SUPREME COURT NO. 99966-0

NO. 80174-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID A. MOORE,

Petitioner.

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

The Honorable Dean Lum, Hon. Mary E. Roberts, Hon. Sean P. O'Donnell, Hon. Veronica Alicea Galván, Hon. Kristin V. Richardson, Judges

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PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner David Moore asks this Court to review the Court of Appeals' June 14, 2021 unpublished decision in State v. Moore, case no. 80174-1-I. The opinion (Op.) is appended to this petition.

B. ISSUES PRESENTED FOR THIS COURT

1. Self-representation may undermine the most basic of the constitution's criminal law objectives, a fair trial. Indiana v. Edwards, 554 U.S. 164, 176-77, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). Here, one judge heard competing expert testimony over the course of a lengthy competency hearing, considered additional medical records post-competency hearing, and determined the petitioner was too mentally ill, based on persistent and inflexible beliefs, to validly waive his right to counsel and lacked the capacity to represent himself. A second judge interacted with the petitioner on a limited basis, attributed to the petitioner objections to continuances—where petitioner made no objections—and then failed to meaningfully consider well-documented mental health concerns and the well-reasoned prior ruling in allowing the petitioner to waive counsel. Did the court violate the petitioner's due process rights and right to counsel by failing to consider specific, well-documented mental health concerns and the court's prior ruling in determining whether the petitioner's waiver of counsel was valid?

2. At the ensuing trial, a prospective juror unequivocally expressed "extreme bias" related to an intense emotional reaction to the crime. The trial court failed to inquire and failed to excuse the juror, who deliberated. Did the trial court violate the petitioner's state and federal constitutional rights when it failed to excuse the explicitly biased juror?

C. STATEMENT OF THE CASE[1]

1. Charge and competency proceedings; well-reasoned determination that persistent mental illness prevented valid waiver of counsel; subsequent waiver of counsel.

The State charged Moore with the second degree murder based on alternative felony murder (assault) and intentional murder theories. CP 278; RCW 9A.32.050(1)(a), (b); RCW 9.94A.533(4). The crime was alleged to have occurred on January 10, 2016. CP 278.

After competency concerns arose, a contested competency hearing was heard in May of 2017 before Judge Mary Roberts. The court, which explicitly did not make a finding regarding Moore's appropriate mental health diagnosis,[2] ruled that Moore had not proven by a preponderance of the evidence that due to mental illness he was incapable of assisting counsel

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[1] After Moore's opening brief was filed, the State ordered the transcription of several additional hearings, resulting in four additional volumes covering 21 additional dates. This petition refers to the consecutively paginated 26 original verbatim reports as RP and the consecutively paginated supplemental verbatim reports as Supp. RP.

[2] CP 98 (Competency Finding of Fact 13).

and therefore incompetent to stand trial. RP 600; CP 99 (written ruling). Moore's distrust or fear of his attorney was not tantamount to mental incapacity to assist counsel. CP 99.

Defense counsel filed a motion for reconsideration based on the medical and treatment records the court had refused to admit at the hearing. CP 105-12. Counsel also submitted additional documentation supporting substantive admission of the records as business records. CP 130-40.

The court declined to reconsider competency. RP 624. But the court admitted the records for purposes of Moore's pending motion to waive counsel and represent himself. RP 624; Motion to Reconsider Exhibits 4-6, 8, 9 (exhibits admitted May 2017). Regarding the motion to waive counsel, Judge Roberts engaged in a lengthy colloquy with Moore, RP 630-58, and also heard input from counsel, RP 659-67, but ultimately reserved ruling until she reviewed the records. RP 624, 667.

In a written ruling, Judge Roberts *denied* Moore's request to waive counsel. The court determined that even though Moore was competent to stand trial, mental illness rendered his waiver of counsel invalid. CP 160-67. Although Moore appeared to understand the charges and penalties he faced, his desire to represent himself stemmed from a paranoid belief that all parties involved, including defense counsel, were virulently racist. CP 162-63 (quoting Moore's letter to court asking to waive counsel). Based on

testimony at the competency hearing, it was clear that Moore was preoccupied with system-wide racism. Racism exists, but Moore's extreme beliefs flowed from mental illness. Such beliefs would undermine his ability to conduct his own defense. This inability to conduct a defense was due to mental illness and not mere lack of skill. CP 164.

The court concluded that Moore's request to represent himself was timely, unequivocal, and voluntary. CP 166-67. But Moore's "mental capacity will have serious and negative effects on his . . . ability to conduct a defense, such that his request to waive counsel and proceed pro se is not being made knowingly and intelligently." CP 167.

A month later, in June of 2017, Moore's attorney was permitted to withdraw based on breakdown in communication and conflict of interest. CP 559-60. Replacement James Womack was appointed. CP 561; RP 673.

Over the months that followed, Moore continued to submit documents demanding that he be permitted to represent himself. E.g., CP 178-79, 197-98, 199-201, 215-16, 221-22, 228-30, 562-64. Moore filed additional motions, as well, complaining about appointed counsel and asserting counsel was complicit in a conspiracy against him. E.g., CP 170-72, 175-77, 183-86 (motions to dismiss complaining about former defense counsel). Moore's extensive correspondence indicated his wish to waive counsel was rooted in preoccupation with the racism of the parties

(including defense counsel), as well as his belief he was the subject of an ongoing conspiracy involving King County judges. CP 203-14, 565-78.

At a November 16, 2018 hearing, however, the court (Judge Sean O'Donnell) allowed Moore to represent himself. Seven short hearings occurred before Judge O'Donnell during the approximately 15 months before that hearing. The State has argued, and the Court of Appeals apparently accepted,[3] that Judge O'Donnell was attuned to Moore's mental health, but the record belies this claim. The hearings occurred as follows:

- Aug. 31, 2017 – Four-minute hearing

  Continuance requested; defense attorney Womack believes Moore will object. Supp. RP 77. Judge asks Moore if he objects to continuance. Moore says he does not know what is going on. Supp. RP 78.

- Jan. 19, 2018 – Three-minute hearing

  Continuance requested. Moore complains his cane and wheelchair were taken; states, "As many motions I put into your court, you gonna attack me like this?" Supp. RP 84. Moore refers to those present as "racist sons of bitches;" he also accuses those present of attacking him because he is Muslim. Supp. RP 84-85. Regarding the need for a continuance, attorney Womack says, "The defense hasn't been finalized, but . . . I have an idea that it will not be a mental defense." Supp. RP 85. When asked, Moore expresses no opinion on continuance but mentions he filed a motion to represent himself. Supp. RP 86. Judge O'Donnell is unfamiliar with that motion; Womack says the matter was dealt with by Judge Roberts. Supp. RP 86.

[3] Op. at 16-17.

- Mar. 30, 2018 – Two-minute hearing

  Continuance requested. Supp. RP 88. When asked about continuance, Moore talks about racism and mentions he wants to represent himself; Judge O'Donnell does not address Moore's comments. Supp. RP 89-90.

