

64061-5

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NO. 64061-5-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

In re the Detention of Robert Pugh

STATE OF WASHINGTON,

Respondent,

v.

BOB PUGH,

Appellant.

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

The Honorable Palmer Robinson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Robert Pugh is a civil committee pursuant to RCW 71.09. Mr. Pugh moved the trial court for leave to proceed *pro se* in his annual review proceedings. The trial court denied Mr. Pugh's motion, finding a) he was competent to stand trial, but not to represent himself, b) he waived the right to self-representation through prior conduct, mainly in 2005, and c) she did not need to decide whether her ruling was based on incompetency or intentionally disruptive conduct in order to deny the motion.

The court erred on all three points. First, in Washington the standard for competency to stand trial or to waive the right to counsel is the same; because our state constitution provides a broader right to self-representation than the Sixth Amendment, federal jurisprudence does not change that rule. Second, Mr. Pugh's prior conduct was neither dilatory nor intended to disrupt the proceedings, and the court never warned him that his conduct could result in forfeiture of the right to self-representation. Third, even if Mr. Pugh was incompetent or if he waived his right by his conduct, the court would have been required to make a specific finding as to either of those facts. The ruling must be reversed.

B. ASSIGNMENT OF ERROR.

The trial court erroneously denied Robert Pugh's right to self-representation under Article 1, Section 22 of the Washington Constitution and the Sixth Amendment of the United States Constitution.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. A motion to proceed *pro se* should be granted if the request is unequivocal, knowing, intelligent, and timely. Here, Mr. Pugh made the motion between annual reviews, had represented himself previously, knew the risks of self-representation, and repeatedly stated his firm desire to proceed *pro se*. Did the court abuse its discretion in denying his motion?

2. In Indiana v. Edwards,¹ the United States Supreme Court held for the first time that the states *may* require a higher standard of competency for waiving counsel than for standing trial. In light of Washington's broader and more established right to self-representation, even where competency has been questioned, should this Court retain Washington's rule of applying the same competency standard to both decisions?

¹ 554 U.S. 164, 128 S.Ct. 2379, 2388, 171 L.Ed.2d 345 (2008).

3. Even under Edwards, a defendant may not be denied the right to self-representation unless the court finds he has a “severe mental illness.” The court did not find Mr. Pugh had a severe mental illness, and could not so find, given his inability to answer the evidence of his purported incompetence. Did the court therefore abuse its discretion in finding him incompetent to represent himself?

4. A *pro se* respondent may waive his right to self-representation through his conduct only if his behavior was “extremely dilatory,” the trial court warned him that continuing such conduct can be deemed as a waiver of that right, and the court finds on the record that he did so. Here, the trial court ruled that Mr. Pugh waived his right to self-representation through his “disruptive” conduct three years prior, but the conduct was not dilatory, he was never warned of the consequences of the conduct the court found problematic, and the court made no such finding. Did the court err in denying his motion to proceed *pro se*?

D. STATEMENT OF THE CASE.

On March 27, 2006, Bob Pugh stipulated to civil commitment as a sexually violent predator (SVP). CP 89-96. He did not admit to the elements required for civil commitment, but stipulated they could be found beyond a reasonable doubt if he proceeded to trial. Id. At the time, Mr. Pugh was *pro se*, with Michael Danko as standby counsel. Id.

On August 5, 2008, the Department of Social and Health Services filed an annual review of Mr. Pugh pursuant to RCW 71.09.070. CP 276-320. In August 2008, Mr. Danko was replaced by Leta Schattauer as Mr. Pugh's standby counsel and Mr. Pugh subsequently withdrew as *pro se* counsel, with Ms. Schattauer acting as full-fledged counsel. CP 321-22.

On April 24, 2009, after Mr. Pugh withdrew his petition for conditional release or unconditional discharge arising from his 2008 annual review, Ms. Schattauer moved to withdraw, arguing traits of borderline personality disorder and borderline intellectual functioning prevented Mr. Pugh from working with counsel effectively. 4/24/09RP 5-16; CP 530, 533. The motion was denied. CP 533. Mr. Pugh then requested leave to represent himself, having already filed a motion to that effect. 4/24/09RP 17; CP 531-

32. The court conducted a thorough colloquy, but because the State and Ms. Schattauer expressed concerns about his competence, the court reserved its ruling. 4/24/09RP 18-31.

On June 30, 2009, the State and Ms. Schattauer both filed briefs objecting to Mr. Pugh's motion to proceed *pro se*. CP 576-624. Ms. Schattauer's brief included a report from Forensic Psychologist Douglas Boer, based primarily on his interview with Mr. Pugh five months prior. CP 605-08. Dr. Boer opined Mr. Pugh was competent to stand trial and work with counsel, but not competent to represent himself. CP 607-08.

On July 10, 2009, the court found that Mr. Pugh was competent to stand trial and reviewed the history of Mr. Pugh's RCW 71.09 proceedings. Specifically, Judge Robinson recalled reluctantly granting Mr. Pugh's initial request to proceed *pro se* in his RCW 71.09 civil commitment trial, followed by disputes over Mr. Pugh's purported refusal to cooperate with transport or depositions. 7/10/09RP 16-19. On the date of trial, Mr. Pugh had requested counsel be appointed; his motion was denied and Mr. Pugh stipulated to meeting the definition of a RCW 71.09 committee. 7/10/09RP 20-21. Judge Robinson found Mr. Pugh "disruptive and

problematic” and incompetent to represent himself and therefore denied the current motion to proceed *pro se*. 7/10/09RP 24, 27.

