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NO. 92334-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

Did the trial court err in finding a defendant incompetent where the defendant was not mentally ill, and where the trial court's ruling – that the defendant was “not competent for the trial we gave him” – was based on its belief that “accommodations” could be made to improve his grasp of the proceedings, and demanded improperly that a defendant must be shown to have actually understood the trial as it unfolded?

B. FACTS

1. PRETRIAL AND TRIAL.

Criminal charges against Alexander Ortiz-Abrego centered on four incidents of coerced oral sex that took place between 1999 and 2002. CP 3-4. The victim was between six and seven years old during this time, and was the daughter of Ortiz-Abrego's cousin. Id. The case was investigated by Detective Chris Knudsen of the King County Sheriff's Office. He is a proficient Spanish-speaker. RP (6/8/11) 10. Detective Knudsen first contacted Ortiz-Abrego at home in Seattle. Because Ortiz-Abrego was unavailable, they agreed to meet at the sheriff's office in Kent at 9 a.m. the next morning. Id. at 10-13. Ortiz-Abrego had no difficulty speaking with or understanding the detective. Id.

Ortiz-Abrego arrived at the Regional Justice Center in Kent at 9 o'clock the next morning. Ortiz-Abrego said he had been to the Center

before when he was accused by neighbors of rape in a previous case; he claimed he was targeted in that case because he was Hispanic. RP (6/8/11) 14. The rape allegation was investigated, but charges were not filed. Id. at 35.¹

In Spanish, Detective Knudsen asked Ortiz-Abrego about the present accusations. (RP 6/8/11) 16-17. Ortiz-Abrego volunteered that he had found the victim asleep on the couch one night and had attempted to wake her to carry her to her room. The victim woke up and started yelling, rousing her mother, who then entered the room and confronted Ortiz-Abrego. Id. at 21. This story is substantially similar to the one given by the complaining witness, with the exception of the nature of the touching. Id. at 22. In addition to offering his version of events, Ortiz-Abrego recalled specific rules of the house set by his cousin. Id. Ortiz-Abrego suggested two possible explanations for the victim's allegations: she was confused about what happened, or another man living in the house committed the crime. RP (6/8/11) 24.

Ortiz-Abrego was calm during the interview, and Detective

¹ The report from this prior event was admitted as exhibit 7 in the competency hearing. It was offered by the prosecutor to show the defendant's ability to recall past facts and to stand up for himself in the face of criminal accusations. Ortiz-Abrego was accused of sexual intercourse with a developmentally delayed high school student, a girl who functioned at about the 12-year-old level. The girl subsequently moved away, so charges were never brought. Still, Ortiz-Abrego gave a statement to authorities denying intercourse but admitting that he allowed the girl to masturbate him to ejaculation.

Knudsen did not notice any difficulty with auditory comprehension. Id. at 26. Ortiz-Abrego's replies were on-topic, coherent, and there were no abnormal delays between Detective Knudsen's questions and Ortiz-Abrego's responses. Id. at 27-28. Additionally, Ortiz-Abrego explained Spanish words when the detective did not know the words. Id.

Ortiz-Abrego was charged by amended information with three counts of Rape of a Child in the First Degree for oral sexual contact with a six-year-old girl that occurred between 1999 and 2002. CP 7. Attorney Paige Garberding represented Ortiz-Abrego from October, 2008 until December, 2009. Anna Samuel replaced Garberding in December, 2009.

Early in the trial, concerns about Ortiz-Abrego's competence were raised by the prosecutor and the court, and the court conducted a colloquy with Ortiz-Abrego. When asked by the court why he was present in court that day, Ortiz-Abrego replied that it was "because it is said I raped somebody." RP (5/10/10) 17. Asked the job of the woman sitting next to him (Samuel), he replied "she says she is my attorney," RP (5/10/10) 18. Asked what his attorney does, he replied, "she says that she is going to defend me." Id. Asked if he knew what he could choose, he said he could decide if he "should declare myself guilty or come to trial." Id. at 20. The judge asked Ortiz-Abrego if he knew what the prosecutor's job was; Ortiz-Abrego replied that he could see that "he's accusing me." Id. Asked who

would decide if he was guilty, he answered, "she says the jury." Id. at 21. When asked if he knew what could happen if the jury believed the prosecutor, he replied that he could, "spend the rest of my life in jail." Id. at 20-21, 23. He knew he had the option of a two year sentence if he accepted a plea offer, and he understood that his five-year-old son would be twenty by the time he was released from prison if he was found guilty at trial. Id. at 19-22.

The court concluded that Ortiz-Abrego was competent to proceed because he met the standard under Washington law "in terms of his understanding of what a trial is." RP (5/10/10) 38. The court hinted that it thought the standard should be higher:

I had a chance to review the case law, and, you know, most of our case law has developed in a mental illness context, but I did have a chance to review State vs. Lawrence . . . It was also a sex case, although it did not involve a child, and apparently the Court of Appeals sets an extremely low standard, which is what I remembered, but I kind of wanted to -- it's sort of hard for me to believe, so I went back and reread it and that's exactly what it says.