- Aug. 31, 2018 – Ten-minute hearing

  Continuance requested. Supp. RP 103. Womack says a third judge, Judge Halpert, suggested Moore might need another mental health examination, but Womack believes Moore will be uncooperative. Supp. RP 104. Judge O'Donnell states competency is not before the court. Supp. RP 104.

  Judge O'Donnell asks for Moore's position on a continuance; Moore calls judge a racist and says court denied his motions to represent himself. Supp. RP 107-08. Despite Moore not having expressed an opinion, judge says he will take Moore's statements as an objection to the continuance. Supp. RP at 108. When prosecutor mentions need for research related to mental health issues, judge dissuades parties from looking into matter further ("[w]ell, but that's not been a mystery"). Supp. RP 109.

  Judge O'Donnell then refuses to grant continuance. Supp. RP 110. When Moore mentions motion to represent himself, judge says "*Well, remind me. I got a lot of cases and I don't memorize them all. Do you want your trial date or do you want it moved*?" Supp. RP 111 (emphasis added). Moore does not answer directly; judge repeats Moore's statement will be considered objection to continuance. Supp. RP 111.

- Sept. 6, 2018 – Nine-minute hearing

  Continuance requested based on difficulty securing key witness interviews. Supp. RP 113. Parties agree that "there may be a hybrid mental defense, slash, self-defense[, slash, identity defense]." Supp. RP 116. Womack observes Moore hasn't said he objected to continuances but court "sort of took judicial notice" of objections. Supp. RP 117. Judge

O'Donnell addresses Moore, who says only, "(Inaudible) racism." Supp. RP 119. Judge again interprets Moore's statement as objection to continuance. Supp. RP 119.

- Oct. 5, 2018 – Four-minute hearing

  Continuance requested. Supp. RP 121. Judge O'Donnell asks that Moore move to where court can see him but does not otherwise address Moore. Supp. RP 121-24.

- Nov. 2, 2018 – Thirteen-minute hearing

  Continuance requested; Womack is leaving on vacation. Supp. RP 125-28. Judge O'Donnell does not want to grant more continuances because Moore is "totally opposed." Supp. RP 129. Asked for his position, Moore does not address continuance but mentions he filed motions to represent himself 17 times. Supp. RP 129-30.

  Judge O'Donnell does *not* indicate that he has reviewed or is familiar with Moore's pleadings. Supp. RP 129-30. He asks about prior Roberts ruling. Supp. RP 130-31. Prosecutor indicates it occurred in May of the previous year. Supp. RP 131. Judge has trouble locating ruling, then claims to have found it. Judge alludes to Moore's mental health issues "throughout the case," but observes Roberts denied Moore's motion "without prejudice."[4] Supp. RP 131. The prosecutor confirms the motion was denied without prejudice. Supp. RP 131. Matter continued until after Womack returns from vacation. Supp. RP 133.

The next hearing was November 16. There, Moore said he had filed

> [seventeen] motions to your court. You turned me—you turned down all of them for some reason. I have no reason why. So I kept regular schedule with them. I'm a meticulous record keeper. Only you know the reason why

[4] Undersigned counsel is unable to locate any indication Judge Roberts denied the motion "without prejudice." CP 160-67; RP 615-70 (May 10, 2017 hearing).

> you turned 'em down, and I know, too. We're not going to kid ourselves here. We're not kids.
>
> I'm not familiar with this guy, with—with—with—with your—with your court-appointed attorney, Carl Womack [sic]. My familiarity with him is through Trieweiler. And he seems to follow Trieweiler's orders real good. So he represents Trieweiler before he ever would in any type of way comprehend a type of representation—representation for me. I can't use him. I don't need him.
>
> I feel like since everybody going, you all—I'm not playing stupid or—on anything. I can comprehend presence of racism real good. I'm from back east.
>
> This—this involves—this involves race, so no one can defend me but, uhm, Allah and me by a Muslim. My beliefs teach me to put that first before anything and represent myself. It's my faith—it's my faith, practice, to represent myself. If he's not Muslim, he can't represent me, first of all. He just can't, no way possible.

RP 683-84.

A colloquy ensued. But Judge Roberts's prior ruling, and the history of Moore's mental health concerns, were not discussed. RP 684-706. The only reference to the previous denial of Moore's motion to represent himself came from Moore himself, who said, "The only big question that was asked me back then in Roberts'[s] court was something about DNA. She comprehended that I didn't know anything about that[.]" RP 687.

The prosecutor supported Moore's request to waive counsel because it was unequivocal and timely, considering he first made that request over a year earlier. RP 697. Meanwhile, Womack acknowledged attorney

Trieweiler had opposed Moore's request to represent himself. RP 702. But Womack could not "in good faith" oppose Moore's request because Moore had asked that Womack stop representing him and ceased communication. RP 703. Neither the prosecutor nor Womack mentioned Judge Roberts's prior ruling or mental health concerns. Yet Moore's statements make it clear his decision to waive counsel remained rooted belief in a racist conspiracy: "I understand what you're saying and everything, but my experience is I've been in this jail and whatever, what they've showed me, racism, I'd be a fool to go—I'd be a fool to get one of these lawyers here. . . . I can see the presence of the racism here." RP 693-94.

The court, without meaningfully addressing Judge Roberts's previous decision or Moore's history of mental health concerns, found Moore's waiver of counsel knowing, voluntary, and intelligent. RP 706.

2. **Effects of mental illness on trial preparation**

Following a series of continuances, trial began in May of 2019. RP 774. Meanwhile, Moore's preoccupation with wide-ranging racist conspiracy continued. E.g., RP 775-76 (comments to trial judge); RP 1052-52, 1065 (CrR 3.5/CrR 3.6 hearing testimony); see also CP 248 ("affidavit of prejudice" complaining judge who ruled on Moore's motion to dismiss in January of 2019 had turned courtroom into a "Ku Klux Klan rally"). Moore refused the services of court-appointed investigator on the ground

that she was racist. RP 758, 763, 790-92, 812, 823-24, 1174. The superior court had directed the jail to provide Moore legal resources. E.g., RP 767; CP 579. But Moore insisted he was denied access to discovery and exculpatory evidence; he also said the jail tampered with legal materials. E.g., RP 745-46, 785, 814-29, 833-38, 861-65, 919, 1090, 1125, 1165-66, 1525. Before and during trial, Moore also repeatedly complained several judges were racist. E.g., RP 802, 830, 849, 856, 897-98, 1124.

3. **Jury selection; seating of biased juror; other juror's concern**

At the trial, Moore sporadically participated in jury selection, frequently interjecting his preoccupation the judge was racist.

The court offered to let Moore review juror biographical forms. He refused on the ground that the court was racist. RP 1199-1200.

When the first panel of prospective jurors was brought in, Moore introduced himself to jurors by stating that David Moore was his slave name and that he was a Muslim. RP 1202. The court indicated to prospective jurors that Moore had pleaded not guilty to the charge. Moore stated he had never entered a plea. RP 1202. When the court called the parties to a sidebar, apparently to discuss hardship excusal requests, Moore refused to participate and interjected that the judge was racist. RP 1221. He appeared to object to the allotted 20-minute voir dire sessions, RP 1224, but then refused to ask questions after the State's first 20-minute session. See RP

1307-08 (announcing to prospective jurors he would not participate in voir dire because the court was racist).