Because Mr. Pugh’s own attorney had argued against his motion, the court requested that appellate counsel be appointed to seek discretionary review of the ruling. 7/10/09RP 31-34.

E. ARGUMENT.

1. UNDER THE WASHINGTON CONSTITUTION, BECAUSE MR. PUGH WAS COMPETENT TO STAND TRIAL, HE WAS ALSO COMPETENT TO REPRESENT HIMSELF.

a. Mr. Pugh has a constitutional right to represent himself. Civil commitment for any purpose is a significant deprivation of liberty that requires due process protections, including the right to counsel. Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); Specht v. Patterson, 386 U.S. 605, 609-10, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). A detainee in a RCW 71.09 proceeding has both a due process and statutory right to the assistance of counsel, which includes the right to represent himself. RCW 71.09.050(1); In re Detention of Turay, 139 Wn.2d 379, 395-96, 986 P.2d 790 (1999), accord In re Detention of J.S., 138 Wn.App. 882, 891, 159 P.3d 435 (2007).

Both the federal and state constitutions guarantee the right to counsel in criminal and civil commitment proceedings. Id.; Wash. Const., art. 1, § 22, U.S. Const., amend. 6. Article 1, section 22 “unequivocally guarantee[s] an accused the constitutional right to represent himself.” State v. Silva, 107 Wn.App. 605, 618, 27 P.3d 663 (2001). This Court has held that the right of self-representation under the Washington constitution is “clear and explicit” and that article 1, section 22 provides broader protection than its federal counterpart. Id. at 618, 622; State v. Rafay, 167 Wn.2d 644, 649, 222 P.3d 86 (2009). “The right to self-representation is either respected or denied; its deprivation cannot be harmless.” State v. Vermillion, 112 Wn.App. 844, 851, 51 P.3d 188 (2002) (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

Although the constitution includes safeguards – like the right to counsel – designed to protect the accused, “to deny the accused in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.” Faretta v. California, 422 U.S. 806, 815, 95 S.Ct. 2525 (1975). Thus, “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.

An individual already committed pursuant to RCW 71.09 has the right “to have an attorney represent him or her at the show cause hearing.” RCW 71.09.090(2)(b). Since effective representation necessarily includes the opportunity to prepare and the hearings recur at least annually, this amounts to an ongoing right to counsel while the individual is committed. Moreover, at a hearing on unconditional discharge or conditional release, “the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commencement proceeding.” RCW 71.09.090(3)(a). The Supreme Court has held that the right to self-representation applies to involuntary civil commitment proceedings under RCW 71.05, upon which RCW 71.09 is based. It necessarily follows that a RCW 71.09 committee also has the right to represent himself.

b. The court erred in finding Mr. Pugh incompetent to represent himself. The Washington Supreme Court held over twenty years ago that a defendant who is competent to stand trial is competent to represent himself. State v. Hahn, 106 Wn.2d 885, 893, 726 P.2d 25 (1986). Seven years later, the U.S. Supreme

Court held a criminal defendant who was found competent to plead guilty was also competent to represent himself for that purpose. Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). The Court explained, “there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.” Id. at 399. Furthermore, the relevant question in deciding whether to grant a motion for self-representation is not the defendant’s skill or ability, but the validity of his waiver. Id. at 400. Therefore, “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” Id. at 399 (emphasis in original).

Last year, the Court weakened Godinez, holding the U.S. Constitution “permits States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” Edwards, 128 S.Ct. at 2388. However, the Court left it to each state to determine whether it would retain the Godinez competence standard or adopt a higher standard for defendants moving to

proceed *pro se*. Id. at 2385-86. Since Edwards was decided, several state courts have declined that invitation.² For example, the California Court of Appeals found no error where a trial court granted a defendant's motion for self-representation, although his competency had been questioned. The California Court explained,

The court in Edwards did not hold, contra to Godinez, that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The Edwards court held only that states may, without running afoul of Faretta, impose a higher standard... "Edwards did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent."

People v. Taylor, 47 Cal.4th 850, 890-91, 102 Cal.Rptr.3d 852

(2009) (quoting State v. Connor, 292 Conn. 483, 517, 973 A.2d 627

(2009)).

²See e.g. People v. Tatum, 389 Ill.App.3d 656, 329 Ill.Dec. 497 (2009) (having found defendant competent to stand trial, court was not required to conduct separate competency inquiry before allowing him to represent himself); State v. Dahl, 776 N.W.2d 37 (N.D., 2009) (despite schizophrenia and personality disorder, defendant who was competent to stand trial was also competent to represent himself); Sheppard v. State, 297 Ga.App. 806, 678 S.E.2d 509 (2009) (although court was sufficiently concerned about defendant's competency to order an evaluation and his mother claimed he was "severely mentally ill" on the first day of trial, court was not required to inquire further into his competency before allowing him to represent himself).

Since Edwards does not require a higher competency standard for self-representation, there is no reason for this Court to adopt one now. To the contrary, such a rule is flawed in at least two ways.

First, Edwards undercuts “the value that was Faretta’s foundation: defendant autonomy.” Leading Case, The Supreme Court, 2007 Term, 122 Harv. L. Rev. 316, 324-25 (2008). Judges “almost always” defer to the opinions of mental health professionals, and while “[c]ompetency determinations may be an appropriate tool for balancing the other values underlying the self-representation right--trial accuracy, judicial efficiency, and dignity--but they necessarily minimize the role of autonomy.” Id. at 324. Furthermore, empirical research now shows that self-representation does *not* sacrifice fairness for autonomy, as was previously assumed. Edwards, 128 S.Ct. at 2388 (citing Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro se Felony Defendant, 85 N.C.L.Rev. 423, 427, 447, 428 (2007)). Indeed, *pro se* defendants “appear to have achieved higher felony acquittal rates than their represented counterparts”. Id.