RP (5/10/10) 33.

During trial, Samuel retained a neuropsychologist, Dr. Tedd Judd, who recommended accommodations to help Ortiz-Abrego understand more of the trial. CP 56. According to Samuel, Ortiz-Abrego consistently demonstrated the ability to recall and communicate his version of events, but he did not testify because he could not avoid topics excluded in rulings

in limine. RP (6/29/11) 46-47. Samuel did not ask the court to implement accommodations, nor did she challenge competency. Ortiz-Abrego was convicted as charged.

2. POST TRIAL.

On June 3, 2010, Samuel filed a motion to arrest judgment or for a new trial, claiming that Ortiz-Abrego did not understand what had happened. On June 11, the trial court ordered Ortiz-Abrego evaluated for competency. CP 61-65. He was sent to Western State Hospital (WSH) on July 14 for a 15-day competency evaluation. An intake assessment was performed by Dr. Roman Gleyzer, a psychiatrist. RP (6/9/11) 48. He had no major psychological issues, and although he had cognitive and intellectual disabilities, Dr. Gleyzer stated that Ortiz-Abrego's level of functioning in society was average. RP (6/9/11) 52-53.

Dr. Ray Hendrickson, a psychologist, also evaluated Ortiz-Abrego. RP (6/28/11) 40. Ortiz-Abrego understood and responded to questions. *Id.* at 44. His work history, and the fact that he was receiving unemployment compensation, were signs of his ability to function in society. *Id.* at 44-45. Dr. Hendrickson opined that Ortiz-Abrego had a below-average level of mental functioning, and a "fairly high" level of adaptive functioning. *Id.* at 59. He diagnosed Ortiz-Abrego with

adjustment disorder, depressed and anxious mood, and borderline intellectual functioning. RP (6/9/11) 54.

There were difficulties in securing a court-certified translator, so the 15-day commitment was extended. RP (6/15/11) 86. At WSH, Ortiz-Abrego demonstrated the ability to both speak and understand a certain amount of English, and interacted with non-Spanish-speaking patients and staff. Id. at 82. He achieved the highest level of patient privileges, allowing him face-to-face meals with his wife. RP (6/9/11) 77. To obtain this status, Ortiz-Abrego had to follow all of the ward rules, have no behavioral issues, and fill out at least two application forms. RP (6/15/11) 88. After approximately 30 days, Ortiz-Abrego was returned to the King County Jail to await a formal evaluation. Id. at 86.

While Ortiz-Abrego was in jail post-trial, he spoke on the telephone with his wife and these calls were recorded. One call occurred on June 1, 2010, a few days after Ortiz-Abrego was convicted and during a time that Samuel believes he was confused. In the recorded call, Ortiz-Abrego demonstrates a higher level of understanding of the legal process than he indicated to Samuel. He clearly understood that he had been found guilty, and that the amount of time he faced in jail had not yet been determined. See Ex. 11 at 5. Ortiz-Abrego stated that he understood he had the right to appeal his guilty verdict and he corrected his wife when

she said that Samuel didn't explain the consequences of trial to him. Id. at 12, 14. He also illustrated that he understood the value of a negotiated guilty plea when he criticized another inmate at the jail for rejecting a three-month plea deal when he was subsequently sentenced to five years.

...there's another one here who has a case just like mine. Same thing happened to him like with me, everything the same and he was given five years. He was offered three months staying at home and the dumbshit said no. Now he'll go to the slammer for five years.

Ex. 11 at 12.

In a call placed on October 14, 2010, Ortiz-Abrego told his wife about another inmate who had pled guilty, again indicating that he understood the meaning of a guilty plea. Ex. 14 at 12. Additionally, he discussed his other attorney, Peter, who Ortiz-Abrego said did not know anything about his criminal case because "he is just for immigration." Id. at 10-12. He also instructed his wife on plans to move his family should he receive a very long sentence, including telling her to garner tenants, and to not sell equipment until they knew his sentence. Ex. 14 at 10, 19.

The full competency evaluation was performed on October 14, 2010, by Dr. George Nelson, a psychologist and developmental disabilities professional from WSH RP (6/15/11) 108-09. Ortiz-Abrego's demeanor was very different during this evaluation than his behavior described by Dr. Tedd Judd and by WSH during his first 30-day visit. Rather than

appearing calm and attentive, Ortiz-Abrego cried often and produced a moaning sound that concerned those present. RP (6/29/11) 64-66*; RP (6/15/11) 112.