During the court's initial questioning of prospective jurors, the State moved to excuse a prospective juror who was concerned that her acquaintanceship with an investigating detective would cause bias. RP 1229-30. Asked for input, Moore stated, "Once again, for the record, in front of these juror people, I told you before they came into the courtroom you explained to me that I had no rights in your courtroom whatsoever because of my skin color and religious belief." RP 1230. The court excused the prospective juror on the State's motion. RP 1230.

During individual questioning of some prospective jurors, a prospective juror revealed that he frequented the convenience store where the stabbing occurred and knew of a stabbing that occurred three years earlier—the time frame of the crime in question—and he had heard the culprit had "done this before." RP 1238-39. It would be "tough" for him to remain unbiased. RP 1239. Moore declined to ask any questions but announced that he knew of several stabbings in the area. RP 1240.

The prospective juror was not then excused, though he was later excused for hardship. RP 1253-54. In reference to Moore's comments, the prosecutor asked the court to order Moore not to interject comments while

questioning the panel. RP 1260-61. Moore argued that he needed to present his defense to jurors and railed at the court for its racism. RP 1261-66.

Outside the panel's presence, Moore, who remained preoccupied with the court's—but not potential jurors'—bias, asked the court to consider a 60-page motion to dismiss and "implicit bias motion." RP 1285. When the court declined, Moore stated "Please recuse yourself. Go do something with yourself. You act like a tri-K. Oh, that's the women's branch of the Ku Klux Klan. I'm going to make the jury aware of this, let them know they're—they're in a very racist courtroom." RP 1289.

The second day of jury selection, during the State's first general voir dire session, the prosecutor asked whether the prospective jurors had been the victims of violent crime or knew such people. RP 1291-92 (May 21, 2019 hearing). The prosecutor indicated he knew prospective juror 12 was one such person based on her prior response. Her sister had gone missing almost 30 years earlier and had been seen "in the company of an African-American individual." RP 1292. When asked by the prosecutor, the juror said she would not be biased against Seattle police based on interactions with another agency related to her sister. RP 1293. Moore interjected:

> She just—she just implied herself as being impliedly biased, maybe, toward me because she used the word "African American," and I'm black.
>
> THE COURT: Okay.

MR. MOORE: I'm African American.

THE COURT: We will deal with excusals of jurors on the break.

[THE STATE]: Okay.

THE COURT: So make a list and . . . keep it in mind.

RP 1293.[5]

The next juror to speak on the violent crime question was prospective juror 22 (also referred to as Juror 22).

[THE STATE]. All right. Juror 22, I see you have your card up?

A. Yeah. So my best friend growing up was stabbed 50—or 45 times in 2015. It was a random attack. He was sleeping in his apartment. Some random guy came off the street into his house and stabbed him while he was sleeping. He—he survived. He—he was a college football player like myself. He—it took him about two years to recover. He never played football again. *And, yeah, it just—I guess I would say I have extreme bias in this case because I—I thought that the person that stabbed him should have received capital punishment and he didn't. But, yeah, that's just—that's kind of my connection. I have really strong feelings behind that because, you know, it affected me emotionally.* He's my best friend and—and his family and stuff. And just seeing him go through the process was really tough for me, so . . . .

Q. I'm sorry to hear that. Did that—that was in Washington State or somewhere else?

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[5] The matter was not addressed at the next break. RP 1338-39, 1349-50. Juror 12 remained as juror number 12 and deliberated. RP 1222-23, 1367-71, 2513.

A. It was in Havre, Montana. And then he—he was flown to Seattle for treatment.

Q. And was—was there actually a criminal case that resulted from that?

A. Yeah. Yeah. The guy's in jail for 100 years.

Q. Okay.

A. Yeah.

Q. All right. Thank you for sharing that.

RP 1293-94 (emphasis added).

No one followed up. Other prospective jurors described having been crime victims or close to crime victims, but none who deliberated so clearly expressed bias. RP 1294-1304, 1321-22. Juror 22 was seated in the box as number 13 and deliberated. RP 1222-23, 1290-91, 1367-71, 2513.

As stated above, Moore did not ask any questions following the State's first voir dire round, when those two jurors spoke. He simply stated that he was Black and had no rights in the courtroom. RP 1307-08.

After the State's second round of voir dire, Moore relented and asked a series of questions: He asked whether any prospective jurors had ties to the Ku Klux Klan or other hate groups, and whether anyone had experienced "racist attacks." RP 1326, 1334. No one answered affirmatively except one prospective juror, who had family members with such associations. RP 1326. Moore also asked whether any prospective

jurors were prejudiced against individuals with disabilities, RP 1338, whether prospective jurors were from outside the area, RP 1336, and whether anyone had had conflicts with Muslims. RP 1326, 1328.

Several prospective jurors relayed contacts with Muslim individuals. RP 1326-33, 1340-45. One prospective juror was excused, on the State's motion, after admitting to anti-Muslim bias. RP 1342-45.

Moore exercised no peremptory challenges. RP 1367-71.

The same day jurors were seated, one of them, juror number 6—prospective juror 34—wrote an email to the court explaining her religious belief would not permit her to pass judgement. CP 304-05; RP 1431. She was also specifically concerned about Moore being allowed to represent himself despite obvious mental illness:

> One of the issues that I wish could have spoken about [during jury selection] was about Mr. Moore's choice to represent himself. I understand that it his right to choose. But when he initially chose not to question the jury pool I could see he does not fully understand the process and may be incapable of understanding. Then when he declined to dismiss any [prospective] jurors I could see his poor understanding will result in this trial being unfair; *there is one juror in particular that will be biased for the prosecution because his friend was violently stabbed[;] he even said he would be biased, and Mr. Moore did not remove him.*

CP 305 (emphasis added).

This juror was called in for individual questioning and was ultimately excused. RP 1431-34. But Moore appeared not to notice that

she had been excused, only commenting on the juror's absence days later. RP 1673. When the court reminded Moore that the juror had been excused, he argued he had not consented to replacing the juror. RP 1674-75.

4. **Testimony and verdict**

The State presented evidence that convenience store clerk William Cross was stabbed during an altercation with a customer and died from his injuries. RP 1419, 1460, 1467, 1662, 1819-21, 1970. An eyewitness initially identified another man. RP 1683-84, 1787. Then the state crime lab matched DNA on a reusable mug found at the convenience store to both Moore and Cross. RP 1483-85, 1497, 1624, 1829, 1859, 2003, 3030. After that, the witness picked Moore from a photomontage. RP 1627-28, 1685-89, 1720-23. A sweatshirt bearing bloodstains that matched Cross's DNA was found at Moore's storage unit. RP 1630-31, 1876, 2007-11.

