okay?

1           ORTIZ-ABREGO: Not so good. I don't speak a lot of  
2 English, whenever he ask me...

3           JUDD: Is he nice to you?

4           ORTIZ-ABREGO: Yes, he's a good person.

5           JUDD: Okay. Does he come with a translator?

6           ORTIZ-ABREGO: Yeah.

7           JUDD: Okay. Do you feel comfortable talking to him?

8           ORTIZ-ABREGO: Yeah.

9           JUDD: Okay. Do you feel like, that you can tell your  
10 attorney anything that you want?

11          ORTIZ-ABREGO: Yeah.

12          JUDD: Okay. And does he answer your questions?

13          ORTIZ-ABREGO: Sometimes I ask him, when am I going home?

14          JUDD: And he doesn't answer that.

15          ORTIZ-ABREGO: No, he says he doesn't know, he says.

16          JUDD: Okay. How about other questions?

17          ORTIZ-ABREGO: Well, I just tell him I want to go home  
18 and that I don't understand all of this. Now, maybe they  
19 think I understand everything, that they think I'm crazy,  
20 and I said that I'm not crazy, you know, that I don't  
21 understand because of the way I've been raised I have never  
22 been in [inaudible]. I have never been in those things,  
23 you know.

24          One time I was in Tacoma in jail. You know, I went one  
25 time and, you know, the attorney was there and he got me

1 out. And there was a friend who sold drugs, who was living  
2 at Daisy's. And he said, let's go out for the ride, and so  
3 I went with him. I had just gotten here. And he sold drugs  
4 and they were already looking for him. And they came like  
5 that, but I wasn't selling drugs or anything. I've never  
6 sold drugs. I didn't even know about that. The one who was  
7 selling was him. But I was with him that day so they also  
8 got me.

9 JUDD: So they arrested you, too?

10 ORTIZ-ABREGO: Yeah, they took me to jail. I was there  
11 for a few days, and then they got me out.

12 JUDD: I think you were there for ten days?

13 ORTIZ-ABREGO: I don't remember how many days, but not  
14 that many.

15 JUDD: In 2006, you also were contacted by the police.  
16 Do you remember that?

17 ORTIZ-ABREGO: How? What do you mean?

18 JUDD: The girl that lived next door said something.

19 ORTIZ-ABREGO: Yeah.

20 JUDD: Tell me about that.

21 ORTIZ-ABREGO: Yeah, she said that I had touched her,  
22 too, that I had raped her. That's a lie. I didn't touch  
23 her. She would always come in. And she was -- she would  
24 say, I want chaka, chaka. And I would tell her, no, I have  
25 my wife. And I don't speak a lot of English, and she's

1 white. And she would say, I want chaka, chaka. But, no, I  
2 don't want anything.

3 JUDD: Mm-hmm.

4 ORTIZ-ABREGO: And that day she went in there and she sat  
5 on the sofa and she would do like this to herself and she  
6 would open up, and -- but I didn't even touch her because I  
7 didn't want any problems with my wife. She was saying  
8 things, but I don't want to talk about it. I didn't want to  
9 talk about that because I already told everything to the  
10 police about that.

11 JUDD: Yeah.

12 ORTIZ-ABREGO: What happened there, you know [inaudible].  
13 I told them the whole truth.

14 JUDD: Yeah, I know. She said that you raped her.

15 ORTIZ-ABREGO: I don't recall what she said that had  
16 happened, but I think she said that I rape her. She's  
17 lying. She's lying. That's a lie. I was working. That  
18 was the day before I was at home and I had the door open,  
19 and she came inside and she closed the door. And after that  
20 my son was there, too.

21 And then the next day, I went to work and then my wife  
22 called me and said there's an officer here looking for you.  
23 And I said why, why?

24 He says that you raped that one over there, the neighbor.  
25 I said, I didn't rape anybody.

1           And she said, well, come over, come over right now and  
2           fix it because I don't know about this.

3           And I went home quickly, and then there was an officer  
4           there and he asked me things, and I told him how everything  
5           was.

6           JUDD: What does "rape" mean? Can you describe to me  
7           what, when you use the word "rape," what you believe that  
8           means?

9           ORTIZ-ABREGO: Well, rape would be when you have sex,  
10          maybe.

11          JUDD: Okay. And if somebody accuses you of that, is  
12          that a serious -- is that serious?

13          ORTIZ-ABREGO: Well, yeah, I would say so.

14          JUDD: Okay. And what happens to people that are  
15          convicted of rape?

16          ORTIZ-ABREGO: Who knows? I don't know what happens.

17          JUDD: Well, is it a crime?

18          ORTIZ-ABREGO: What is a crime?

19          JUDD: Is rape a crime?

20          ORTIZ-ABREGO: Well, they say so.

21          JUDD: Okay.

22          ORTIZ-ABREGO: If you do that, yeah.

23          JUDD: Okay.

24          ORTIZ-ABREGO: But if you haven't done anything, no.

25          JUDD: Sure. What happens to people -- what do they say

1 happens to somebody who has committed a crime?

2 ORTIZ-ABREGO: They put them in jail.

3 JUDD: Okay. Yeah. In 2006 I know that you -- she made  
4 the accusation, but they found evidence that supported  
5 your -- what you were saying.

6 ORTIZ-ABREGO: I tell the truth about [inaudible]. I  
7 don't lie. She was the one who gave me papers all the time,  
8 she would send me letters. I gave the police all the  
9 letters, everything she would send me.

