Supreme Court No. 94681-7
Court of Appeals No. 33990-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JEROME CURRY, JR.,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review two issues from the Court of Appeal's published decision *State v. Curry*, No. 33990-4-III. (Opinion hereafter).

II. ISSUES PRESENTED FOR REVIEW

1. Does the published opinion of the Court of Appeals cloud, rather than clarify, the distinctions made by this Court in *Madsen*[1] and *Luvene*,[2] and thereby improperly chill a citizen's right to self-representation as explicitly guaranteed by article I, section 22 of the Washington Constitution such that this Court should accept review to reconcile *Luvene* with *Madsen*.

2. Does a trial court presumptively abuse its discretion by granting a defendant's demand for self-representation where the request is made solely to avoid a delay in the scheduled trial date necessitated by a substitution of counsel, and does the admonition that courts must indulge every reasonable presumption against waiver of a defendant's right to counsel override the abuse of discretion

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[1] *State v. Madsen,* 168 Wn.2d 496, 229 P.3d 714 (2010).

[2] *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995).

standard such that the appellate court could substitute its own judgment for that of the lower court?

III. STATEMENT OF THE CASE

Procedural Facts.

On December 29, 2014, in Spokane County, Mr. Jerome Curry was charged with possession of a controlled substance, heroin, with intent to deliver, and possession of a controlled substance, methamphetamine. CP 4.[3] Prior to trial, in early April 2015, Mr. Curry filed several pro se motions. (4/3/15) RP 7-8. On April 30, 2015, Mr. Curry also filed a motion to proceed pro se. CP 48-58. His attorney's declaration[4] in support of the motion to proceed pro se averred that Mr. Curry was requesting a motion hearing to allow him to represent himself, or, in the alternative, to obtain a new lawyer. CP 49.

The declaration and the attachments in support of the motion established that Mr. Curry had previously represented himself in a multi-count felony trial at the superior court level, and, in part, at the appellate

[3] Mr. Curry was evaluated for competency. The trial court found him competent to stand trial, a finding he does not contest on appeal. (4/3/15) RP 4; CP 34-35.

[4] The declaration was made by Mr. Curry's appointed trial counsel, Mr. Elston.

level, "with some success." CP 49. One appellate decision[5] attached to the motion to proceed pro se established that Mr. Curry had represented himself at a previous trial, as well as at the resentencing after he prevailed on a sentencing issue in his first appeal. CP 52. Additionally, at the appellate level, Mr. Curry had raised the issue of whether he was denied his right to counsel *after* the case was remanded to the superior court from the appellate court for resentencing where he, again, represented himself.[6]

In the present case, the trial court granted Mr. Curry's request to proceed pro se after engaging him in an extensive colloquy. (5/7/15) RP 1-20.

Mr. Curry was convicted of two felony possession of controlled substance charges. CP 127, 128. He appealed. Division Three reversed the case, stating "this case is much like *Luvene*," and held that Mr. Curry's demand to represent himself was equivocal, because "the record does not suggest Mr. Curry sought an early trial date for strategic reasons. He simply

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[5] CP 52-54; *State v. Curry*, 173 Wn. App. 1003, 2013 WL 269029 (2013).

[6] Four years ago, in a prior appeal, Curry claimed that he was denied counsel when his case was remanded to the trial court for resentencing. The Court of Appeals, Division III, held that Curry was not denied counsel after he had effectuated his right to represent himself during that earlier trial because he never requested reappointment of counsel at the resentencing. CP 53. *State v. Curry*, 173 Wn. App. 1003 at *2 (2013).

wanted to settle his fate as quickly as possible. Under our case law, this motivation rendered Mr. Curry's request for self-representation equivocal."

IV. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

Review should be accepted because the Opinion establishes a new requirement of a legally strategic reason for invoking one's constitutionally guaranteed right of self-representation, and this position is irreconcilable with this Court's directive expressed in *Madsen*. RAP 13.4(b)(1). The published opinion of the Court of Appeals clouds, rather than clarifies, the distinctions made by this Court in *Madsen* and *Luvene*, and thereby improperly chills a citizen's right to self-representation as explicitly guaranteed by article I, section 22 of the Washington Constitution such that this Court should accept review to reconcile *Luvene* with *Madsen*. RAP 13.4(b)(1), (3) & (4).

