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STATE OF WASHINGTON
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NO. 966532

IN THE SUPREME COURT FOR WASHINGTON STATE

STATE OF WASHINGTON,

Petitioner,

v.

MATTHEW SEAN MCCARTHY

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

SUPPLEMENTAL RESPONDENT'S BRIEF

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I. SUPPLEMENTAL ISSUES PRESENTED

1. Did the court of appeals apply the appropriate standard of review to assess whether the trial court should have conducted a third competency evaluation?
2. Did the court of appeals err, when it adopted a California rule?
3. Whether an evidentiary hearing, years after trial, could resolve the issue of competency and restore due process?

II. STATEMENT OF THE CASE PERTINENT TO SUPPLEMENTAL ARGUMENT

We do not have facts that can supplement facts already presented in State v. McCarthy, 6 Wash.App.2d 94, 429 P.3d 1086 (2018), review granted, 435 P.3d 265 (2019). For that reason, we adopt the facts the court of appeals relied on, for purposes here.

III. ARGUMENT

1. IT IS THE APPELLATE COURT'S RESPONSIBILITY TO INDEPENDENTLY REVIEW UNDISPUTED FACTS WHENEVER CONSTITUTIONAL RIGHTS ARE AT ISSUE.

The majority does not explicitly declare the standard of review it applies here, in State v. McCarthy, 6 Wash.App.2d 94 429 P.3d 1086 (2018), review granted, 435 P.3d 265 (2019). However, its review, which was based on the undisputed evidence, is in congruence with appellate review on other matters of constitutional significance.

Normally, on appeal, great significance is attached to factual findings of a trial court. However, when fundamental constitutional rights are in issue, like here, it is incumbent upon an appellate court to make its own independent examination and

evaluation on the undisputed facts. See U.S. Const. amend. XIV; Medina v. California, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

Independent review generally requires the appellate court to freshly examine “crucial facts”—those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. See, e.g., Hernandez v. New York, 500 U.S. 352, 367, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); Harte–Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688–89, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). In deciding the constitutional question, the appellate court may also review evidence ignored by a lower court. City of Houston, Tex., v. Hill, 482 U.S. 451, 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); State v. Kilburn, 151 Wash. 2d 36, 50–51, 84 P.3d 1215, 1223 (2004)

Generally, courts conduct independent review to address whether a particular category of speech is protected. State v. Schaler, 169 Wash. 2d 274, 282, 236 P.3d 858, 862 (2010). But, independent review is not limited to cases that involve First Amendment issues. New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Our United States Supreme Court has historically justified independent federal or appellate review, in other cases, as a means to compensate for “perceived shortcomings of the trier of fact by way of bias or some other factor....” See Haynes v. State of Wash., 373 U.S. 503, 518, 83 S. Ct. 1336, 1344, 10 L. Ed. 2d 513 (1963); Watts v. Indiana, 338 U.S. 49, 52, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801 (1949); Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935).

For example, in Haynes v. State of Wash., 373 U.S. 503, 518, 83 S. Ct. 1336, 1345, 10 L. Ed. 2d 513 (1963), the trial court admitted as evidence a written confession

police obtained from Raymond L. Haynes who was arrested on suspicion of robbery. Police questioned Haynes, held him in incommunicado for 16 hours, and told him he could not call his wife, until he signed the confession. Haynes v. State of Wash., 373 U.S. at 504.

The trial court failed to consider evidence of coercion and instructed the jury in terms of a Washington statute which permitted the jury to only consider a corroborated confession ‘made under inducement’ and not a confession ‘made under the influence of fear produced by threats. Haynes v. State of Wash., 373 U.S. at 506–07.

The Court reversed Haynes’s conviction, and concluded, “It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an independent determination here, see, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 147-148, 64 S.Ct. 921, 923, 88 L.Ed. 1192 (1944) ‘we cannot escape the responsibility of making our own examination of the record.’” Haynes v. State of Wash., 373 U.S. at 515–16.

In Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 1349, 93 L.E. 1801 (1949), Robert A. Watts was arrested on a Wednesday for criminal assault. He was subjected to rigorous interrogation methods, including being forced to sleep on the floor, and held without arraignment for some days in solitary confinement, without the aid of counsel or friends, and without advice as to his constitutional rights, until the following Tuesday, when he confessed to murder.

Although Indiana law, at the time, required persons charged with crime to be promptly arraigned. The facts showed Watts was arraigned almost a week after he was

arrested. The trial court ignored the law along with police procedure and admitted as evidence Watts's confession. Watts v. Indiana, 338 U.S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949).

The United States Supreme Court made its own independent examination and evaluation of the case and reversed Watts' convictions. The Court found because Watts was not given a prompt preliminary hearing as required by Indiana law and because he was subjected to coercive methods employed by the police officials to elicit the confession, his due process rights under the Fourteenth Amendment were violated. Id.

In Norris v. State of Alabama, 294 U.S. 587, 590–91, 55 S. Ct. 579, 580, 79 L. Ed. 1074 (1935), the trial court denied Clarence Norris's motion to quash an indictment for rape on the ground qualified black citizens were systematically excluded from jury service solely on the basis of race. The court also denied Norris's motion to quash the jury pool, in the county where he was tried, on the ground that county excluded black citizens from juries. Norris v. State of Alabama, 294 U.S. 587, 588, 55 S. Ct. 579, 579, 79 L. Ed. 1074 (1935). Relying on a state statute that defined juror qualifications, the trial court denied both motions despite undisputed evidence that showed for a generation or more no black person had been called for jury service in the county and that a substantial number of black persons qualified under state law were systematically excluded from jury pools. Norris v. State of Alabama, 294 U.S. at 591.

The United States Supreme Court found "upon the proof contained in the record..." Norris had been denied due process of law and reversed his conviction. Norris v. State of Alabama, 294 U.S. at 588.

This brief does not cite Haynes, Watts, and Norris to suggest the facts in those cases are similar to the facts here, or to suggest the way the trial court here administered RCW 10.77.050 was based on bias or some other discriminatory effort. Instead, the purpose of these cases is to highlight instances, like here, where only an independent review of undisputed facts could resolve whether a person was denied due process.

2. RCW 10.77.050 IS STRUCTURED IN SUCH A WAY THAT A PRESUMPTION OF COMPETENCY TO STAND TRIAL BECOMES UNREBUTTABLE EVEN IN LIGHT OF BONA FIDE EVIDENCE TO THE CONTRARY.

The conviction of an accused person while he is legally incompetent violates due process, Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956), and state procedures must be adequate to protect this right. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 838, 15 L. Ed. 2d 815 (1966). Washington law implements this due process protection by statute. RCW 10.77.050 provides that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” State v. Coley, 180 Wash. 2d 543, 551, 326 P.3d 702, 706 (2014). When the legislature enacted RCW 10.77.050, there was no way to predict how it would work in practice.

Generally, the way RCW 10.77.050 works is if there is a reason to doubt a defendant’s competency to stand trial, at the start of trial, the court will order an evaluation, then, restoration treatment. Then, the status quo is usually the default presumption that a defendant is competent throughout trial proceedings. See In re Pers. Restraint of Rhome, 172 Wash.2d 654, 663 n. 2, 260 P.3d 874 (2011) (recognizing “the general presumption of competency to stand trial” (citing State v. Hahn, 106

Wash.2d 885, 895, 726 P.2d 25 (1986)); State v. Coley, 180 Wash. 2d 543, 563, 326 P.3d 702, 712 (2014).

But, as the court of appeals found here, there are flaws with RCW 10.77.050 and those flaws threaten due process. This Court has found, with RCW 10.77.050, the legislature created a comprehensive scheme for evaluating a defendant's competency, with a closely regulated cycle of treatment and evaluation followed by a judicial determination of competency. The scheme is intended to ensure the defendant's competency, whenever questioned, so he may be tried..." State v. Coley, 180 Wash. 2d at 554. But the scheme does not allow for instances that may arise during trial.