Moore—who testified over three days and hundreds of transcript pages—continued to assert he was the victim of a race-based conspiracy by Seattle Police and King County prosecutors and judges. He further asserted he had been denied access to discovery and exculpatory evidence, primarily phones and data storage devices seized at the time of arrest. His phones would have proved the conspiracy. RP 2081-86, 2114-21, 2150-59, 2182-93, 2195-2200, 2203-12, 2228-31, 2246, 2317-32, 2347-51. During the

third day of Moore's testimony,[6] the court barred Moore from further direct examination of himself after he refused to follow limitations. RP 2102-03, 2381, 2388; CP 387-90. The jury found Moore guilty. CP 391-92.

5. **Appeal and issues warranting this Court's review**

Moore appealed, raising the issues identified above. As for the first issue, the Court of Appeals—sidestepping Moore's due process argument—said the trial court didn't abuse its discretion by allowing Moore to waive counsel because Moore probably had a personality disorder and therefore he might "present very differently to the court at different points in time[.]" Op. at 16. Moreover, Judge O'Donnell saw Moore at several hearings. Op. at 16-17. The Court of Appeals determined the juror's statement "I guess I would say I have extreme bias" and concerns regarding his emotional reaction to a crime similar to the one in this case were not indicative of bias. Op. at 18-19. Moore now asks this Court to grant review and reverse.

D. REASONS REVIEW SHOULD BE GRANTED

1. **Introduction**

The court violated Moore's rights to due process and to the assistance of counsel when it all but ignored Judge Roberts's prior ruling and allowed Moore to waive counsel without meaningfully considering the

[6] Moore initially told jury he planned to testify for a month and a half. RP 1402.

effect of mental illness on such a waiver. The trial court also erred in failing to excuse a juror whose extreme emotional reaction made him, by his own admission, precisely the wrong juror for the case. For either or both reasons, this Court should grant review and reverse.

These issues are interrelated. A key consideration for the Supreme Court in Indiana v. Edwards was that "proceedings must not only be fair, they must [also] 'appear fair to all who observe them.'" Edwards, 554 U.S. at 177 (quoting Wheat v. United States, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). The fact that Moore was allowed to represent himself, without the court fulling grasping the issues before it, ultimately led to unfair jury selection proceedings, which alarmed a conscientious observer. Both intertwined issues merit this Court's attention.

2. **This Court should grant review under RAP 13.4(b)(3) and (4) to address the process due to ensure that an accused who is not capable of waiving the right to counsel and representing himself does not slip through the cracks.**

This Court should grant review to address the process due to ensure that one who is not capable of waiving the right to counsel and not capable of representing him does not slip through the judicial system's cracks. Due process requires that, where a trial court has found counsel waiver invalid based on mental health concerns, a subsequent court must meaningfully address those mental health concerns before permitting the accused to waive

counsel. Here, the November 2018 proceedings related to waiver were inadequate to satisfy due process.

While the right to represent oneself is an important right, the government's interest in ensuring the integrity and efficiency of a trial may outweigh the defendant's interest in acting as his own lawyer. Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 162, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). Where an accused lacks the capacity to represent himself, it may "undercut[] the most basic of the Constitution's criminal law objectives, providing a fair trial." Edwards, 554 U.S. 164 at 176-77. "[A] trial court must [also] satisfy itself that the waiver of . . . constitutional rights is knowing and voluntary." Godinez v. Moran, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L.Ed.2d 321 (1993).

Trial courts may limit the right to self-representation when there is a question about the defendant's competency to act as his own counsel. In re Pers. Restraint of Rhome, 172 Wn.2d 654, 661-62, 260 P.3d 874 (2011). The state constitutional right to self-representation, although explicit where the federal right is not, "may not properly be construed as an absolute right[.]" State v. Kolocotronis, 73 Wn.2d 92, 98, 436 P.2d 774 (1968).

In Kolocotronis, this Court found that it is the responsibility of the trial court to determine whether an accused person has the capacity to intelligently to waive the services of counsel and act as his own counsel. Id.

at 101. In considering whether a defendant whose competency is in question can make a knowing and intelligent waiver, a trial court considers the background, experience, and conduct of the accused; this may include consideration of the defendant's history of mental illness. Id. at 99. If the trial court determines an accused does not have the mental capacity to intelligently waive counsel, or adequate mental capacity to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law are violated if the court allows waiver. Id.

In 2008, 40 years after Kolocotronis was decided, an opinion from the United States Supreme Court underscored its continuing vitality, at least as to the principles set forth above. Edwards, 554 U.S. 164. Although the dignity and autonomy of an individual underscore the right to self-representation, in the Supreme Court's view:

> [A] right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.

Id. at 176 (citation omitted) (quoting McKaskle v. Wiggins, 465 U.S. 168, 176-77, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)).

Then, in Rhome, 172 Wn.2d 654, which reached this Court as a collateral attack, a mentally ill defendant who had been found competent to

stand trial was permitted to waive counsel and represent himself in a murder trial. The trial court's waiver colloquy did not directly address mental health issues. Rhome was convicted and later filed a personal restraint petition, arguing a trial court must consider an accused person's mental illness before permitting a waiver of counsel. Id. at 657, 664.

This Court stated, "a defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel, but [Kolocotronis, Edwards, and another case] do not require us to find that an independent determination of competency for self-representation is a constitutional mandate." Rhome, 172 Wn.2d at 665. This Court acknowledged, however, that based on Edwards and Kolocotronis, constitutional due process might require "a more stringent waiver of counsel for a defendant whose competency is questioned." Id. In keeping with this pronouncement, this Court also noted that "Edwards held that a state court may take this into account, and strongly suggested such considerations are integral to a knowing and intelligent waiver." Rhome, 172 Wn.2d at 665. This Court declined to apply such a rule in Rhome's case based in part on limitations on declaring new rules of criminal procedure in collateral proceedings. Id. at 665-66, 669-70 (citing Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)).

This Court interpreted Edwards and Kolocotronis not to require a mental health inquiry in all cases in which an accused attempts to waive counsel—at least when the matter is first raised in collateral proceedings. This case, however, comes before this Court in a different procedural posture and with different facts. Moore's intertwined rights to a fair trial and to the assistance of counsel required that the trial court at least minimally address mental health—and the court's own well-reasoned prior waiver ruling—in determining whether the waiver of counsel was consistent with the due process discussed in Edwards and Kolocotronis.

In Edwards, moreover, the United States Supreme Court authorized state courts to consider mental capacity in determining whether counsel could be validly waived. It follows that states are now permitted to require (as a matter of procedure) that mental capacity be considered. And, specifically, such consideration should be *required* where an accused has previously been determined to be incapable of waiving his right to counsel. See Edwards, 554 U.S. at 178 (the Constitution permits States to "insist" on representation by counsel for those competent to stand trial under Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960), but who lack capacity to represent themselves); cf. Edwards, 554 U.S. at 173-74 (observing that, as stated in Dusky, states are free to adopt stricter competency standards than those set forth in Dusky).