Dr. Nelson was surprised at the level of difficulty Ortiz-Abrego had with the evaluation, stating that Ortiz-Abrego was having more difficulty than he had observed in people with an I.Q. of 50. RP (6/15/11) 115. He struggled to reconcile Dr. Judd's 5/17/10 report with Ortiz-Abrego's demeanor in October. Id. at 116. He noted that people displaying the limits that Ortiz-Abrego was showing usually could not hold a job, have a family, or pass a driver's test. RP (6/21/11) 27. Dr. Nelson said that in hundreds of competency evaluations, he had seen only five or six people perform so poorly, and none of them functioned in the community. Id. Dr. Nelson diagnosed adjustment disorder with mixed anxiety and depression as a result of the stress of trial and time in jail. CP 141. He believed that the emotional distress Ortiz-Abrego displayed during the evaluation was a major component of incompetence. RP (6/21/11) 25. Although puzzled by the overall picture, Dr. Nelson believed that medication could resolve Ortiz-Abrego's emotional and cognitive issues. Id. at 52.

On October 15, 2010, the day after Dr. Nelson evaluated Ortiz-Abrego, there was another call between Ortiz-Abrego and his wife and,

like the recorded call on October 14, Ortiz-Abrego showed none of the confusion he displayed to Dr. Nelson. His wife told him about a possible job offer, they discussed the type of work, the number of hours, and days she might work. Ortiz-Abrego told her to take the job. Ex. 12 at 6-7.

Ortiz-Abrego was sent to WSH for a 90-day restoration program from November 17, 2010 to February 22, 2011. CP 96. Dr. Gleyzer did another intake assessment. Ortiz-Abrego gave several answers that were inconsistent with the initial intake assessment in July, 2010; he now alleged abuse as a child and injuries from a beating at the hands of gang members. RP (6/9/11) 59. Ironically, in spite of these select, newly-recovered memories, Ortiz-Abrego illustrated general memory loss, and appeared “unwilling, or unable to provide information.” Id. at 60. This change could be caused by either a serious medical condition or malingering. Id. at 61.

Ortiz-Abrego was assigned to the most basic competency restoration classes. RP (6/15/11) 83. He did not appear very focused on the classes, and he learned little to nothing about the trial process. Id. at 103. WSH staff reported that Ortiz-Abrego could and did engage in activities that interested him, like discussions about mental health and sports. RP (6/28/11) (Vitrano) 19. He again obtained the highest patient privileges. RP (6/9/11) 77.

There were several differences between his behavior during the first and second WSH commitments. While Ortiz-Abrego had spoken with non-Spanish-speakers during the initial commitment, he insisted during the 90-day restoration period that he understood no English. RP (6/9/11) 82. He also self-reported memory and knowledge deficiencies that he did not report during the first admission. Id. at 88.

Ortiz-Abrego received his final competency evaluation from Drs. Hendrickson and Gleyzer on February 9, 2011. Dr. Hendrickson noted that Ortiz-Abrego responded to most of the questions presented in this evaluation with "I don't know" or "I don't remember," even to questions like, "what is your mother's name," and others that Ortiz-Abrego had previously answered without difficulty. RP (6/28/11) 70-71. Although Dr. Hendrickson stated that the change in Ortiz-Abrego's responsiveness could be caused by disease or trauma, he noted that there was no evidence of either disease or trauma in jail or hospital records. Id. at 72. Dr. Gleyzer stated that a broad inability to remember information is often a sign of malingering, because even severely impaired individuals will be able to answer some questions. RP (6/9/11) 91. Neither doctor could test for malingering because neither spoke Spanish. Id. at 94.

The final February 24, 2011, report was inconclusive as to competency. CP 145-56. Dr. Gleyzer explained that while there were no

indications that Ortiz-Abrego lacked the capacity to understand a trial, the evaluators could not make a determination because of Ortiz-Abrego's non-responsive answers. RP (6/9/11) 95-95. Dr. Hendrickson believed based on Ortiz-Abrego's differing presentations, that Ortiz-Abrego was malingering. RP (6/28/11) 18.*

On April 22, 2011, Dr. Tedd Judd evaluated Ortiz-Abrego in the King County Jail. RP (6/8/11) 136. Dr. Judd reviewed Dr. Nelson and Dr. Hendrickson's reports but was still surprised by Ortiz-Abrego's poor performance. A test for malingering showed that Ortiz-Abrego was obviously exaggerating his symptoms. Id. at 138. Dr. Judd repeated several of the tests he had performed on May 17, 2010, and Ortiz-Abrego performance was substantially worse. Id. at 139. There was no recorded medical reason for the decline. Id. He said that neither depression nor anxiety could have caused the drop in performance he observed. Id.

3. COMPETENCY HEARING.

Drs. Gleyzer, Hendrickson, Nelson, and Judd all testified during a contested competency hearing from June 8, 2011 to June 30, 2011. They had all been given information that they had not seen before opining on competency. For example, Drs. Gleyzer and Hendrickson had not seen the transcripts of the jail phone calls, Ortiz-Abrego's interview with Detective Knudsen, and the colloquy on competency that took place with the trial

judge on 5/10/10. Dr. Hendrickson changed his opinion based on this information to conclude that Ortiz-Abrego was exaggerating his cognitive issues in February, 2011. RP (6/28/11) 20.* Dr. Hendrickson concluded that Ortiz-Abrego did have the capacity to understand the nature of the charges against him and assist his attorney in his defense. Id. at 25-26.