10 JUDD: Right.

11 ORTIZ-ABREGO: I kept telling her not to bother me  
12 because I have my wife and my children. You know, one time  
13 I was lying down like that, and then when I felt it, it was  
14 her, somebody was touching me. And it was her. She came  
15 into my home, and I told her to go outside.

16 JUDD: You remember this pretty well then?

17 ORTIZ-ABREGO: Yeah.

18 JUDD: Yeah. Okay. And you remembered the -- what  
19 happened in 2000 when you went to jail?

20 ORTIZ-ABREGO: What do you mean, jail?

21 JUDD: You were in jail in 2000.

22 ORTIZ-ABREGO: When they brought me here?

23 JUDD: No, no, no, no. In Tacoma.

24 ORTIZ-ABREGO: I have only been in jail once, and today  
25 I'm here. That's twice.

1 JUDD: Okay.

2 ORTIZ-ABREGO: One time is when I was with that friend  
3 who was selling drugs.

4 JUDD: Right. And what I'm asking is, you remember what  
5 happened then.

6 ORTIZ-ABREGO: About what, who?

7 JUDD: About your friend selling drugs.

8 ORTIZ-ABREGO: Well, they put me in jail.

9 JUDD: Where --

10 ORTIZ-ABREGO: I hadn't done anything. I told the  
11 officer I don't know about this.

12 JUDD: Yeah.

13 ORTIZ-ABREGO: It was my friend who was selling, but I  
14 didn't even know he sold. He said that he worked.

15 JUDD: Yeah, yeah. And where did they say that he was  
16 selling drugs?

17 ORTIZ-ABREGO: Who knows? I don't know where. He never  
18 told me.

19 JUDD: Do you remember where you were when you were  
20 arrested?

21 ORTIZ-ABREGO: Yeah.

22 JUDD: Where was that?

23 ORTIZ-ABREGO: On the street. We were walking.

24 JUDD: Oh, okay. In Tacoma?

25 ORTIZ-ABREGO: Yeah.

1 JUDD: Was that the first time you had been in jail?

2 ORTIZ-ABREGO: Yeah.

3 JUDD: Okay.

4 ORTIZ-ABREGO: I was there once for Immigration.

5 JUDD: Immigration, I'm sorry. Yeah. And that was for  
6 how long?

7 ORTIZ-ABREGO: It was a long time ago; I don't remember.

8 JUDD: Okay. So actually you have been in jail -- this  
9 is the third time?

10 ORTIZ-ABREGO: Yeah.

11 JUDD: Okay. So Immigration and then Tacoma and then  
12 here?

13 ORTIZ-ABREGO: Yeah.

14 JUDD: Okay, okay. And you want to go home.

15 ORTIZ-ABREGO: Yeah.

16 JUDD: If -- no, nothing. Give me just a second.

17 So have they -- you said a couple of times that you were  
18 going to -- they said that you would be here for a year or  
19 maybe two years? Do you have any idea how long that you may  
20 be in jail?

21 ORTIZ-ABREGO: No.

22 JUDD: Okay. When you were in the -- in your trial, did  
23 you testify? Did you get on the stand?

24 ORTIZ-ABREGO: What do you mean, "stand"?

25 JUDD: Okay. Did you talk to the jury?



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C E R T I F I C A T E

STATE OF WASHINGTON )  
 )  
COUNTY OF SNOHOMISH )

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this                      day of                      2013.

NOTARY PUBLIC in and for  
the State of Washington,  
residing at Lynnwood.  
My commission expires 4-27-14.

# **APPENDIX H**

## **Selected Jury Instructions**

**FILED**  
KING COUNTY, WASHINGTON

MAR 14 2013

SUPERIOR COURT CLERK  
BY Melissa Ehlers  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ALEXANDER ORTIZ-ABREGO )  
 )  
 Defendant. )  
\_\_\_\_\_

No. 08-1-12172-7 SEA

THE COURT'S INSTRUCTIONS TO THE JURY

DATED: MARCH 13, 2013

  
SUSAN J. CRAIGHEAD, JUDGE

No. 7

A person commits the crime of rape of a child when the person has sexual intercourse with a child.

In addition to its ordinary meaning, sexual intercourse means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.

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.

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.

The defendant is presumed to be incompetent. The State has the burden of proving the defendant is competent by a preponderance of the evidence. The defendant has no burden of proving that his is incompetent.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

If you find that the State has established that the defendant is competent by a preponderance of the evidence, it will be your duty to return a verdict of "competent" to stand trial. On the other hand, if you find that the State has not established that the defendant is competent, it will be your duty to return a verdict of "incompetent" to stand trial.

# F A X

Law Office of James Koenig  
11300 Roosevelt Way NE, Suite 300  
Seattle, WA



**To:**  
**FAX NUMBER:** (206) 389-2613

**FROM:** JAMES KOENIG  
**FAX NUMBER:** (206) 826-6568

**DATE:** 5/31/2013 11:58 AM

**REGARDING:** RE: STATE V. ORTIZ-ABREGO, #70320-0-1

**PHONE NUMBER FOR FOLLOW-UP:**  
(206) 923-7409

**COMMENTS:**

Attached please find the Certificate of Service in #70320-0-1 filed with the court today, May 31, 2013

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY 31 PM 12:00

No. 70320-0-1

**CERTIFICATE OF SERVICE**

On today's date I delivered a copy of Petitioner's Motion for Discretionary Review to King County Prosecuting Attorney Appellate Unit, W554 King County Courthouse, 516 Third Avenue, Seattle, WA 98104.

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

  
James E. Koenig  
Done in Seattle, Washington

5/31/13  
Date

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY 31 PM 12:00