Finally, as Edwards made clear, the right to represent oneself is not the paramount constitutional right in the realm of criminal jurisprudence. The right must at times give way to other considerations:

> [Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)] does not answer the question before us both because it did not consider the problem of mental competency (cf. [id. at 835] (Faretta was "literate, competent, and understanding")), and because Faretta itself and later cases have made clear that the right of self-representation is not absolute, see Martinez[, 528 U.S. at 163] (no right of self-representation on direct appeal in a criminal case); [Wiggins, 465 U.S. at 178-79] (appointment of standby counsel over self-represented defendant's objection is permissible); Faretta, 422 U.S. [at 835, n. 46] (no right "to abuse the dignity of the courtroom"); ibid. (no right to avoid compliance with "relevant rules of procedural and substantive law"); id., at 834, n. 46 (no right to "engag[e] in serious and obstructionist misconduct[.]) . . . .

Edwards, 554 U.S. at 170-71.

Requiring a trial court to consider mental capacity to represent oneself, where an accused has already been determined to lack that capacity, is not an impermissible roadblock to self-representation. Rather, it is a limited procedural safeguard necessary to prevent grave injustice. As argued in the Court of Appeals, due process therefore requires that, where a trial court has found an accused person's counsel waiver to be invalid based on mental health concerns, a subsequent court must address mental

health concerns before permitting the accused to waive counsel.[7] Here, this second waiver colloquy was inadequate, and that court's determination invalid. This Court should grant review to address this important matter, which was not squarely addressed by the Court of Appeals.

3. This Court should grant review under RAP 13.4(b)(2) and (3) where a biased juror deliberated.

This Court should grant review under RAP 13.4(b)(2) and (3) where a biased juror deliberated, denying Moore a fair trial. As stated above, the juror said, "I guess I would say I have extreme bias in this case because I—I thought that the person that stabbed [my best friend] should have received

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[7] As Moore argued in the Court of Appeals, "due process 'is flexible and calls for such procedural protections as the particular situation demands.'" In re Pers. Restraint of Sinka, 92 Wn.2d 555, 565, 599 P.2d 1275 (1979) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). Under the framework set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), a court determines the procedural safeguards to which an individual is entitled by balancing "(1) the significance of the private interest to be protected; (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the fiscal and administrative burdens that the additional procedural safeguards would entail." State v. Maule, 112 Wn. App. 887, 893, 51 P.3d 811, 77 P.3d 362 (2002). The United States Supreme Court has declined to apply Mathews in certain criminal contexts. Medina v. California, 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). But that court's rejection of Mathews analysis rested on unwillingness to intrude upon the states' prerogative to enact criminal procedural rules. Medina, 505 U.S. at 443. Washington courts have applied Medina rather than Mathews in analyzing due process challenges to burden of proof allocation within chapter 10.77 RCW. E.g., State v. Coley, 180 Wn.2d 543, 558, 326 P.3d 702 (2014). Here, however, there is no existing statute or rule that prohibits a court from considering mental health concerns in determining whether waiver of counsel is knowing, voluntary, and intelligent. Thus, no rule or statute is due the deference contemplated by the Medina test. Mathews is, therefore, arguably the appropriate test.

capital punishment and he didn't." RP 1293-94 (May 21, 2019 hearing). Further, "I have really strong feelings behind that because, you know, it affected me emotionally. He's my best friend and—and his family and stuff." RP 1294. Notably, the punishment the juror deemed inadequate was 100 years of imprisonment, rather than death. RP 1294.

The Sixth Amendment guarantees an accused person a verdict by impartial, indifferent jurors, and the bias or prejudice of even a single juror violates an accused person's right to a fair trial. Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998). The question of whether to seat a biased juror is not a discretionary or strategic decision; rather, the seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001). Furthermore, if the record demonstrates the actual bias of a juror, seating the biased juror is a manifest error which may be raised for the first time on appeal. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015), review denied, 184 Wn.2d 1036 (2016).

The Court of Appeals indicates that, despite highly concerning statements, Juror 22 was not, in fact, biased. Op. at 18-19. But the juror's statements indicated actual bias, that is, a strong emotional reaction based on a close friend's victimization. This made him a singularly inappropriate juror to try the case. Actual bias occurs when there is "the existence of a

state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Actual bias can be shown by the express admission of the juror of a state of mind prejudicial to a party's interest. United States v. Cerrato-Reyes, 176 F.3d 1253, 1260 (10th Cir. 1999). Even where the juror does not express actual bias, bias may be inferred if facts underlying the bias are such that they "would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality." United States v. Powell, 226 F.3d 1181, 1189 (10th Cir. 2000). Here, Juror 22 expressed bias and explained the emotional root of his partiality.

The Court of Appeals speculates that because neither the parties nor the judge followed up with questioning, "the juror's tone and demeanor did not raise concern of actual bias." The juror's statement must have been "more equivocal that it may seem on its face." Op. at 18. But the juror's statements clearly evince the type of emotional involvement that the constitution, statutes, and appellate courts deem inappropriate in a juror. Previously, the Court of Appeals rejected a nearly identical argument. See Irby, 187 Wn. App. at 197 ("We are unable to imagine how the sentence 'I would like to say he's guilty' could be uttered in a tone of voice that would excuse the complete lack of follow-up questions."). Further, the record

clearly demonstrated that another juror was disturbed by the statements, undermining the Court of Appeals speculation that the juror's demeanor belied his words.

A trial court has an independent obligation to excuse a biased juror. Id. at 193; see State v. Guevara Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (collecting authorities), review denied, 195 Wn.2d 1025 (2020). The trial court failed to do so in this case, denying Moore a fair trial. The Court of Appeals' resolution of this issue is perplexingly at odds with its own prior decisions and the constitution. This Court should grant review and reverse.

E. CONCLUSION

This Court should grant review on both issues.

DATED this 9th day of July, 2021.

Respectfully submitted,

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APPENDIX

FILED
6/14/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID ALLEN MOORE, Appellant.	)	No. 80174-1-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — David A. Moore seeks reversal of his conviction for murder in the second degree, contending that the trial court erred in allowing him to waive counsel and represent himself at trial and in seating a juror who expressed potential bias during voir dire. Because Moore has not shown that the trial court abused its discretion in determining that his waiver of counsel was knowing, intelligent, and voluntary and has not demonstrated that the juror expressed actual bias, we affirm.

FACTS

On January 10, 2016, William Cross, a clerk at the Union Station Market in Seattle's International District, was stabbed during an altercation with a customer. Cross died from his injuries. Police collected a black plastic mug that the assailant had thrown in the store's trash can, and the state crime lab matched DNA[1] on the

[1] Deoxyribonucleic acid.

mug to both Cross and David Moore. A witness later identified Moore as Cross' attacker from a photo montage. Police found a sweatshirt bearing bloodstains that matched Cross' DNA in Moore's storage unit. Moore was charged with murder in the second degree based on alternative theories of felony murder (assault) and intentional murder.

Competency Proceedings and First Order on Motion to Waive Counsel

In August 2016, Moore moved to discharge his appointed attorney, David Trieweiler, based on differences of opinion about the meaning and importance of evidence. Judge Dean Lum denied the motion without prejudice but indicated that the court would entertain a motion based on more specific grounds if noted for in camera review. In September 2016, Moore renewed the motion. Judge Lum found that it was appropriate to close the courtroom to the State and the public for the motion hearing, then denied the request for new counsel.