A. DOES A TRIAL COURT PRESUMPTIVELY ABUSE ITS DISCRETION BY GRANTING A PRO SE DEMAND FOR SELF-REPRESENTATION WHERE THE REQUEST IS MADE SOLELY TO AVOID A DELAY IN THE TRIAL DATE NECESSITATED BY A SUBSTITUTION OF COUNSEL; AND DOES THE ADMONITION THAT COURTS MUST INDULGE EVERY REASONABLE PRESUMPTION AGAINST WAIVER OF A DEFENDANT'S RIGHT TO COUNSEL OVERRIDE THE ABUSE OF DISCRETION STANDARD ON REVIEW SUCH THAT THE APPELLATE COURT CAN SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE LOWER COURT?

The Court of Appeals' published opinion is simply wrong. It improperly requires the defendant to have some *strategically* thoughtful

reason to exercise his constitutional right to self-representation. Opinion at 8 (stating: "the record does not suggest Mr. Curry sought an early trial date for strategic reasons. He simply wanted to settle his fate as quickly as possible. Under our case law, this motivation rendered Mr. Curry's request for self-representation equivocal").

This new requirement of a "legally strategic reason" for invoking one's constitutionally guaranteed right of self-representation is irreconcilable with this Court's directive expressed in *Madsen*:

> This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta,* 422 U.S. [806,] at 834 [95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)], 95 S.Ct. 2525; *State v. Vermillion,* 112 Wn. App. 844, 51 P.3d 188 (2002). 'The unjustified denial of this [pro se] right *requires* reversal.' *State v. Stenson,* 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)."

Madsen, 168 Wn.2d at 503 (emphasis the Court's). Therefore, review is appropriate. RAP 13.4(b)(1).

Additionally, the defendant's rationale for his request was to potentially shorten the duration of his custody – if he prevailed at trial representing himself, as he had before, he would be out of custody some 30 days earlier than if he prevailed with counsel. The Opinion makes light of the defendant's desired strategy, paternalistically determining that time is not of the essence. The appellate court thereby substitutes its own opinion

and reasoning for that of the defendant and the trial court. Indeed, deftly sweeping away one right by establishing that another right could be legally violated, the Opinion suggests that because the time for trial as mandated under CrR 3.3 could be continued over the defendant's objection, there is no valid basis for a defendant to exercise *his* constitutional right to self-representation.[7]

However, the trial court was in the best position to determine the facts and sincerity of the defendant's demand. Indeed, "time" [8] is the only asset some defendants possess; and the appellate court makes light of the defendant's desire to protect that asset by representing himself, and of the trial court's honoring of that constitutional request. Under the umbrella of

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[7] *State v. Curry*, Opinion at 7-8:

> But a defendant concerned with trial delay is not forced to make a hard choice between competing rights. The right to a speedy trial can be harmonized with counsel's need for more time. CrR 3.3(f); *State v. Campbell,* 103 Wn.2d 1, 13-15, 691 P.2d 929 (1984). In addition, unlike truly antithetical rights, a defendant's waiver of the right to counsel does not empower the defendant to insist on a specific speedy trial date. Trial dates can be changed over a defendant's objection. *State v. Flinn,* 154 Wn.2d 193, 201, 110 P.3d 748 (2005). Because of this possibility, there is no guarantee that a defendant who discharges counsel in hopes of hastening the trial process will reap any benefit.

[8] "All we have to decide is what to do with the time that is given us." J. R. R. TOLKIEN, THE FELLOWSHIP OF THE RING.

the "admonition that we must indulge every reasonable presumption against the waiver of a defendant's right to counsel,"[9] the Opinion presumes away the abuse of discretion standard and the deference due to the trial court.[10] The Opinion begins by stating that "Mr. Curry confirmed the trial court's characterization of his position," Opinion at 3, acknowledging the extensive colloquy with the defendant confirming that the decision was his "freewill choice" and that it was made *solely* because he did not want a thirty-day extension of the trial date. The Opinion then metamorphoses this straightforward and unequivocal request into an equivocal one because it was made for the very reasons it was made, so that Curry could "settle his fate as quickly as possible." Opinion at 8.