Secondly, because of the rule's "severe mental illness" requirement, the subset of defendants that states can deem competent to stand trial but incompetent to proceed *pro se* is necessarily extremely narrow and likely unworkable. Indeed, even with only one competency standard, "competency determinations ... have proven notoriously difficult to administer." 122 Harv. L. Rev. at 323. "Replicating this imprecision by allowing states to create a second competency determination for would-be *pro se* defendants injects more ambiguity into the criminal trial process for defendants seeking to exercise their constitutional Faretta right." Id.

When applied to the civil commitment context, the rule becomes even more unworkable. Although many civil committees, like Mr. Pugh, are competent to stand trial, every civil committee, by definition, has a mental illness. A person detained under RCW 71.09 has been found to have a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." A person detained under RCW 71.05 is either "gravely disabled" or "presents a likelihood of serious harm... as the result of a mental disorder." With that basis, higher standard of Edwards would likely create a

default rule, in practice if not in law, that all civil committees have a “severe mental illness” and therefore cannot represent themselves. This would be in direct violation of Turay, 139 Wn.2d 379 and J.S. , 138 Wn.App. 892, which held that those committed under RCW 71.09 and 71.05 have the constitutional right to represent themselves, by the same standard as criminal defendants.

i. The Washington Constitution provides a stronger right of self-representation than its federal counterpart.

The state and federal constitutions guarantee the right to due process of law. Const. art. 1, § 3; U.S. Const. amend 14. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed.2d 437 (1992). The indefinite commitment of sexually violent predators restricts the fundamental right of liberty, implicating the constitutional due process guarantees of both constitutions, and similar enough to criminal proceedings to trigger a Gunwall³ analysis. Id. at 77; Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed.2d

³ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

501 (1997); In re Detention of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003).

In Gunwall, this Court set forth six nonexclusive criteria for determining whether a provision of our state constitution should be interpreted as providing broader protection in a given context than its federal counterpart. The criteria are: (1) the textual language; (2) differences in the texts; (3) constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Id. at 58. A review of these factors demonstrates that the Washington Constitution not only provides a stronger right of self-representation than the federal constitution, but also protects that right against erosion by a higher competency standard.

ii. Textual and structural differences between the two constitutions, as well as state constitutional history, establish that article 1, § 22 more broadly protects the right to self-representation. Article 1, § 22 of the Washington Constitution reads, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel. . .” Const. art. 1, § 22. In contrast, the Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the

right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. 6.

The Supreme Court has already established that the first three Gunwall factors cut strongly in favor of a more robust right to self-representation in our state. Rafay, 167 Wn.2d at 649. The textual difference between article 1, section 22 and the Sixth Amendment is of “great significance” in demonstrating for Washington’s broader protection of this right. Id.; Silva, 107 Wn.App. at 619. The Washington Constitution expressly guarantees the right of self-representation, while the federal constitution merely implies it. Id. at 617-18; Faretta, 422 U.S. at 814.

In choosing this language, the framers of the state constitution rejected not only the language of the Sixth Amendment, but also the language of the Oregon and Indiana Constitutions, which provide the right to defend in person “and” through counsel. Proposed 1878 Const. art. V, § 13; Ore. Const. art. 1, § 12; Ind. Const. art. 1, § 13; B. Rosenow, ed., The Journal of the Washington State Constitutional Convention 1889 at 511-12 (1999). This indicates that our founders did not consider the language of those constitutions or the federal constitution “to

adequately state the extent of the rights meant to be protected by the Washington Constitution.” Silva, 107 Wn.App. at 619. Instead, the founders were careful to guarantee the right to defend in person *or* by counsel.⁴ As the Supreme Court recently held, “such history reinforces the textual support for recognition of the right... of self-representation on appeal.” Rafay, 167 Wn.2d at 652.

The fifth Gunwall factor, structural difference, always cuts in favor of an independent state constitutional analysis. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593.

iii. Preexisting state law clearly and consistently provides that the competency standards for standing trial and representing oneself are the same. An analysis of the remaining factors –preexisting state law and matters of particular state or local concern – show that following Edwards would contravene Washington’s rule of a single competency standard,

⁴ The Sixth Amendment’s common law history also cuts against a higher competency standard. As Justice Scalia pointed out in dissent, “[i]t was never the rule at common law that a defendant could be competent to stand trial and yet incompetent to either exercise or give up some of the rights provided for his defense.” Edwards, 128 S.Ct. at 2391 (Scalia, J., dissenting). And the only tribunal in British history to have “forced counsel upon an unwilling defendant” was the Star Chamber, an institution that “for centuries symbolized disregard of basic individual rights.” Faretta, 422 U.S. at 821.

which is rooted in a more established and more consistent foundation.

In determining whether an issue is a matter of state or local concern, this Court looks to whether the United States Supreme Court has deferred to the States on the issue in question. Gunwall, 106 Wn.2d at 62 n.11; State v. Brown, 132 Wn.2d 259, 597-98, 940 P.2d 546 (1997). The Supreme Court explicitly did that in Edwards, leaving it to each State to determine whether it would grant or deny “gray area” defendants the right to represent themselves. 128 S.Ct. at 2385. Given Washington’s preexisting law, our State should continue to permit defendants who are competent to stand trial to represent themselves if they so choose.