Dr. Gleyzer also changed his opinion and concluded that Ortiz-Abrego was competent. RP (6/9/11) 99-101. In response to the court's questions, Dr. Gleyzer said that the only explanation for Ortiz-Abrego's decline was malingering. RP (6/15/11) 66.

Dr. Nelson testified that the jail calls showed that Ortiz-Abrego had a much higher level of abstract thinking, sequential planning and problem-solving than Dr. Nelson's initial evaluation had led him to believe. RP (6/21/11) 69-72. The two calls made contemporaneous with the October 14, 2010, evaluation further led Dr. Nelson to question his opinion that Ortiz-Abrego was incompetent.

Dr. Judd did not change his opinion about Ortiz-Abrego's competency based on the new information. Dr. Judd admitted, however, that he had not reviewed all of the jail calls, and he acknowledged that facts noted by the prosecutor were significant and would alter his opinion

of Ortiz-Abrego.² Dr. Judd agreed that Ortiz-Abrego's decision to malingering showed that Ortiz-Abrego understood his peril. RP (6/8/11) 169.

4. RULINGS AND COMMENTS BY THE TRIAL COURT REGARDING THE LEGAL TEST FOR COMPETENCY.

After the competency hearing, the trial court concluded that Ortiz-Abrego had been incompetent, vacated the conviction, and granted a new trial. The trial court began its oral ruling by saying, "this is a unique case, a unique defendant, and as a result I've made a unique decision." RP

(7/5/11) 2. The court then ruled as follows:

1. I find by the preponderance of the evidence that at the time of trial, the defendant understood the charges made against him. I have significant doubts about the defendant's ability to appreciate his peril, but I cannot make the finding that he lacks this ability because it is possible a more skilled attorney utilizing the type of accommodations suggested by Dr. Judd could have helped the defendant understand this.
2. However, because none of the accommodations Dr. Judd suggested were made, I find by a preponderance of the evidence that the defendant was unable to understand the trial process, the testimony of witnesses, and argument as a result of the combination of his borderline intellectual functioning and his auditory processing disability. Therefore, I find that he lacked the capacity to assist his attorney in the absence of the accommodations outlined by Dr. Judd, as set forth in Exhibit 4.

² Dr. Judd admitted that he had reviewed only "two or three" of the jail transcripts (RP (6/9/11) 17). He had not read the June 1, 2010 call in which Ortiz-Abrego discusses plea bargaining, appeals, lawyers, and other legal concepts about this trial, nor the transcript in which Ortiz-Abrego devised a plan to have his five-year-old son call the wife of a different inmate to discuss with them putting money into that inmate's jail account. RP (6/9/11) 15. He had not reviewed the transcript where the defendant helps his wife decide whether to accept a job. *Id.* at 16-17. Dr. Judd did not know that Ortiz-Abrego was collecting unemployment insurance and that he had changed his story about how he was hit in the head as a child. RP (6/8/11) 153, 160.

3. I find by a preponderance of the evidence that the defendant was not competent to stand the trial that we gave him, because he was not capable of properly understanding the nature of the trial proceeding or rationally assisting his legal counsel in the defense of his cause.
4. I find that the defendant is not competent to be sentenced because even if the Court were to adopt the accommodations recommended by Dr. Judd, [the defendant] did not understand the proceeding that led to his conviction.

CP 346-47. The State appealed.

As it had before trial, the court again expressed dissatisfaction with the legal standard for competency. RP (7/5/11) 3-4 (“I recognize that the bar for competency is, frankly, surprisingly low.”), 30 (“I’m not sure I would have decided Ortiz³ the way it was decided, but, that was the law, so that is what I followed.”). In a subsequent hearing when the court considered how to “restore” the defendant to competency, the court explained its reasoning. It said, “I mean, I was concerned that the trial we gave him he wasn’t competent to stand, but that doesn’t mean we can’t give him a trial that he could be competent to stand.” RP (8/11/11) 12-13.

The court elaborated as follows:

Well, ... I think I have the information now to say that he would not be competent to stand at (sic) trial that happened the same way that our trial did happen, but that doesn’t mean that we couldn’t create circumstances where he would be competent.

³ State v. Ortiz, 104 Wn.2d 479, 706 P.2d 1069 (1985).

Unlike a lot of situations, *we may not be in a situation of changing the defendant; we may be in a situation of changing us.*

RP (8/11/11) 13-14 (italics added).

Other statements made by the court show that it injected principles from disability law into the competency determination. See also RP (8/11/11) 8 (“Accommodations ...actually factored into my reasoning...”), 22-23 (“... he was not competent to stand the trial we gave him”), 23 (“...we are going to have to examine how we could design a trial for which he could be competent to stand. . .”), 24 (“...my concern is that restoration is assuming that we can change the defendant when we have evidence before the court that we ... could change how we do a trial”).⁴

In later hearings, the trial court struggled to find and fund a “cognitive aide” who would prepare Ortiz-Abrego for a subsequent trial and who would, ostensibly, sit with him through the trial. RP (10/14/11) 80-85. At one point, defense counsel raised the question whether the American Disabilities Act (ADA)⁵ might be an avenue to secure funding. The trial court said, “I have to admit that I’ve been thinking about the ADA pretty much throughout this whole series of proceedings and how it

⁴ Defense counsel was apparently confused by the ruling as, in a subsequent hearing, he characterized the ruling this way: “The Court has decided for Due Process reasons that the trial given wasn’t appropriate, which is different than finding he wasn’t competent for trial. . . . Because the court is finding that he might be competent with the appropriate accommodations.” RP (9/2/11) 31.