The Opinion undermines the abuse of discretion standard. Therefore, review is appropriate under RAP 13.4(b)(1). The question should

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[9] Opinion at 5.

[10] This Court has determined that "[t]he 'ad hoc,' fact-specific analysis of waiver of counsel questions is best assigned to the discretion of the trial court." *State v. Hahn,* 106 Wn.2d 885, 900-01, 726 P.2d 25 (1986) (emphasis omitted). Review is under an abuse of discretion standard. *Madsen*, 168 Wn.2d at 504. This Court has determined that a decision on a defendant's request for self-representation will be reversed only if the decision is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *Madsen,* 168 Wn.2d at 504 (citing *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

not be whether *the appellate court* would have decided otherwise in the first instance, but whether *the trial judge* was justified in reaching his or her determination, after engaging in an extensive face-to-face discussion with the defendant.

B. THE PUBLISHED OPINION OF THE COURT OF APPEALS CLOUDS, RATHER THAN CLARIFIES, THE DISTINCTIONS MADE BY THIS COURT IN *MADSEN* AND *LUVENE*, AND THEREBY IMPROPERLY CHILLS A CITIZEN'S RIGHT TO SELF-REPRESENTATION AS EXPLICITLY GUARANTEED BY ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION SUCH THAT THIS COURT SHOULD ACCEPT REVIEW TO RECONCILE *LUVENE* WITH *MADSEN*.

The Opinion improperly compares this case to *Luvene*, and ignores the holding of *Madsen*, thereby clouding, rather than clarifying, the hard choices made independently by judges regarding the right to self-representation. This is already a potential Catch 22.[11] It is notable that this Court did not mention *Luvene* in its analysis in *Madsen*.

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[11] "Morale was deteriorating and it was all Yossarian's fault. The country was in peril; he was jeopardizing his traditional rights of freedom and independence by daring to exercise them." JOSEPH HELLER, CATCH-22 (Chapter 39: The Eternal City).

Many courts have recognized the Catch-22 judges face in the waiver of counsel setting. *See State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991) (A defendant's request for self-representation can be a "heads I win, tails you lose" proposition for a trial court. *Id.* at 377, (citations omitted); *State v. Lawrence*, 166 Wn. App. 378, 395, 271 P.3d 280 (2012) (Trial judges face exceedingly difficult choices when deciding whether to allow a defendant to waive the right to counsel in order to assert the right to self-representation).

The upshot of the Opinion is that it undermines the administration of justice by encouraging gamesmanship in the courtroom by criminal defendants, making more readily available an appellate parachute for appellants, and potentially frustrating the orderly progress of trial proceedings.

A complete examination of the instant record establishes that the trial court properly granted Curry's request for self-representation. While there is no talismanic formula for a *Faretta*[12] inquiry, the differences between Luvene's situation and Curry's are striking. In contrast to Luvene, who made his request to proceed on his own while his attorney was simultaneously arguing to continue his death penalty case, here, Curry personally requested his attorney set a motion hearing to allow him to argue to the trial court regarding his desire and right to represent himself,[13] and did so *long* before trial, at least as early as April 24, 2015. CP 49. Thereafter, Curry made his request in writing on April 30, 2015, a full month before trial. CP 48-58. The motion was heard a week later, on May 7, 2015. (5/7/15) RP 1-20. At this point, his right to self-representation existed as a matter of law. *See Madsen*, 168 Wn.2d at 508 (noting that if the demand for

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[12] *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[13] Or, in the alternative, to get a new lawyer.

self-representation is made "*well before the trial and unaccompanied by a motion for a continuance, the right of self representation exists as a matter of law*." (Emphasis the Court's, citing *State v. Baker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)). Here, Curry's demand was more than timely.