In November 2016, Judge Lum held a hearing to address Moore's pro se motion to waive counsel and represent himself. The court authorized a brief closure of the courtroom to hear an offer of proof from Trieweiler regarding a request for a competency evaluation. The court found that there was reason to doubt Moore's competency to stand trial and ordered an evaluation at Western State Hospital (WSH).

Moore was admitted to WSH on December 12, 2016, where he remained for observation until December 23, 2016. The parties requested a contested competency hearing, which was held before Judge Mary Roberts in April 2017. Dr. August Piper, the defense expert psychiatrist, testified that he had interviewed

Moore in November 2016 and January 2017. He also reviewed many of Moore's medical, mental health, and jail records. Based on the interviews and records, Piper opined that Moore suffered from a delusional disorder that prevented him from rationally assisting counsel. Piper described a delusion as a belief that a person holds despite a relative lack of evidence that is not part of their cultural or religious background. Piper noted that a person with a delusional disorder "generally can function reasonably well in areas outside of the delusional belief" and "can look fairly well put together until you get to the subject of the delusion."

Moore was convinced that the entire court system was racist and that he would not be able to have a fair trial because he was African American. He believed that all white people were racists and out to get him, and that Trieweiler was a member of the Ku Klux Klan. Piper, who was identified in the record as African American, agreed that racism against African Americans and other people of color is a serious problem in the United States. However, he found Moore's beliefs to be delusional because of the extent to which Moore thought that "everything in the country is explained by racism and that everything that happens to him is derived because of racist beliefs by other people." Piper believed that Moore's delusion prevented him from rationally assisting counsel because he was unable to trust his attorney enough to allow for effective representation.

Dr. Ray Hendrickson, a psychological forensic evaluator at WSH, testified that he had evaluated Moore during his stay at WSH. Although Hendrickson had been unsuccessful in attempting to interview Moore, he was able to form an opinion about Moore's capacity to understand the charges after reviewing hospital

and jail records, prior evaluation reports, and chart notes for the period that he was at WSH. Hendrickson opined that Moore had personality traits of both antisocial and narcissistic personality disorders. After reviewing Moore's records, Hendrickson believed that providers were able to "form a more accurate picture of his presentation" when observing him for a longer period of time. In these instances, the evaluators noted "largely antisocial and narcissistic" traits, as well as some paranoid traits. Hendrickson did not believe that Moore had a psychotic disorder, which he explained as "a thought disorder where people aren't able to organize their thoughts in a concrete manner, . . . they're dissociated, they're—they're disorganized, disconnected." By contrast, he noted that Moore's presentation was "goal directed," and he was able to make his needs known in a way that indicated what he wanted and how he perceived others were reacting to him. Hendrickson acknowledged that Moore had been diagnosed with psychotic disorders in the past, but noted that these diagnoses stemmed from "times when he was viewed for a very short period of time." He found no indication that Moore had a "mental disease or defect, the symptoms of which would impair his ability to have a factual or a rational understanding of the charges and court proceedings he faces." He also opined that Moore exhibited "no symptoms of mental disease or defect that impair his ability or capacity to consult with his attorney with a reasonable degree of rational understanding. Whether he exercises that . . . [is] a volitional choice."

Dr. Margaret Dean, a staff psychiatrist at WSH, testified that she served as Moore's treating psychiatrist at WSH. She had met with him personally and

reviewed his treatment records. Dean found that Moore met the criteria for both antisocial and narcissistic personality disorders. She did not believe that he presented with the signs and symptoms of a psychotic disorder. She noted that he was able to clearly communicate his needs and desires both when he was angry and when he was calm. She opined that "no major mental illness currently interferes with Mr. Moore's capacity to understand the nature of the proceedings against him or to assist defense counsel in his own defense" and that the personality disorders that she had diagnosed did not impact his capacity to understand the proceedings.

Judge Roberts ruled that Moore had not proven by a preponderance of the evidence that he was incapable of assisting counsel and therefore incompetent to stand trial. In its written decision, the court found that it "need not and does not determine the correct diagnosis for Mr. Moore." However, the court found the opinions of Hendrickson and Dean "well-supported and persuasive" and characterized Piper's opinions as "less well-supported and less persuasive than the testimony of Drs. Hendrickson and Dean." The court noted that even if Moore feared or distrusted his attorney, "[a] lack of trust is not a lack of mental capacity to assist."

Defense counsel filed a motion for reconsideration based on the court's refusal to admit certain medical and treatment records and submitted additional documentation that the documents constituted business records. The court declined to reconsider its competency determination but admitted the records for purposes of Moore's pending motion to waive counsel and represent himself. After

hearing from Moore and counsel, Judge Roberts reserved ruling so that she could review the medical records.

In a written ruling, the court denied Moore's motion to waive counsel. The court ruled that, although it had found Moore competent to stand trial, his mental illness rendered his waiver of counsel invalid:

> Although his current symptoms of any mental disease or defect do not rise to the level that they would cause him to lack the capacity to understand the nature of the proceedings against him or lack the capacity [to] assist his attorney in his defense, his mental illness is such that he lacks the capacity to conduct such a defense. The court makes this finding based on a lack of capacity, not a lack of skill.

Because "Moore's mental capacity [would] have serious and negative effects on his the [sic] ability to conduct a defense," the court ruled that his request to waive counsel and proceed pro se was not made knowingly and intelligently.

In June 2017, Trieweiler was permitted to withdraw based on a breakdown of communication and conflict of interest. James Womack was appointed as Moore's replacement counsel. Moore continued to submit documents and motions demanding that he be allowed to represent himself.

Second Order on Motion to Waive Counsel

In November 2018, an omnibus hearing was held before Judge Sean O'Donnell. Moore requested that the court entertain his motions to proceed pro se. Womack stated his understanding that the matter had been ruled on by Judge Roberts, and the court located and reviewed the order denying Moore's previous motion to represent himself. Although not expressly stated in the written order, Judge O'Donnell noted that the previous motion was "denied without prejudice."

The court set a hearing on the pending motion for later that month. At the hearing, Moore explained why he wanted to represent himself:

> [T]his involves race, so no one can defend me but, uhm, Allah and me by a Muslim. My beliefs teach me to put that first before anything and represent myself. It's my faith—it's my faith, practice, to represent myself. If he's not Muslim, he can't represent me, first of all. He just can't, no way possible.

Judge O'Donnell engaged in a lengthy colloquy with Moore, questioning him about his understanding of the charge he faced, the challenges of representing himself, and his knowledge of procedure. The State pointed out that Moore had represented himself in a 2010 King County criminal case and took the position that, if Moore "was unequivocal about his request to go pro se, that he should be allowed to do so." Womack acknowledged that Moore's prior counsel had opposed his repeated requests to represent himself but stated that "[t]he status of the case was different then" and explained his position:

> I don't think in good faith I can take an adverse position . . . to his request. He has made that known. He—as I've indicated for the record, he has made his request known to me directly and has ceased any communication with me, and so the ability of counsel to effectively assist him is—is severely limited.

Judge O'Donnell found the waiver of counsel knowing, voluntary, and intelligent and granted Moore's motion to represent himself.