⁵ Americans with Disabilities Act of 1990, 42 U.S.C. §12112(b)(5)(A).

would apply in this context, and I don't know." RP (10/21/11) 91. When the prosecutor pointed out that this was not really "restoration," the court replied, "...it is about restoration in the sense of how do we find a way to teach this defendant what's happening so that he can make rational decisions and assist his attorney and follow the proceedings."

RP (10/21/11) 97.

Much later, a jury found Ortiz-Abrego competent and Ortiz-Abrego moved to vacate the jury's verdict. Although the motion was denied, the trial court indicated by letter to the parties an interest in obtaining appellate review regarding the appropriate legal standard.

Appendix B. The court said:

[T]he real dispute here is over what the standard for competency should be in a case involving the unique cognitive impairments presented by Mr. Ortiz-Abrego. The court attempted to draft jury instructions that relied on the statute and the case law to tell the jury what "competency to stand trial" means—yet, in the end, the instructions represented a compromise between two diametrically opposed views of what a defendant must be able to do to be competent to stand trial....

Appendix A.

Ortiz-Abrego sought discretionary review of the jury competency proceeding. The trial court certified that a key legal issue was presented by the motion, and that resolution of that legal issue by the appellate court would promote the ultimate determination of the litigation. Appendix C

(Order on Certification). In that order, the court made clear that the controlling issue was the legal standard for competency, not simply its own evaluation of the evidence.

Substantively, the central legal issue in this case is this: Does “competency to stand trial” require the capacity to understand a trial as it unfolds and, if so, to what extent? ... This is not a case involving mental illness.

* * *

The State has taken the position that the law in Washington is settled as to what must be established to find a defendant competent and there is no need to address the issue framed above. There is little doubt that the central issue in this case remains the defendant’s competency to stand trial given his unique limitations; whether competency includes the capacity to understand a trial as it happens is a controlling question of law presented by this case.

Appendix B at 2-3.

5. COURT OF APPEALS DECISION.

The Court of Appeals reversed because the trial court had applied an standard unsupported by precedent that required “proof that a defendant has an actual or ‘proper’ understanding of ‘the trial process, the testimony of witnesses, and argument.’” State v. Ortiz-Abrego, No. 67894-9-I, slip op. at 8 (filed August 17, 2015). The court held that “the court’s finding of incompetence due to a lack of accommodations conflicts with the standard stated in the statute and case law” and “the court strayed from well-established Washington law, adopting a hybrid standard blending Washington competency law with the ‘reasonable accommodations’

requirements of the ADA.” Ortiz-Abrego, slip op. at 9. The court remanded with directions to apply the usual standard. Slip op. at 10.

C: ARGUMENT

1. ORTIZ-ABREGO WAS COMPETENT UNDER THE EXISTING COMPETENCY STANDARD.

a. Legal Standards.

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

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

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

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

The United States Supreme Court in Moran held that if “the capacity for a ‘reasoned choice’” among alternatives is a higher standard than the Dusky standard (whether the defendant has a rational understanding of the proceedings), that higher standard is not required for competency. Moran, 509 U.S. at 397-98. It observed that how the ‘reasoned choice’ standard may be different than Dusky is not readily apparent. Id. The Court reaffirmed that the standard for competency to plead guilty, to stand trial, or to waive counsel is whether the defendant has the capacity for rational understanding.⁶ Id. at 398-99.

⁶ Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cited by Ortiz-Abrego, also does not heighten the Dusky standard; the case involved a delusional defendant and held that a defendant must have “sufficient contact with reality” to have a rational understanding of the proceedings. There is no suggestion that Ortiz-Abrego had any mental illness that caused him to be out of touch with reality.

The Court explained: “The focus of a competency inquiry is the defendant’s mental capacity; the question is whether he has the *ability* to understand the proceedings.” *Id.* at 401 n.12 (emphasis in original) (citing Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (holding a defendant is incompetent if he lacks the capacity to understand the nature and object of the proceedings)). Before a guilty plea is accepted, a trial court must in addition be satisfied that the waiver of constitutional rights is knowing and voluntary – an inquiry which “by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision.” Moran, 509 U.S. at 400-01 & n.12 (emphasis in original) (citations omitted).⁷

This Court has repeatedly held that a defendant does not need to be capable of choosing between alternative defenses or trial strategies in order to be competent. State v. Lord, 117 Wn.2d 829, 900-01, 822 P.2d 177 (1991); Ortiz, 104 Wn.2d at 483. The Court in Ortiz specifically