Washington consistently recognized the right to self-representation long before the U.S. Supreme Court recognized it in Faretta.⁵ The Washington Supreme Court also explicitly addressed

⁵ See, e.g., State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931) (“In this state, a defendant may conduct his entire defense without counsel if he so chooses”); Gensburg v. Smith, 35 Wn.2d 849, 856, 215 P.2d 880 (1950) (defendant “competently and intelligently” waived right to counsel); Klappoth v. Squier, 50 Wn.2d 675, 677, 314 P.2d 430 (1957) (court had no duty to press counsel on defendant who “competently and intelligently” waived that right); State v. Kolocotronis, 73 Wn.2d 92, 97, 436 P.2d 774 (1968) (appointment of counsel over defendant’s objections denied him the right, under article 1, section 22, to represent himself); State v. Johnson, 74 Wn.2d 567, 572, 445 P.2d 726 (1968) (“defendant need not accept appointed counsel and may, if he so desires, handle the trial... himself”).

the issue of self-representation by defendants with diagnosed mental illness. State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983); Hahn, 106 Wn.2d at 893. In both cases, the Court held that since the criminal defendants were competent to stand trial, they were competent to waive their right to counsel – seven and eleven years, respectively, before the U.S. Supreme Court issued the same holding in Godinez.

In Jones, the defendant was found competent to stand trial by several psychiatrists, although they believed he was a paranoid schizophrenic. 99 Wn.2d at 738-39. He pleaded not guilty, but the court, at the prosecutor's request, entered a "not guilty by insanity" (NGI) plea against his wishes and appointed amicus counsel to argue that theory at trial. Id. at 737-38. The jury found he committed the charged assault but was insane. Id. at 738. The Supreme Court held the standard for competency to stand trial was identical to the standard for competency to waive the insanity defense. Id. at 746. After discussing other courts' decisions requiring a higher standard the Court concluded, "We believe the better view is that both competency standards should require an ability to make necessary decisions at trial." Id. The Court explained that, as the test of competency for trial in Washington is

whether a defendant is “capable of assist[ing] in his own defense,” that test “include[s] the same ability to understand and choose among alternative defenses which is necessary to intelligently and voluntarily waive the insanity defense.” Id. “Thus,” the Court held, “*the only permissible inquiries* when a defendant seeks to waive his insanity defense are whether he is competent to stand trial and whether his decision is intelligent and voluntary.” Id. (emphasis added).

Hahn was also diagnosed with paranoid schizophrenia but found competent to stand trial. Hahn, 106 Wn.2d at 888. As in the instant case, his attorney opposed his motion to represent himself at his murder trial. After a colloquy, the court granted Hahn’s motion, with his former attorney as standby counsel. Id. The Court noted that its decision in Jones explicitly addressed “waiver of an insanity plea in terms of the Faretta standards for waiver of counsel” and applied the same standard: “a defendant who is competent to stand trial may waive the assistance of counsel if the waiver is made knowingly and intelligently.” Id. at 893. The Hahn opinion also explicitly overruled footnoted dictum in Jones which suggested a higher standard for the waiver of counsel. Id. at 892.

Under Hahn the only additional requirement for a competent person to waive counsel is that the trial court must make “a specific finding that he or she is competent to so waive.” Id. at 893. That finding adds nothing to the test of competency however. The Court adopted the language of RCW 10.77.020(1), which provides the right to counsel *and* self-representation to the criminally insane “at any and all stages of the proceedings pursuant to this chapter.”

In making such findings, the court shall be guided but not limited by the following standards: Whether the person attempting to waive the assistance of counsel, does so understanding:

- (a) The nature of the charges;
- (b) The statutory offense included within them;
- (c) The range of allowable punishments thereunder;
- (d) Possible defenses to the charges and circumstances in mitigation thereof; and
- (e) All other facts essential to a broad understanding of the whole matter.

Hahn, 106 Wn.2d at 893 (quoting RCW 10.77.020(1)). This language simply spells out the “knowing, intelligent, and voluntary standard” in detail, and describes a textbook colloquy.⁶

⁶ The Hahn Court also suggested that courts be guided by CrR 4.1(c), which provides at arraignment,

In sum, Hahn held:

The standards for waiver of both an insanity plea and the right to counsel are (1) competency to stand trial and (2) a knowing and intelligent waiver with “eyes open”, which includes an awareness of the dangers and disadvantages of the decision.

Id. at 895 (citing Jones, 99 Wn.2d at 741; Faretta, *supra*). This is no different than the standard for a criminal defendant whose competency is not in question. In fact, this Court has applied Hahn where mental competency was not at issue, because it so clearly lays out the standard for determining the validity of *any* defendant’s waiver of the right to counsel. See Vermillion, 112 Wn.App. at 857-58. This Court has also affirmed Hahn in cases where the defendant’s competency was evaluated and found sufficient for trial. See State v. McDonald, 96 Wn.App. 311, 979 P.2d 857 (1999); State v. Honton, 85 Wn.App. 415, 932 P.2d 1276, *rev. denied*, 133 Wn.2d 1011 (1997); *cf.* State v. Smith, 50 Wn.App. 524, 529, 749 P.2d 202, *rev. denied*, 110 Wn.2d 1025 (1988) (trial court erred by failing to inquire into defendant’s competency *and* by

If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes[.]

allowing him to proceed *pro se* with no colloquy or warnings). Over the years no opinion has weakened Hahn's holding.