Trial

The case proceeded to trial in May 2019 before Judge Kristin Richardson. During the court's initial questioning of prospective jurors, it asked Moore if he had any objection to the exclusion of a juror who indicated that her acquaintanceship with the investigating detective would cause her to be biased. He replied,

> Once again, for the record, in front of these juror people, I told you before they came into the courtroom you explained to me that I had no rights in your courtroom whatsoever because of my skin color and religious belief.
>
> Whatever you do, Allah is akbar.

The court excused the juror.

Another prospective juror revealed that he frequented the convenience store where the stabbing occurred, and he had heard about a stabbing that had occurred there around the same time. He had heard that the culprit had "done this before" and said it would be "tough" for him to remain unbiased. Moore stated, "I have no problem with him being on y'all's (unintelligible) jury. The time you—you speaking of, about five or six stabbings happened within the same time frame he's talking about, so I don't think it have any reference to the area. . . . I'm glad he's safe." The prospective juror was not excused at that time, although he was later excused for hardship. The court also individually questioned a prospective juror who indicated that his history of "harassment" by the Seattle Police Department would affect his ability to be fair. He was excused on the State's motion.

On the second day of jury selection, several prospective jurors were questioned about their relationships to victims of violent crime. Juror 12 reported that her sister had gone missing in 1991, and the juror considered it a violent crime because she believed she had been abducted. Juror 12 stated that the Lynnwood Police Department had investigated and "were told that there were several sightings of her in the company of an African-American individual . . . but all leads led to nowhere." The State asked if she could be fair in a case involving the Seattle

Police Department, and she said that she could. Moore indicated that he might have an objection to Juror 12:

> MR. MOORE: Excuse me, Your Honor?
>
> THE COURT: Yes, sir.
>
> MR. MOORE: She just—she just implied herself as being impliedly biased, maybe, toward me because she used the word "African American," and I'm [B]lack.
>
> THE COURT: Okay.
>
> MR. MOORE: I'm African American.
>
> THE COURT: We will deal with excusals of jurors on the break. . . . So make a list and keep—keep it in mind.

The State then turned to Juror 22, who indicated that his best friend had been attacked in his home and stabbed 45 to 50 times. He volunteered that, "I guess I would say I have extreme bias in this case because I—I thought that the person that stabbed him should have received capital punishment and he didn't. . . . I have really strong feelings behind that because, you know, it affected me emotionally." Neither party asked follow-up questions about the juror's ability to be fair, nor did the court. Juror 22 was seated and deliberated.

Moore declined to ask the panel any questions or excuse any prospective jurors during the first round of voir dire. After the State's second round of voir dire, Moore asked the venire several questions. He asked whether any prospective jurors had ties to hate groups such as the Ku Klux Klan, and one prospective juror responded that they had estranged family members with such associations. Moore asked whether anyone had experienced any racist attacks and whether they were prejudiced against people with disabilities. He also inquired about the jurors'

contact with Muslims. One prospective juror was excused on the State's motion after admitting that he grew up around people with bias against Muslims and was not sure that he could be fair. At the end of the morning session, the court explained to Moore that he would be permitted to exercise peremptory challenges and could remove up to eight jurors for no reason. Moore did not use any of his peremptory challenges.

On the day the jurors were seated, Juror 6 wrote an email to the court explaining that her religious beliefs would not permit her to pass judgment on Moore. She also voiced concerns that Moore did not appear to understand the process and "his poor understanding will result in this trial being unfair," specifically mentioning his failure to excuse Juror 22, the juror who had admitted to bias based on his friend's stabbing. Juror 6 was called in for questioning and excused.

After the juror's excusal, the court noted "for the record that there appear to be four persons of color on the jury." Moore took issue with this remark, leading to the following exchange:

> MR. MOORE: Why you point—which one is that? Four person of color or something you said?
>
> THE COURT: Yes, on the jury.
>
> MR. MOORE: What's that got to do with the jury? I didn't—I didn't—
>
> THE COURT: No, it's strictly for the appellate record. If there is to be a conviction and if there is to be an appeal, then it's important for that be—for that to be on the record.
>
> MR. MOORE: Objection to that remark. That's a remark of—that's—that is a prejudicial remark against me because I didn't—I never brought up an—an object about the jury's being color or whatever.
>
> I didn't even—I didn't even use my peremptory challenges to get rid of a juror, because I want them to feel like I'm not being

> prejudiced toward them, even when their—they had a [B]lack guy stabbed a friend or something, whatever, I didn't say nothing at all, period. I wanted them not to feel like I'm prejudiced or anything.

Moore explained in his opening statement that he intended to "prove the fabrication of this attack" but stated, "My whole goal here is not even—it might sound kind of weird. It's not even to bring you over into a finding of guiltiness [sic] or not guilty. It's to try to bring people up out of their racism that they [are] subconsciously trapped in, stuck in." Moore testified in his own defense over the course of three days, asserting that he was the victim of a race-based conspiracy involving the Seattle Police and King County prosecutors and judges. The court barred Moore from further direct examination of himself on the third day after Moore refused to follow the court's limitations on his testimony.

The jury found Moore guilty as charged. He received a high-end standard range sentence of 254 months imprisonment plus a 24-month deadly weapon enhancement for a total sentence of 278 months. Moore appealed.

ANALYSIS

I. Waiver of Counsel

Moore first contends that the trial court violated his rights to counsel and due process in determining that his waiver of counsel was valid because it failed to consider his mental illness and the court's prior denial of his motion to represent himself.

The Washington Constitution and the United States Constitution guarantee a criminal defendant the right to self-representation. WASH. CONST. art. I, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

In Faretta v. California, the United States Supreme Court observed that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. at 817. The Washington Supreme Court has remarked that "[t]his right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

The Faretta Court acknowledged that there is an inherent tension between the right of self-representation and the guaranty of counsel. 422 U.S. at 833–34. However, the Court noted that the right to counsel did not necessarily mean that "a State may compel a defendant to accept a lawyer he does not want." Id. at 833. Despite the advantages of representation, the defendant's choice is paramount:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Id. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (Brennan, J., concurring)).

To balance the right of self-representation with a defendant's fundamental right to a fair trial, the Faretta Court held that the waiver of the right to counsel must be made "knowingly and intelligently[:]"

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942)). Therefore, when a request to proceed pro se is unequivocal and timely, the trial court must determine whether the defendant's request is voluntary, knowing, and intelligent. Madsen, 168 Wn.2d at 504. The court must "'indulge in every reasonable presumption' against a defendant's waiver of his or her right to counsel." In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)). However, "[t]he grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." Madsen, 168 Wn.2d at 504–05.

The determination of whether a defendant has validly waived their right to counsel is within the discretion of the trial court. State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986). "A decision on a defendant's request for self-representation will therefore be reversed only if the decision is 'manifestly unreasonable,' relies on unsupported facts, or applies an incorrect legal standard." State v. Coley, 180 Wn.2d 543, 559, 326 P.3d 702 (2014) (quoting Madsen, 168

Wn.2d at 504). Appellate courts "give great deference to the trial court's discretion because the trial court is in a favorable position to the appellate courts in evaluating a request to proceed pro se." State v. Burns, 193 Wn.2d 190, 202, 438 P.3d 1183 (2019). In general, "[t]rial judges have more experience with evaluating requests to proceed pro se and have the benefit of observing the behavior, intonation, and characteristics of the defendant during a request." Id. On appeal, the defendant bears the burden of proof to show that their right to counsel was not competently and intelligently waived. Hahn, 106 Wn.2d at 901.