Additionally, Curry had thought his request through; he had prior experience and practice in this type of request and the law surrounding the request. In direct contrast, Luvene did not establish that he understood the seriousness of the charge, that he was familiar with court rules, or that he was in any way prepared to adequately represent himself.[14] Rather, his request was impulsive, confusing, and unreliable. Unlike Luvene, Curry engaged in an intelligent discussion with the court. He unequivocally expressed his desire to represent himself and responded to the trial court's colloquy with an understanding of court procedure and his legal rights. He was advised on the record of the penalties involved,[15] acknowledged that he

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[14] "While Mr. Luvene did state that he was 'prepared to go for myself', he also stated, 'I'm not even prepared about that', and '[t]his is out of my league for doing that.' Taken in the context of the record as a whole, these statements can be seen only as an expression of frustration by Mr. Luvene with the delay in going to trial and not as an unequivocal assertion of his right to self-representation." *Luvene*, 127 Wn.2d at 698-99.

[15] (5/7/15) RP 4-6.

fully understood them,[16] and knew when his trial dates where scheduled.[17] Thereafter, Curry engaged in the following colloquy with the court regarding prior charges where he had conducted the trial by himself, with some success at the trial level:

> THE COURT: Okay. I was about to ask you about that. You have represented yourself on a prior occasion; is that right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And what was the nature of that case?
>
> THE DEFENDANT: Basically it was part of escape from community custody, fourth degree domestic violence, and a second degree malicious mischief, gave me 54 months and six months of community custody.
>
> THE COURT: Okay. And is it -- did you have a trial then with a jury?
>
> THE DEFENDANT: Yes.

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[16] THE COURT: Thanks, Counsel. Mr. Curry, that is the jeopardy or punishment that you face potentially on conviction for these matters. Do you understand that, sir?

THE DEFENDANT: Yes, I do.

(5/7/15) RP 6.

[17] THE COURT: Okay. When are your trial dates scheduled currently, do you know?

THE DEFENDANT: Pretrial is on the 15th of next week, Friday, and my trial date is June 1st.

(5/7/15) RP 7.

THE COURT: Did you select the jury yourself, from your side of things?

THE DEFENDANT: No, I didn't.

THE COURT: How did that go then? What happened there with the jury selection?

THE DEFENDANT: Basically it was not the way it should have went but, you know, that's why I took over and went pro se.

THE COURT: Okay. So you didn't have a standby attorney, you just did the --

THE DEFENDANT: Yeah.

THE COURT: -- trial all by yourself?

THE DEFENDANT: John Rogers was standby, but I basically had taken over after that.

THE COURT: And when was that, that you had that trial?

THE DEFENDANT: 2009 of -- I think September.

THE COURT: Okay. And were you convicted on all the charges or some of the charges or how did that go?

THE DEFENDANT: No. I was convicted on two charges, the no-contact order violation and second degree malicious mischief. And I had won on appeals twice in Division III, and it was sent back to superior court.

THE COURT: Okay. And so were your convictions reversed in the appeal process?

THE DEFENDANT: It was remanded on part of the community custody.

THE COURT: Okay. Were you satisfied with the final result there, or is some of that still pending?

THE DEFENDANT: That's still pending. That's why I'm fighting right now on the escape from community custody and on racial profiling on the other cases that's involved with the illegal search and seizure.

THE COURT: Okay. And we did talk about the potential punishment you face, and you're aware of that, as the attorneys outlined the standard ranges if you're convicted of all these matters?

THE DEFENDANT: Yes.

THE COURT: You have participated in a trial, as you said. Do you understand that if you are representing yourself, you're on your own? In other words, if you --

THE DEFENDANT: Yes.

THE COURT: -- get stuck and there's an objection from the prosecutor or you might not know how to object, you're not able to ask the judge to step in for you and help you out; do you understand that?

THE DEFENDANT: Yes, I know that.

THE COURT: And are you familiar at all, apart from what you've said, with the rules of evidence? Have you studied those at all?

THE DEFENDANT: Like I said, I'm fairly new. I'm just basically just going for what I know. I know I can get evidence. I've got to present evidence to the court and to the jury. But I'll learn more about that within the next couple, couple weeks.