In J.S., the Court made clear that when a respondent in an involuntary civil commitment proceeding unequivocally asks for leave to represent himself, the court should grant the motion as long as it determines: 1) the defendant is competent to decide whether to waive the right to counsel, based on the criteria of RCW 10.77.020(1), and 2) the waiver is knowing, voluntary, and intelligent. J.S., 138 Wn.App. 892. Again, this procedure is functionally identical to the procedure for a criminal defendant's waiver of the right to counsel, albeit more detailed.

The Court did *not* suggest that the competency required for the first prong of this test would be different or higher than the competency required for trial. In fact, the opinion strongly suggests the standard for waiver could actually be lower, since J.S. himself was found incompetent to stand trial two days before the commitment petition was filed, seven days before his request to proceed *pro se*, eleven days before the court's ruling. Id. at 885-86. If the competency standard for waiver were higher than the

Hahn, 106 Wn.2d at 893-94. Again, this is functionally no different than the Faretta "knowing, intelligent, and voluntary" standard.

standard for trial, the entire analysis of J.S. would have been unnecessary. The trial court could have justifiably relied on the earlier finding of incompetency to deny the motion. But the Court criticized the trial court for doing just that, and required an independent finding of incompetency pursuant to RCW 10.77.020(1). Id. at 895, n. 8, 896.

Our preexisting state law supports a stronger right to self-representation than the federal constitution, and that right should not be diminished by fluctuating Supreme Court jurisprudence. Edwards should not disturb Washington's rule that the competence for standing trial or for waiving counsel is the same.

c. The court abused its discretion in denying Mr. Pugh's request. The denial of a request to proceed *pro se* is reviewed for abuse of discretion in civil commitment as in criminal proceedings. J.S., 138 Wn.App. at 892 (citing State v. Breedlove, 79 Wn.App. 101, 106, 900 P.2d 586 (1995) and State v. Fritz, 21 Wn.App. 354, 361, 585 P.2d 173 (1978)). A request to proceed *pro se* should generally be granted if unequivocal, intelligent, knowing and voluntary. J.S., 138 Wn.2d at 892; State v. Stenson, 132 Wn.2d 668, 737-39, 940 P.2d 1239 (1997), cert. denied sub nom., Stenson v. Washington, 523 U.S. 1008 (1998).

Here, the court's colloquy established that Mr. Pugh's request was unequivocal:

THE COURT: [D]o you really want to represent yourself in this case from now on forever without stand-by counsel and without a lawyer? Is that really what you're asking me to do?

THE DEFENDANT: Yes.

4/24/09RP 17.

THE DEFENDANT: Oh, do you mean, Your Honor, would even if [Ms. Schattauer] stays, would I make the same motion? ... Yes.

4/24/09RP 21.

THE COURT: You have waived your right to counsel in this case from now until it's done. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

...

THE COURT: You still think that's a better decision for you to represent yourself than have somebody who's an experienced, trained, licensed lawyer represent you? You think that's a better decision for you? Is that what you want to do?

THE DEFENDANT: For me, I'd say yes.

4/24/09RP 27.

THE DEFENDANT: I am firm about this. It is my wish. It is what I want, and it is what I desire.

7/10/09RP 6.

THE DEFENDANT: I don't plan on sitting here and requesting an attorney... I made that kind of clear in the last hearing when I requested it on that I did not want to keep going through attorneys when Ms. Schattauer made the motion to withdraw as

counsel... And that was one of the reasons that I had given to go *pro se*. So this isn't just, you know, back and forth, back and forth, back and forth. This is permanent. It will be this way until you or a jury releases me from the Department of Social and Health Services.

7/10/09RP 10.

Mr. Pugh's competency to stand trial was not disputed, and his competency to represent himself should therefore have been presumed. To the extent it was in question, the court was required, under Hahn and J.S., to inquire into his competency using the factors of RCW 10.77.020(1). To the extent that the court covered the same ground and Mr. Pugh was able to touch on those issues, it is clear that he met the criteria: he demonstrated in detail that he understood the nature and consequences of show-cause and annual review proceedings. 4/24/09RP 11-27; 7/10/09RP 11.

But instead of using the 10.77 factors, the court relied predominantly on stale psychological records which did not address the topics contemplated by those factors.⁷ Ms. Schattauer, taking

⁷ Mr. Pugh's SVP evaluation, conducted by Clinical Psychologist Amy Phenix, diagnosed him with Pedophilia, Mood Disorder Not Otherwise Specified, Borderline Intellectual Functioning, and Personality Disorder Not Otherwise Specified with narcissistic, borderline, and antisocial traits. CP 75. The 2008 and 2009 Annual Reviews, both conducted by DSHS Psychologist James Manley, diagnosed him with Pedophilia, Major Depression, Antisocial Personality Disorder, Borderline Personality Disorder, and Narcissistic Personality Disorder. CP 293, 544. None of these reports addressed Mr. Pugh's competence.

the unusual position of arguing against her client's competence, submitted a report from Forensic Psychologist Douglas Boer. CP 605-08. Dr. Boer admitted he had not spoken to Mr. Pugh since interviewing him *five months* earlier. CP 605. (Compare J.S., supra (although respondent had been found incompetent for trial only *eleven days* before the court ruled on his motion for self-representation, the court was still required to make a separate determination of his competency before denying that motion)). Based on his old evaluation and updated records from the Special Commitment Center, Dr. Boer opined that a combination of personality disorders and borderline intellectual functioning "mitigate against his ability to represent himself adequately in legal proceedings," that his "ability to make good choices, understand complexities of legal issues, and actually produce documentation that would help himself would be negligible" and that he would be a "bad lawyer." CP 605-08. He concluded Mr. Pugh "needs the support of counsel and is not competent to represent himself *pro se*. However, he can otherwise assist Ms. Schattauer in his defence." CP 608.