The defendant's capacity to waive counsel is distinct from the defendant's competence to stand trial:

> The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. . . . The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.

Godinez v. Moran, 509 U.S. 389, 401 n.12, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (emphasis in original). In Indiana v. Edwards, the United States Supreme Court considered the effect of this distinction on a defendant's right to self-representation and stated that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky[2] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 554 U.S. 164, 178, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) (alterations in original). The Court did not define "severe mental illness" but found that a defendant with "serious thinking

[2] Dusky v. United States 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

difficulties and delusion," inability "to cooperate with his attorney in his defense because of his schizophrenic illness," and "marked difficulties in thinking" could be prevented from waiving his right to counsel. Id. at 167–68 (internal quotation marks omitted).

The Washington Supreme Court has also acknowledged that a trial court may "limit the right to self-representation when there is a question about a defendant's competency to waive counsel or to act as his own counsel, even if the defendant has been found competent to stand trial." In re Pers. Restraint Pet. of Rhome, 172 Wn.2d 654, 661–62, 260 P.3d 874 (2011). "In considering whether a defendant whose competency is in question is capable of making a knowing and intelligent waiver, a trial court considers the background, experience, and conduct of the accused, which may include a history of mental illness." Id. at 663. The Rhome court emphasized that Edwards does not require trial courts to evaluate a defendant's mental health status to secure a valid waiver of counsel; it is "but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel." Id. at 665. In so holding, the court made clear that, although mental health issues could be relevant to a knowing and intelligent waiver, "this does not translate into a heightened standard for waiver of counsel and pro se representation when there are mental health issues present." Id. at 666.

Moore argues that Judge O'Donnell abused his discretion in allowing Moore to represent himself because "due process required the court to consider Moore's mental illness, and the court's own prior ruling, in determining whether Moore's

waiver of counsel was valid." He contends that the court's waiver colloquy was inadequate, resulting in an erroneous determination that Moore's waiver of counsel was knowing, voluntary, and intelligent. And he argues that, "[w]here there is no showing that circumstances have changed" since an earlier denial of a motion to waive counsel based on a lack of capacity, the requirement that the trial court engage in "'every reasonable presumption' against waiver must include consideration of a prior finding by the superior court that the defendant's waiver was invalid based on mental capacity concerns."

Under Rhome, a superior court's prior finding that a waiver of counsel was invalid based on the defendant's mental health is simply another factor that a court may consider when determining whether a pending waiver is knowing and intelligent. Moore had been found competent to stand trial and, although the court did not make specific findings regarding his diagnosis, it credited the testimony of experts who opined that Moore did not suffer from any psychotic disorder. As the State noted at oral argument, Moore does not point to any authority for the proposition that a personality disorder renders a defendant incapable of exercising their right to self-representation. Moore's argument does not account for the inherently fluid nature of both mental health and the attorney-client relationship. These factors are not fixed and stagnant. A defendant with a personality disorder may present very differently to the court at different points in time, even without a change in circumstances. Similarly, the attorney-client relationship may strengthen, deteriorate, or simply carry on without issue as a case progresses. It is within the court's discretion to take a fresh look at all of these factors and

determine how they affect a defendant's ability to understand the consequences of a waiver of counsel.

Here, the record indicates that Judge O'Donnell had at least briefly reviewed Judge Roberts' previous order denying Moore's request to represent himself. As the State points out, Judge O'Donnell had observed and interacted with Moore over the course of multiple hearings, had read Moore's repeated motions to waive counsel, and was aware that Moore's mental health was an ongoing concern. Judge O'Donnell also engaged in a lengthy colloquy with Moore, confirming that he understood the consequences of his request to represent himself and emphasizing the standard to which he would be held as a pro se participant. After conducting this inquiry, the court concluded that Moore's waiver was unequivocal, timely, voluntary, knowing, and intelligent. The court did not abuse its discretion in allowing Moore to represent himself.

II. Juror Bias

Moore also argues that reversal is required because the trial court failed to excuse a juror who expressed potential bias. The State responds that the record does not demonstrate the juror's actual bias, that Moore invited or failed to preserve any error by failing to request the removal of Juror 22 from the jury, and that the trial court would risk violating Moore's Faretta rights by intervening in his jury selection strategy. Appellate courts review a trial court's failure to dismiss a juror for bias for an abuse of discretion. State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020).

We will consider an issue not raised in the trial court if it involves manifest constitutional error. RAP 2.5(a)(3). A criminal defendant has a constitutional right to a fair and impartial jury. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "[I]f the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error" requiring reversal, regardless of a defendant's failure to challenge the juror for cause at trial. State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).

"Actual bias is 'the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.'" Id. (quoting RCW 4.44.170(2)). The record must demonstrate a probability of actual bias; a mere possibility of bias or an equivocal expression of bias is not sufficient. State v. Sassen Van Elsloo, 191 Wn.2d 798, 808–09, 425 P.3d 807 (2018).

Here, the State has the better argument because the record does not demonstrate a probability of actual bias. As the State points out, Juror 22 did not make an unequivocal statement that he could not be fair in deciding this case. The juror's assertion that "I guess I would say I have extreme bias" was volunteered as he was describing his friend's attack and was not given in response to any question regarding whether the incident would affect his ability to be fair. Neither party nor the judge followed up with questioning, suggesting that the juror's tone and demeanor did not raise concern of actual bias. These considerations indicate that the juror's statement was more equivocal that it may seem on its face.

Also, Juror 22's chief objection to his friend's situation concerned the sentence that the assailant received. Moore presented a defense of identity, denying that he had stabbed Cross, rather than arguing any justification for the stabbing. At best, Juror 22's statement suggests bias against those who stab others. Moore denied that he belonged to that class. Although Juror 22 might have been biased against Moore after determining that he had stabbed someone, there is no indication that he would be unable to weigh the evidence or make that determination fairly.

Because Moore has not shown a probability of actual bias, he has not shown a manifest constitutional error that may be raised for the first time on review.[3]

Affirmed.

WE CONCUR:

[3] Moore submitted a pro se statement of additional grounds for review in which he raises broad allegations of racism and governmental misconduct. However, because the statement does not adequately inform us of the nature and occurrence of the alleged errors and appears to involve facts or evidence not in the record, these issues are properly raised through a personal restraint petition, not a statement of additional grounds. See State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013).

Moore additionally sent two letters to this court that were received on April 12, 2021 and April 22, 2021, each of which contained similar allegations regarding the verbatim report of proceedings prepared for this appeal. In the absence of a specific request for relief or supporting authority, we are unable to address this issue. Moore may also wish to include this issue in his personal restraint petition.

NIELSEN KOCH P.L.L.C.

July 09, 2021 - 10:37 AM

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