⁷ Ortiz-Abrego quotes from the concurring opinion in Moran, apparently suggesting that it identifies a higher standard to establish competency. Pet. for Review, at 13. To the contrary, the point of Justice Kennedy’s concurrence was that the Dusky standard applies from arraignment through verdict. Moran, 509 U.S. at 402-09 (Kennedy, J., concurring). Justice Kennedy identifies the crucial component of the inquiry as the defendant’s possession of “a reasonable degree of rational understanding.” *Id.* at 404 (quoting Dusky). He also notes that “whether the defendant has made a knowing, intelligent, and voluntary decision to make certain fundamental choices during the course of criminal proceedings is another subject of judicial inquiry.” *Id.* at 403.

rejected⁸ the argument that Ortiz-Abrego makes here, that it had adopted a higher competency standard in State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). Jones also observed that a person may be competent to stand trial while not having the capacity to determine the advisability of entering an insanity plea. Id. at 746 n.3 (noting that it had reached that conclusion in State v. Kolocotronis, 73 Wn.2d 92, 102, 436 P.2d 774 (1968)).

Defendants with serious mental illness and cognitive deficits have been deemed competent to stand trial. See e.g. State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986) (delusional and paranoid schizophrenic who was not medicated); Ortiz, 104 Wn.2d at 482 (I.Q. of 49-59); State v. Minnix, 63 Wn. App. 494, 820 P.2d 956 (1991) (I.Q. between 49 and 67); State v. Lawrence, 108 Wn. App. 226, 31 P.3d 1198 (2001). In Lawrence, the trial court found competent a defendant who had an I.Q. of 60, which classified him as mildly retarded, and a “slow thought process” that at times caused there to be very long pauses between the asking of a question and his answer. Lawrence, 108 Wn. App. at 231. On appeal, Lawrence tried to distinguish himself from the defendants in Ortiz and Minnix, who were found competent despite significant disabilities, because his “mental impairment and response latencies made communication during trial impossible.” Id. at 232. The appeals court affirmed the finding of

⁸ Ortiz, 104 Wn.2d at 483.

competency, noting that Lawrence had the capacity to respond, was aware of his own self-interest, and was able to follow his attorney's directives. Id. The court concluded, "[t]he fact that Lawrence was unable to respond promptly, or that he had a slow thought process, does not prove that he was unable to comprehend what was being said, or unable to communicate his thoughts to counsel." Id., at 232-33.

There are many reasons a person may appear to not understand a proceeding – inattention, distraction by personal circumstances, refusal to participate because of disdain for the system or the lawyer, or malingering. Thus, proof of actual understanding of every aspect of the proceedings is not required to satisfy fundamental due process. A lawyer is provided to every defendant at public expense to ensure that he has a guide through the system and an advocate in the courtroom. Illustrating that actual understanding and actual assistance to counsel are not necessary to a finding of competency; a defendant who refuses to cooperate with defense counsel is not for that reason incompetent to stand trial, although the ability to assist counsel is one component of competency. State v. Hicks, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985).

b. Ortiz-Abrego Was Competent Under These Standards.

There was a plethora of evidence showing that Ortiz-Abrego was competent under the normal standard. Although he undoubtedly had cognitive limits and a relatively low I.Q., he lived an independent life, he was married with children, he worked, he managed his life, he was a soccer referee, and he was able to arrange for unemployment insurance when needed. Once this investigation began, he spoke to the detective about two separate criminal investigations and provided details about the alleged crimes and offered non-exculpatory explanations for his conduct. He was represented for over a year by an experienced lawyer who raised no concerns about competency and his trial attorney likewise did not raise the issue. The trial court found him competent at the beginning of trial because he could identify his lawyer and her role, he knew he was charged with rape, he knew that he could plead guilty or contest his guilt, he knew that the prosecutor was his accuser, and he plainly could recite past facts to assist his lawyer in presenting a defense.

The recorded jail calls also establish competency. On June 1, 2010, at the same time as Samuel was telling the trial court that Ortiz-Abrego did not understand he had been convicted, he spoke to his wife on the telephone and made fun of an inmate who did not accept a favorable

plea deal. He showed that he recognized the difference between immigration lawyers and criminal lawyers, good lawyers and bad ones, the approximate sentence he faced, and his rights to appeal his conviction. In October, he engaged in rudimentary but somewhat detailed life-planning with his wife, and he generally evinced an awareness of his surroundings and the legal system. This level of understanding of plea bargaining and sentencing far exceeds the basic standard required by law.

2. THE TRIAL COURT ERRED BY APPLYING A NEW HYBRID LEGAL STANDARD.

It is apparent from the record that the trial court was dissatisfied with the existing competency standard, and was attracted by the approach to competency employed by Dr. Tedd Judd and, as a result, transformed the competency determination into an attempt to maximize Ortiz-Abrego's understanding of trial proceedings, rather than simply an assessment of whether he had the capacity to understand the proceedings and recall past facts sufficient to assist his lawyer in preparing for trial. The Court said:

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

CP 342 (emphasis added).