This report was not helpful to the court. It describes Mr. Pugh's lack of *technical*, not mental competency. "Technical competency" is not a "valid ground" on which to deny a motion for self-representation. Fritz, 21 Wn.App. at 364. "It is clear... that a defendant's competency to wage an effective pro se defense is a separate matter from his competency to waive his right to counsel." State v. Imus, 37 Wn.App. 170, 178, 679 P.2d 376, rev. denied, 101 Wn.2d 1016 (1984). In Imus, the court and prosecutor knew the defendant was of borderline intelligence and functionally illiterate. Nonetheless, the court properly exercised its discretion in allowing him to proceed *pro se*, because he demonstrated he was "fully aware" of the risks and consequences of his waiver. The question was not whether Mr. Pugh could represent himself effectively or even "adequately." The question was whether he understood the nature of the proceedings and the risks and consequences involved. The court should have found him competent to waive the right to counsel and continued to the next prong: whether the waiver was knowing, intelligent, and voluntary.

Mr. Pugh had represented himself in his RCW 71.09 proceeding, personal restraint petition, and writ of habeas corpus. 4/24/09RP 23. His explanation of the status of his PRP and

habeas petitions demonstrated he was able to read, understand, and apply the concepts of precedent and exhaustion of remedies. 4/24/09RP 23-24. He was well acquainted with the risks of self-representation, but explained he had learned more about the law in the years since his initial commitment, including greater familiarity with the Rules of Evidence and the procedure to subpoena witnesses. 4/24/09RP 22-27. In arguing his position, he accurately stated the holdings of J.S., Edwards, and Silva and the distinction between the federal and state constitutions. 7/10/09RP 5. He correctly stated that a waiver of the right to counsel must be voluntarily and intelligently made, and argued why he met that standard. 7/10/09RP 14. When the court announced its ruling, he was careful to make sure it was clearly explained on the record for appeal. 7/10/09RP 24-27. The record shows Mr. Pugh's legal knowledge and experience probably exceeded that of the average *pro se* defendant. No one suggested Mr. Pugh's attempted waiver was *not* knowing, intelligent, and voluntary, only that he was not competent to make it.

Mr. Pugh met the standard required for a valid waiver of the right to counsel. As an unequivocal, knowing, intelligent, and voluntary request, the motion should have been granted. The court

abused its discretion and violated article 1, section 22, requiring reversal.

2. UNDER ANY STANDARD, THE COURT ERRED IN FINDING MR. PUGH INCOMPETENT TO REPRESENT HIMSELF FOR ANNUAL REVIEW PROCEEDINGS.

a. Even under the *Edwards* standard, *Godinez*

governs on the facts of this case. Like the state courts discussed above, federal courts have also limited the Edwards holding. For example, where a criminal defendant asserted an insanity defense but was twice found competent to stand trial, the 10th Circuit Court of Appeals held Edwards did not require the trial court to find him incompetent to represent himself. United States v. DeShazer, 554 F.3d 1281 (10th Cir. 2009). “To the contrary, Edwards itself reaffirmed that a court may constitutionally permit a defendant to represent himself so long as he is competent to stand trial. We are aware of no case that reads Edwards differently.” Id. at 1290 (citing Edwards, 128 S.Ct. at 2385). Instead, the Court held the trial court properly exercised its discretion, consistent with Godinez, when it allowed the defendant to proceed *pro se*.

Similarly, in a case from the Seventh Circuit, a defendant was found competent to stand trial despite his “bizarre” and “absurd” behavior and statements, and permitted to represent himself. United States v. Berry, 565 F.3d 385, 387 (7th Cir. 2009). On appeal he argued the trial court erred because it failed to apply

a higher competency standard to his request to proceed pro se. The Court disagreed, holding, “the Constitution *may* have allowed the trial judge to block his request to go it alone, but it certainly didn't require it.” Id. at 391 (emphasis in the original; citing DeShazer, 554 F.3d at 1290).

Edwards distinguished Godinez mainly in that Godinez wanted only to enter a plea, while Edwards wished to represent himself at trial. Edwards, 128 S.Ct. at 2385, citing Godinez, 509 U.S. at 399. The two cases together show that varying degrees of competence are required in different situations.

A criminal trial involves the highest degree of constitutional protections and requires the most “technical legal knowledge;” therefore, the Edwards Court held that the State is not *required* to grant a request for self-representation from a defendant competent to stand trial but not to represent himself. 128 S.Ct. at 2385, 2388. But when the defendant seeks only to change his plea, “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” Id. at 2384, quoting Godinez, 509 U.S. at 399 (emphasis in the original).

Here, the issue is Mr. Pugh’s representation for his annual

review show cause hearings for the duration of his civil commitment. These hearings do not approach the complexity of a criminal trial and do not require the same level of competence. This case is much closer to Godinez, with a much narrower gap, if any, between the competence needed for trial and the competence needed for self-representation.

b. Without finding he had a "severe mental illness," the court could not find Mr. Pugh incompetent to represent himself.

In Berry, the Seventh Circuit observed:

[T]he Edwards Court repeatedly cabined its holding with phrases like "mental derangement," 128 S.Ct. at 2386, "gray-area defendant," id. at 2385, "borderline-competent criminal defendant," id. at 2384, and, of course, "severe mental illness," id. at 2388. Edwards himself, after all, suffered from schizophrenia and delusions, not just a personality disorder. *So even if we were to read Edwards to require counsel in certain cases--a dubious reading--the rule would only apply when the defendant is suffering from a "severe mental illness." Nothing in the opinion suggests that a court can deny a request for self-representation in the absence of this.* Because there was no evidence before the trial court showing that Berry had such an affliction, Edwards was simply off the table.