THE COURT: And do you understand then that as far as rules of evidence are concerned and rules of criminal procedure are concerned, in general, that those are the rules

that everybody has to follow in a criminal trial? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And so, even though you are not an attorney, you would still be required to follow the very same rules that the attorney, the prosecutor would have to follow; are you clear on that?

THE DEFENDANT: Yes, yes.

THE COURT: And in presenting your case, do you understand that if you choose to testify, you can't just -

THE DEFENDANT: Yes.

THE COURT: -- narrate; you can't go on and on about, you know, a particular subject without asking yourself a question and then trying to answer that question.

THE DEFENDANT: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, yes. That's what happened to me in my trial so....

THE COURT: Right. And in that regard, the prosecutor might well object to you presenting your case if you run outside those limitations. Do you understand that?

THE DEFENDANT: Yes. I mean, I have no choice. I mean, there -- the law kind of contradicts itself on certain issues in like my community custody. And that's where I'm here at, for -- I mean, I have none of the evidence that I need, but I see that there's contradictions in some of the -- the good time behavior that you get from being locked up and getting released, you know. So, there are contradictions, well, to -- to my good time and my community custody. This is why I'm having a great deal of issues here. I mean, it would -- on

my escape from community custody is -- is basically over. I've got time served on that.

(5/7/15) RP 8-12

Division Three's reliance on *Luvene* is misplaced and is opposite to this Court's much later opinion in *Madsen*. It cannot be an *abuse of discretion* to grant a pro se request under these circumstances, even if different judges would have ruled differently. "Unequivocal" does not mean you liked your options. A bad choice with limited options is not the absence of a choice. Curry made a choice between two unattractive options; that is not "equivocation." The trial judge was in the best position to make this call. If the trial court had denied the request for self-representation made more than a month before trial, *Madsen* may dictate that the conviction be reversed because Curry's demand was unequivocal, though ill-advised. This Court should accept review to reconcile the *Luvene* with *Madsen*. RAP 13.4(a)(1), (3), & (4).

V. CONCLUSION

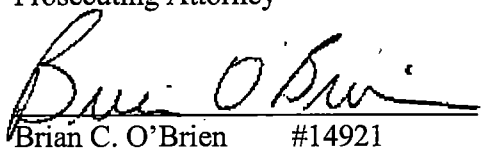
Review should be accepted because the Opinion establishes a new requirement of a legally strategic reason for invoking one's constitutionally guaranteed right of self-representation, a position that is irreconcilable with this Court's directive expressed in *Madsen*.

The published opinion of the court of appeals clouds, rather than clarifies, the distinctions made by this Court in *Madsen* and *Luvene*, such

that this Court should accept review to reconcile *Luvene* with *Madsen.* RAP 13.4(b)(1), (3) & (4). The State respectfully requests this Court accept review of these issues.

Dated this 14th day of June, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



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ATTACHMENT A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 33990-4-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
JEROME CURRY JR,	)	
	)	
Appellant.	)	

PENNELL, J. — Criminal defendants enjoy competing rights to counsel and self-representation. As between these two rights, the default is the right to counsel. To overcome the presumption in favor of counsel, a defendant must first unequivocally request self-representation. This prerequisite is not satisfied if a defendant's desire to forfeit counsel is rooted in frustration with counsel's need for a continuance.

During Jerome Curry's prosecution for felony drug offenses, he asked to represent himself. The court held a hearing at which Mr. Curry repeatedly stated he had no choice but to forfeit counsel because his attorney would not be ready to proceed without a continuance. The qualifications attached to Mr. Curry's request for self-representation constituted equivocation. Accordingly, Mr. Curry's request for self-representation was invalid, and the convictions sustained thereafter must be reversed.

BACKGROUND

Mr. Curry was charged with two counts of possession of a controlled substance. He was originally appointed counsel but filed several pretrial motions pro se.[1] Defense counsel ultimately filed a motion on Mr. Curry's behalf, requesting leave for Mr. Curry to proceed without counsel.