The approach “differs conceptually” but it also a departure from the legal standard. “Capacity” is a measure of a defendant’s *ability* to understand; it is not a measure of whether a person actually *did* understand. Evidence that a defendant understood elements of the trial is evidence that he had the capacity to understand, but the converse is not necessarily true. A person could in fact fail to understand the trial even though he had the *capacity* to understand. Many defendants fail to actually understand proceedings because they are disinterested, inattentive, tired, frustrated, angry, or unrealistic. Requiring some (indeterminate) showing of *actual* understanding substantially raises the bar of competency.

Attempting to assess “proper” understanding is particularly difficult as to defendants who are malingering. It may be hard to know whether a defendant understands concepts when he is honestly answering questions. When, however, the defendant purposely deceives the investigator, that task becomes nearly impossible. Deliberate malingering – a technique to advance one’s interests with evaluators and the court – inherently contradicts any claim that a defendant is not competent. Here, all the experts agreed Ortiz-Abrego was malingering.

This Court reject, as it has in the past, attempts to raise the competency bar. See Hahn, 106 Wn.2d at 894 (holding that the appellate

court erred in holding that ability to understand and choose trial strategies is necessary for competency to stand trial); State v. Gwaltney, 77 Wn.2d 906, 908, 468 P.2d 433 (1970) (reversing finding of incompetence based on defendant's inability to control odd facial expressions because inability to control behavior is not part of the competency analysis).

3. A HYBRID LEGAL STANDARD IS NOT CONSTITUTIONALLY OR STATUTORILY REQUIRED AND WOULD BE POOR POLICY.

As argued above, the trial court's competency ruling demands inquiry into a defendant's actual understanding of evidence and concepts presented at trial. This standard is not required by the Constitution or our state statute. It would also be poor policy.

A trial court may make accommodations to improve defendant's comprehension of the proceedings. However, transforming discretionary accommodations into a constitutional mandate for perfect understanding is both an unworkable standard and would confer unwarranted immunity from criminal prosecution.

Most citizens (and even many lawyers) will struggle to truly understand all concepts in a criminal trial. What exactly must be understood; rules of evidence; the distinctions between procedure and substance; the meaning and boundaries of a particular substantive law; the proper application of law to factual subtleties; the intricacies of the

Sentencing Reform Act? How deep must the understanding be? How will comprehension be measured, and by whom? Cognitive capacity is difficult enough to measure, and that is the sole “modest aim” of competency determinations. Assessing a defendant’s “actual” or “rational” understanding of a proceeding will be nearly impossible, especially considering that many defendants suffer personality disorders, attention deficits, anger difficulties (often directed at their lawyers and the court), chronic substance abuse, and a myriad other major and minor mental illnesses. Attempting to assess “understanding” in this realm will lead to endless litigation in both trial courts and on appeal.

A test for competency along the lines suggested by the trial court would also embroil the already overburdened mental health system, including Western and Eastern State Hospitals, with an impossible task of teaching detailed legal concepts to defendants and determining optimal accommodations for a wide variety of learning disabilities. An appellate court ruling along the lines envisioned by the trial court would effectively impose an enormous unfunded mandate on an already fragile system.

Finally, raising the bar to competency as the trial court has done will make a much larger class of criminal defendants beyond the reach of the law. As more fully explained in the State’s reply brief below, Ortiz-Abrego and other defendants who fail the trial court’s competency test

cannot be prosecuted criminally, and also will not meet the stringent requirements of the involuntary commitment system. See RCW 71.05.240 and.280. A lack of perfect understanding should not grant these defendants immunity from criminal prosecution.

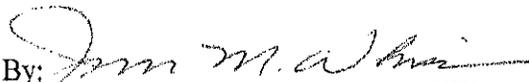
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the decision of the Court of Appeals, and remand this case to the trial court with instructions that the court employ the ordinary competency standard.

DATED this 1st day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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

APPENDIX A

FILED
KING COUNTY WASHINGTON

APR - 4 2013

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

State of WASHINGTON

Plaintiff/Petitioner,

vs.

Alexander Ortiz-Abrego

Defendant/Respondent.

NO. 08-1-12172-7 SEA

Correspondence

Superior Court for the State of Washington
in and for the County of King

SUSAN J. CRAIGHEAD
Judge

King County Courthouse
Seattle, Washington 98104-2312
E-mail: Susan.Craighead@kingcounty.gov

April 3, 2013

James Koenig
11300 Roosevelt Way NE Ste 300
Seattle, WA 98125-6243

Valiant Richey
King Co Prosecutor's Office
516 3rd Ave Ste W554
Seattle, WA 98104-2390

Counsel,

Before the court are the defendant's motion for arrest of judgment pursuant to CrR 7.4 and a motion for an order of relief from judgment. The State opposes both motions.