Berry, 565 F.3d at 391 (emphasis added). Here as in Berry, without a finding of "severe mental illness," the court could not find Mr. Pugh incompetent to represent himself under Edwards.

Washington cannot impose a higher burden on the exercise of the right to proceed *pro se* than the United States Supreme Court allows under the federal constitution. Fritz, 21 Wn.App. at 356-57. The court did not find Mr. Pugh had a “severe mental illness” (a still undefined term), and was not presented with reliable evidence on his mental state, given that Mr. Pugh was afforded no avenue to challenge the evidence of his purported incompetence.

The court accepted the assertions of Ms. Schattauer and Dr. Boer, discussed *supra*, in finding Mr. Pugh incompetent to represent himself, even though those assertions do not necessarily add up to a “severe mental illness” and the court did not so find. The court ignored the fact that Mr. Pugh was incapable of responding to these assertions. Mr. Pugh was still represented by counsel, but his counsel was using her resources and authority to argue against his position. She had access to Dr. Boer or other experts and the funding to pay them; he did not. Mr. Pugh was trapped in legal representation purgatory; he could neither effectively advocate for himself nor rely on his attorney to do so.

Given this situation, the court had three options: to appoint conflict counsel or a guardian ad litem to advance Mr. Pugh’s position; to order a psychological evaluation so that Mr. Pugh would

not be forced to rely on the report requested by Ms. Schattauer, or to allow him to represent himself. The court's failure to do so was an abuse of discretion, leaving no tenable basis for its denial of Mr. Pugh's motion.

3. THE COURT ERRED IN RULING MR. PUGH WAIVED HIS RIGHT TO SELF-REPRESENTATION BY HIS CONDUCT.

Washington courts have recognized waiver or forfeiture of a constitutional right by conduct only in "rare circumstances." State v. Klein, 161 Wn.2d 554, 562, 166 P.3d 1149 (2007).

"[F]orfeiture" has been found where the conduct of the accused was "extremely dilatory." Relinquishment by conduct is only constitutional once a defendant has been warned that he or she will waive this right if he or she engages in dilatory tactics. Any misconduct thereafter may be held to include an implied request to proceed pro se and a waiver of counsel.

Id. (citing City of Tacoma v. Bishop, 82 Wn.App. 850, 859, 920 P.2d 214 (1996)). Several cases demonstrate the Courts' reluctance to find forfeiture of a constitutional right.

For example, in Bishop, the defendant failed to obtain a lawyer, although the trial court repeatedly told him to contact the Department of Assigned Counsel and gave him additional time to do so. 82 Wn.App. at 860. The court finally refused to grant another continuance to obtain counsel and instead found he had

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forfeited the right to counsel by his conduct, and forced him to proceed with his trial *pro se*. Id. at 860-61. The Court of Appeals reversed, holding the defendant's misconduct was not so dilatory as to lead to forfeiture and in any event, the court was required to warn him of the consequences of his actions before denying further continuances. Id. In Klein, the defendants were not warned that their failure to appear could be implied as a waiver of their right to appeal, and the court made no finding that their conduct was "extremely dilatory." 161 Wn.2d at 563. The Supreme Court therefore held "[t]here could be no implied request for waiver under these facts." Id.

Fritz, decided in 1978, was a rare case where the Court of Appeals found a defendant waived his right by his dilatory conduct. 21 Wn.App. 354. Fritz requested and was granted permission to proceed *pro se*, but waived that right by "doing everything possible to delay his scheduled trial and obstruct the orderly course of the administration of justice[.]" Id. at 365. He fled the state to avoid his first trial date and on the morning of his third trial date, "sought to discharge his new attorney, represent himself and obtain yet another continuance of the trial." Id. But Fritz is easily distinguishable from the case at hand. First, Mr. Pugh's allegedly disruptive conduct did not include breaking any laws. Second, the dilatory

conduct in that case was much closer in time to the motion and ruling which were the subject of the appeal. Third, the Court pointed out one impact of Fritz's conduct was the prosecutor's "demonstrated and understandable difficulties... in trying to keep the State's witnesses available" as the trial was repeatedly postponed over a year and a half. Id. Fourth, Fritz might be analyzed differently today, in light of the strengthening of the right to self-representation (as enunciated in Silva and Rafay), and a more recent decision discussing the purported waiver of that right through "disruptive" conduct.

Earlier this year, the Supreme Court upheld a defendant's right to represent himself, despite his "disruptions" of the trial:

A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant were represented by counsel.

State v. Madsen, 168 Wn.2d 496, ___ P.3d ___, 2010 WL 1077894, at 3 (2010). The Court acknowledged, "[a] court may deny *pro se* status if the defendant is trying to postpone the administration of justice" but not "merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency." Id. at 4

(citing Faretta, 422 U.S. at 834; Vermillion, 112 Wn.App. at 850-51).

The record does not establish that Mr. Pugh tried “to postpone the administration of justice.” The court was bothered by Mr. Pugh’s conduct over the course of his SVP proceeding (sequence of events recited in the oral ruling and summarized here):

October, 2005 – Having already granted Pugh’s request to proceed *pro se* and appointed Danko as standby counsel, court confirms he wishes to remain *pro se* and discusses motion hearings which he set but was not prepared for. Pugh decides to waive show cause hearing.

December, 2005 – Pugh twice refuses to be transported to court for status hearings, appears by phone. Pugh refuses to go forward with deposition of Dr. Phenix because he lacks certain SCC records.