The trial court addressed the motion to proceed without counsel at a pretrial hearing. At the hearing, the court engaged Mr. Curry in a lengthy discussion focused on whether Mr. Curry's waiver of counsel was knowing, voluntary, and intelligent. Throughout this discussion, Mr. Curry repeatedly stated he had "no choice" but to represent himself because he wanted to assert his right to a speedy trial. *See* Verbatim Report of Proceedings (VRP) (May 7, 2015) at 4, 12, 19.

Mr. Curry explained he was frustrated because a change in personnel at the office of public defense meant his attorney would need a continuance. He stated:

> [B]asically, I mean, if I've got to sit and wait until the end of June, . . . I mean, send me to prison or release me. One of the two. I mean, I aint got time to sit here. I mean, I have obligations on the streets. I'm losing my home. And if I've got to lose my home, I might as well defend [myself].

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[1] Also prior to trial, the court found Mr. Curry competent to stand trial after ordering an evaluation. Mr. Curry has not raised any competency concerns and does not argue that his mental health is relevant to any issues on appeal.

Id. at 13. Mr. Curry stated that if his counsel could be ready by an earlier date, he would have "no problem" working with counsel. *Id.* at 14.

At the close of the hearing, the court asked if Mr. Curry's decision to proceed without counsel was his "voluntary and steadfast decision." *Id.* at 18. Mr. Curry stated, "Well, it's not voluntary. . . . It's I have no choice in the matter." *Id.* at 18-19. The court then made the following inquiry:

> THE COURT: Well, it's either your freewill choice of doing this, or somehow there's been some pressure put on you. And the only pressure I recall you saying is the time pressure; that is, that you believe you don't have a choice because you don't want an extension of the trial date, since you have other affairs that you believe you need to take care of. And you'd rather have an outcome quicker rather than later on. That's what I understand you to say. Is that accurate?
> THE DEFENDANT: That's—that's accurate.

Id. at 19.

After Mr. Curry confirmed the court's characterization of his position, the court granted Mr. Curry's request for self-representation. Approximately five weeks later, Mr. Curry represented himself at a jury trial and was convicted as charged. He now appeals.

ANALYSIS

Our state and federal constitutions confer on criminal defendants the right of self-representation. WASH. CONST. art I, § 22; *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). While this right is widely known and well

established, implementation is difficult because exercising the right of self-representation involves waiving the right to counsel. *State v. DeWeese*, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991). As between the competing rights to self-representation and to counsel, the latter is preferred. Accordingly, we indulge "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (internal quotation marks omitted) (quoting *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

We review a trial court's disposition of a defendant's request for self-representation for abuse of discretion. *Id.* This is a deferential standard. However, we will reverse a trial court's decision under this standard if it is unsupported by the record or if it was reached "'by applying the wrong legal standard.'" *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

The first step a trial court faces in assessing a defendant's request for self-representation is to determine whether the request is timely and unequivocal. *Id.* Both prerequisites must be met, or the inquiry ends there. *State v. Woods*, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001). Without a timely and unequivocal request, the right to counsel remains in place and the request for self-representation must be denied. *Id.* at 587-88. Only if the request for self-representation is both timely and unequivocal must the court

continue the inquiry by determining whether the request is "voluntary, knowing, and intelligent." *Madsen*, 168 Wn.2d at 504 (citing *Faretta*, 422 U.S. at 835).

This case involves only the threshold question of whether Mr. Curry's request for self-representation was unequivocal. Thus, we do not look at whether the trial court engaged in an adequate colloquy under *Faretta*. We instead focus on Mr. Curry's statements and whether the record, as a whole, indicates his request for self-representation was unequivocal. *See Woods*, 143 Wn.2d at 586.

When a request for self-representation is made in the context of a defendant's desire to exercise his or her speedy trial rights, the question of equivocation is complex. On the one hand, a defendant's request for self-representation is equivocal if it is based merely on displeasure with counsel's need for a continuance. *Id.* at 587; *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). But on the other hand, a defendant can make a strategic choice to assert the right to self-representation in order to avoid a trial delay. *State v. Modica*, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), *aff'd*, 164 Wn.2d 83, 186 P.3d 1062 (2008).