Whether a person is competent to stand trial "... is, in fact, the most significant mental health inquiry pursued in the system of criminal law." Stone A: Mental health and the law: a system in transition. Rockville, MD: National Institute of Mental Health, 1975: DHEW Pub. No. ADM 75-176. And, that inquiry should not stop after an order of competency is entered. In fact, the United States Supreme Court has long since held the court must conduct an inquiry into competence whenever a bona fide doubt is raised concerning the issue. Drope v. Missouri, 420 U.S. 162, 170-173, 95 S.Ct. 896, 432 L.Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

Trial courts have been exhorted to remain alert to signs suggesting a defendant may be impaired, such as odd demeanor in the courtroom, irrational behavior, or past medical evidence of mental illness, and take action to protect a defendant's rights at the time questions regarding competence arise. See Drope v. Missouri, 420 U.S. at 180-181 ("[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior

medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required . . .”). “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.” See, e.g., Id. at 181; Mae C. Quinn, Reconceptualizing Competence: An Appeal, 66 Wash. & Lee L. Rev. 259, 261–62 (2009).

Moreover, trial courts must take a “realistic account” of a defendant’s mental capacities, when he seeks to conduct his own defense at trial. See Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). In Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), the United States Supreme Court upheld a trial court’s decision that denied a defendant the right to represent himself at trial.

Like Mr. McCarthy, Ahmad Edwards, the defendant in that case, moved the court to represent himself on attempted murder and other charges. The Court determined the trial judge, who was familiar with the full details of Edwards’s mental health screenings, took a realistic account of Edwards’s capacity to represent himself and properly insisted he be represented by counsel.

Unlike the trial court in Edwards, however, the trial court here, granted Mr. McCarthy’s motion and allowed him to continue as his own counsel for some time, despite episodes that showed Mr. McCarthy’s mental health was deteriorating. Here, the trial court acted in accordance with RCW 10.77.050. But, under RCW 10.77.050 trial courts are not held to their affirmative duty to monitor a defendant’s competence, throughout trial proceedings, regardless of what counsel says or does. See Drope v.

Missouri, 420 U.S. 162, 181, 95 S.Ct. 896, 432 L.Ed. 2d 103 (1975) (stating that courts must be ever vigilant for signs that a defendant is not competent to stand trial).

The California rule the court of appeals adopted, here, does just that. It requires courts to order a second, or even a third competency evaluation hearing, after a defendant has been deemed competent to stand trial, if evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competency. State v. McCarthy, 6 Wash. App. 2d, 94 429 P.3d 1086 (2018), review granted, 435 P.3d 265 (2019) citing, People v. Mendoza, 62 Cal. 4th 856, 365 P.3d 297, 320, 198 Cal.Rptr.3d 445 (2016); People v. Medina, 11 Cal. 4th 694, 906 P.2d 2, 23, 47 Cal.Rptr.2d 165 (1995). Therefore, the court of appeals' decision to apply it in this case should be upheld and, ultimately adopted in Washington.

3. AN EVIDENTIARY HEARING YEARS AFTER TRIAL WOULD NOT RESOLVE WHETHER MR. MCCARTHY WAS COMPETENT DURING TRIAL PROCEEDINGS.

The United States Supreme Court has emphasized the difficulty it would be to retrospectively determine an accused's competence to stand trial. Dusky v. United States, 362 U.S. 402, 403, 80 S.Ct. 788 (1960). "A nunc pro tunc, or retrospective, determination of competence, is difficult under the best of circumstances..." Drope v. Missouri, 420 U.S. 162, 183, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), particularly, as here, where a significant amount of time has passed. Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). In such an instance, when the defendant is subjected to trial in the absence of a mental health determination, any ensuing conviction would violate due process and must be reversed. Id.

IV. CONCLUSION

Based on the arguments above, on the arguments we raise in our opening brief, along with our response to the state's petition for discretionary review, we ask this Court to affirm the court of appeals' decision.

Submitted this 5th day of April, 2019.

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DECLARATION OF SERVICE

April 5, 2019

Supreme Court Case No. 966532

Case Name: *State of Washington v. Matthew Sean McCarthy*

I declare under penalty and perjury of the laws of Washington State that on **Friday, April 5, 2019**, I filed the attached supplemental appellant's brief with Division Three Court of Appeals and served copies to:

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