January, 2006 – Pugh states he is ready for deposition; court subsequently orders him to go forward with it. Pugh moves to waive jury trial. Because of recent assault incident, Pugh will need three officers and a van to transport.

March 15-16, 2006 – On two dates, Pugh refuses to answer certain questions at his deposition; court instructs him to answer.

March 17, 2006 – Pugh and State intend to stipulate that he meets definition of SVP. Court explains consequences to Pugh. Stipulation almost completed but then terminated.

March 20, 2006 – Pugh moves to continue trial and to have counsel appointed for trial and on contempt issue.

March 27, 2006 – State reports Pugh’s “attempts to delay or block this case from proceeding” (not explained in this record). Pugh not ready for trial, requests appointment of counsel. Court explains

which decisions would be counsel's and which would be his. Pugh decides to stipulate. Court finds him competent. Stipulation signed.

7/10/09RP 16-22. As for the current matter, the court stated that a show cause hearing was scheduled for March 11, 2009, but Mr. Pugh indicated that morning his decision to waive his right to the hearing. 7/10/09RP 22-23.

The court explained its interpretation of this history:

I'm not clear, and I don't think I need to find, in the context of this case whether Mr. Pugh's wanting to go pro se, then not wanting to go pro se, then wanting to go pro se, when he's pro se... he notes motions, he's not prepared to go ahead, he says bring me to court then refuses to come, he comes to court, he stipulates to things which he's previously, and understandably, not been willing to stipulate to.. Whether those are tactical and conscious decisions to disrupt the proceedings or whether they are the result of his inability to actually represent himself in any way which is consistent with the principles, if not standards, enunciated in Indiana v. Edwards.

I am going to deny his request to go *pro se* for those reasons.

7/10/09RP 22-23 (emphasis added).

This ruling was misguided and erroneous. The court was required to find whether the conduct in question was intended to disrupt the proceedings. Intent is the heart of the matter, as the Supreme Court made clear in Klein and Madsen. Mr. Pugh has the

right to change his mind, at the last minute if necessary, as litigants and their attorneys, on the verge of trial, frequently do. He may find at the last minute he is unprepared and ask for a continuance or strike the hearing, as licensed attorneys frequently do. These decisions do not indicate intent to derail the proceedings and certainly do not rise to the level of “extremely dilatory” conduct.

Nor can Mr. Pugh’s refusal to be transported in December 2005 be considered so “dilatory” as to waive his *pro se* right. Mr. Pugh explained he refused to be transported on those occasions because he had been assaulted by guards and had been restrained with handcuffs which cause nerve damage, despite doctor’s orders to use flex cuffs. 7/10/09RP 25. Perhaps there were other ways Mr. Pugh could have addressed his fear of further harm in transport, but the record does not establish he was trying to disrupt the proceedings; if anything, it indicates he was trying to stay physically safe. This conduct was not “extremely dilatory” and the court did not so find.

In attempt to clarify the ruling, the court restated it:

Whether you are competent to represent yourself or whether you are competent but have chosen historically to do so in a way which is disruptive and problematic,... I don't think I have to make that decision which way it is... You say you want to come to court, we send three people in a van to go get you, you refuse to come. You note up hearings. Everybody's here and you strike your hearings. *Whether that's because you just can't represent yourself in a meaningful way, in any way that would ensure you fair representation in these proceedings or whether you have chosen not to, I'm not sure. I don't think ... I need to make that decision.*

7/10/09RP 24 (emphasis added). The restated ruling suffers from the same flaw: If the denial of the motion was based on incompetency, the court *was required* to find incompetency. If – alternatively or additionally – the denial was based on “waiver by conduct,” the court *was required* to find the conduct was “extremely dilatory” and intentionally continued after warnings of the consequences.⁸

Furthermore, the court repeatedly advised against self-representation, but never warned Mr. Pugh that continuing this

⁸ The restated ruling also suffers from an additional flaw: the court's concern for “meaningful” and “fair” representation. While certainly well-meaning, this is not a valid ground for denial of the motion. “[A]ny consideration of a defendant's ability to ‘exercise the skill and judgment necessary to secure himself a fair trial’ was rendered inappropriate by Faretta.” Hahn, 106 Wn.2d at 890 n. 2, 726 P.2d 25 (citing Fritz, 21 Wn.App. at 360).

conduct could result in counsel being forced upon him. With the exception of the March 11, 2009 hearing, the court was relying on conduct which occurred three years before. The court could not reasonably find that Mr. Pugh's behavior three years ago could be translated in the present day as an implied waiver of his constitutional right to represent himself.

Because Mr. Pugh neither engaged in "extremely dilatory" conduct nor persisted in such conduct after being warned it would be deemed a waiver of his right to self-representation, the court's ruling lacked any valid basis. Bishop, 82 Wn.App. at 862; Klein, 161 Wn.2d at 563. Reversal is therefore required. Id.

F. CONCLUSION

For the foregoing reasons, Mr. Pugh respectfully requests this Court grant review and reverse the trial court's order denying his motion to proceed *pro se*.

DATED this 13th day of May, 2010.

Respectfully submitted,


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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN RE THE DETENTION OF)	
)	
BOB PUGH,)	NO. 64061-5-I
)	
APPELLANT.)	
)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DAVID HACKETT, DPA KING COUNTY PROSECUTOR'S OFFICE SVP UNIT KING COUNTY ADMINISTRATION BLDG. 500 FOURTH AVENUE, 9 TH FLR SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> BOB PUGH SPECIAL COMMITMENT CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF MAY, 2010.

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