Two tools guide our review of Mr. Curry's request for self-representation to determine if it was equivocal. First, there is the admonition that we must indulge every reasonable presumption against the waiver of a defendant's right to counsel. Second, we

may compare Mr. Curry's statements with the ones deemed equivocal in *Luvene*. The *Luvene* court held the following request for self-representation was equivocal:

> I've been here since July . . . . You know, I don't wanna sit here any longer. It's me that has to deal with this. If I'm prepared to go for myself, then that's me. You know, can't nobody tell me what I wanna do. They say I did this, so why not—if I wanna go to trial, why can't I go to trial on the date they have set for my life? I'm prepared. I'm not even prepared about that. I wanna go to trial, sir. . . .
>
> I don't wanna extend my time. This is out of my league for doing that. I do not want to go. If he's not ready to represent me, then forget that. But I want to go to trial on this date.

Luvene, 127 Wn.2d at 698. Our Supreme Court concluded these statements by Mr. Luvene could "be seen only as an expression of frustration" with trial counsel's delay. *Id.* at 699. There was, therefore, no valid request for self-representation and the presumption in favor of counsel remained in place.

Both available tools militate in favor of finding Mr. Curry's request for self-representation equivocal. This case is much like *Luvene*. Throughout his hearing, Mr. Curry consistently asserted he had "no choice" but to ask for self-representation. Mr. Curry never identified any strategic reason for preferring an early trial date. He was instead resigned to just get things over with, reasoning, "I can do bad by myself." VRP (May 7, 2015) at 7. The State argues Mr. Curry's waiver was valid, pointing out that he repeatedly asked to represent himself even after being warned of the dangers and

disadvantages of doing so. The problem with the State's position is it only goes to the issue of voluntariness; it does not address the foundational issue of equivocation. Because the record as a whole raises serious doubt as to the validity of Mr. Curry's request for self-representation, the presumption against waiver favors invalidating the removal of counsel.

We note a defendant's claim that he has "no choice" but to request self-representation is not always a sign of equivocation. Criminal prosecutions are full of hard choices. For example, because a criminal defendant does not have the right to appointed counsel of his or her choice, a defendant may have to choose between the attorney selected by the court or self-representation. *See DeWeese*, 117 Wn.2d at 378. A defendant's ultimate selection is not invalid just because the choice was hard.

But a defendant concerned with trial delay is not forced to make a hard choice between competing rights. The right to a speedy trial can be harmonized with counsel's need for more time. CrR 3.3(f); *State v. Campbell*, 103 Wn.2d 1, 13-15, 691 P.2d 929 (1984). In addition, unlike truly antithetical rights, a defendant's waiver of the right to counsel does not empower the defendant to insist on a specific speedy trial date. Trial dates can be changed over a defendant's objection. *State v. Flinn*, 154 Wn.2d 193, 201, 110 P.3d 748 (2005). Because of this possibility, there is no guarantee that a defendant

who discharges counsel in hopes of hastening the trial process will reap any benefit.

Our opinion should not be interpreted to mean that a defendant can never make a strategic choice to waive counsel in hopes that his or her proceedings will go forward more quickly. The constitutional right to self-representation affords defendants this choice. *See Modica*, 136 Wn. App. at 442. However, for a valid waiver to occur, the record as a whole must demonstrate the defendant is clear-eyed in his strategy and not merely frustrated with the slow pace of the legal process.

Here, the record does not suggest Mr. Curry sought an early trial date for strategic reasons. He simply wanted to settle his fate as quickly as possible. Under our case law, this motivation rendered Mr. Curry's request for self-representation equivocal. The motion should have been denied and counsel retained.

CONCLUSION

Mr. Curry's conviction is reversed, and this matter is remanded to the trial court for further proceedings.

Pennell, J.

WE CONCUR:

Fearing, C.J.

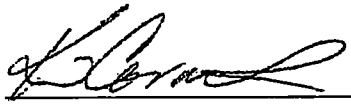
Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEROME CURRY, JR., Appellant.	No. _____ COA 33990-4-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 14, 2017, I e-mailed a copy of the Petition for Review in this matter, pursuant to the parties' agreement, to:

Marie Trombley
marietrombley@comcast.net

6/14/2017 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

June 14, 2017 - 1:20 PM

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