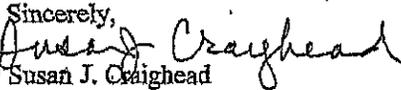
These motions follow a second competency hearing for Mr. Ortiz-Abrego. At the State's request the question of the defendant's competency to stand trial was tried to a jury. It became apparent that the State chose a jury trial over a bench trial because there was no evidence supporting the notion that the Defendant is competent to stand beyond what this court had already found insufficient during the first competency hearing. After watching Mr. Ortiz-Abrego through a third hearing, this court is even more convinced that he is unable to understand court proceedings and has does not appreciate his peril. Indeed, as the jury was filing into court to deliver its verdict as to competency, the court observed the defendant yawning. He showed no reaction at all to the announcement of the jury's decision. This court could not in good conscience preside over Mr. Ortiz-Abrego's next criminal trial because it would not be a fair trial and, effectively, Mr. Ortiz-Abrego would not be truly present at the trial. I suspect that I am not the only person involved in this case whose conscience is troubled by the prospect of trying this man again.

Yet, the jury has spoken. I worry that perhaps there would have been a different verdict if it had not been necessary to tell the jury the nature of the charges here. It does not appear to me that CrR 7.4 or CrR 7.8 apply to what is essentially an interlocutory decision in the midst of a criminal prosecution. Even if one or both of the rules do apply in this setting, the real dispute here is over what the standard for competency should be in a case involving the unique cognitive impairments presented by Mr. Ortiz-Abrego. The court attempted to draft jury instructions that relied on the statute and the case law to tell the jury what "competency to stand trial" means – yet, in the end, the instructions represented a compromise between two diametrically opposed views of what a defendant must be able to do to be competent to stand trial. When the defense challenges the evidence underlying the jury's verdict, it is from the defendant's perspective on what is required to be competent to stand trial – not an insufficiency of proof as to, for example, an element of a crime clearly defined by law. Similarly, in its CrR 7.8 motion, the defense challenges the lack of a definition for "appreciate one's peril," yet there really is no accepted definition in case law. In short, the challenges raised by the defense at this stage are better addressed to the appellate court.

As this verdict may not be deemed a final, appealable order by the Court of Appeals, defense may wish to pursue a motion for discretionary review. The court would entertain a request to certify the issues in this hearing for discretionary review pursuant to RAP 2.3(b)(4); the parties may wish to confer with one another and with respective appellate consultants before deciding whether to seek a certification. It may be that there is merit in asking the Court of Appeals to stay the first appeal while the appeal from this hearing is prepared (no doubt on an accelerated basis). If the parties disagree about whether the matter should be certified, the court would want to hear from both sides. There may be good reasons not to certify this matter at this time.

Finally, I want to thank all of you for the tremendous work you put into this case. This is a record like no other. The trial exposed weaknesses at Western State Hospital that urgently need to be addressed. You are some of the finest attorneys with whom I have ever worked. It has been an honor to preside over these proceedings.

Sincerely,


Susan J. Craighead

Judge

APPENDIX B

FILED

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs

ALEXANDER ORITZ-ABREGO,

Defendant.

NO. 08-1-12172-7 SEA

ORDER ON CERTIFICATION

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 WL5463863¹; 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 ¹ It is not clear that this is a published decision, but it is in the 7th circuit now and illustrates the morass that will be created
if the issue at hand is not resolved by the state courts.

26 ORDER

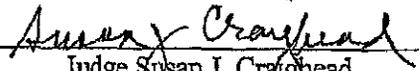
Susan J. Craighead
King County Superior Court
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resources to this case. Rather than address two appeals, the appellate court might choose to join this case with the earlier-filed appeal. In light of the importance of the issue presented here to the fundamental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

Now, therefore, it is hereby ORDERED that the following issue is certified for discretionary review by the Court of Appeals: 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?

DATED: May 20, 2013.


Judge Susan J. Craighead

ORDER

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

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Gregory Link, the attorney for the petitioner, at Greg@washapp.org, containing a copy of the **SUPPLEMENTAL BRIEF OF RESPONDENT**, in State v. Alexander Ortiz-Abrego, Cause No. 92334-5, in the Supreme Court, for the State of Washington.

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

Dated this 1st day of August, 2016.



Name:

Done in Seattle, Washington

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From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 01, 2016 4:07 PM
To: 'Brame, Wynne'
Cc: Whisman, Jim; 'greg@washapp.org' (greg@washapp.org); wapofficemail@washapp.org
Subject: RE: Alexander Ortiz-Abrego, Supreme Court No. 92334-5

Received 8/1/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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From: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
Sent: Monday, August 01, 2016 3:46 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Whisman, Jim <Jim.Whisman@kingcounty.gov>; 'greg@washapp.org' (greg@washapp.org) <greg@washapp.org>; wapofficemail@washapp.org
Subject: Alexander Ortiz-Abrego, Supreme Court No. 92334-5

Please accept for filing the attached documents (Motion to File Overlength Brief and Respondents Supplemental Brief) in State of Washington v. Alexander Ortiz-Abrego, Supreme Court No. 92334-5.

Thank you.

James M. Whisman
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WSBA #91002

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at James Whisman's direction.

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