

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

STATE OF WASHINGTON,

Respondent,

v.

ABDUL-KAHLIF CALHOUN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Rosanne Buckner
The Honorable C.J. Lee,
The Honorable Lisa Worswick,
The Honorable Kathryn J. Nelson, and
The Honorable Frank E. Cuthbertson, Judges

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Calhoun's waiver of counsel and request for self-representation was not knowingly, voluntarily and intelligently made.

2. The statute under which Mr. Calhoun's sentence was ordered to run consecutive, RCW 9.94A.589(3), violates the state and federal rights to equal protection.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To be valid, a defendant's waiver of the constitutional right to assistance of counsel and his exercise of the right to self-representation must be knowing, voluntary and intelligent. Because of the importance of the rights at issue, there is a presumption against waiver of the right to counsel. Further, the trial court is required to ensure that the defendant is made aware of the dangers and disadvantages of self-representation.

Did Mr. Calhoun make an invalid waiver of the right to counsel where the court did not inform Mr. Calhoun that he was more likely to get convicted if he represented himself, would be better off with counsel, would not have the court's assistance in representing himself, and would not be allowed to change his mind and assert his right to counsel because the granting of reappointment was discretionary with the court?

2. RCW 9.94A.589(3) authorizes a trial court to depart from the statutory presumption that a sentence will be served concurrently by ordering it to be served consecutively, without requiring the court to give or even have a permissible reason. Does the statute violate the state and federal constitutional rights to equal protection by allowing the court to treat similarly situated individuals differently?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Abdul-kahlif K. Calhoun was charged by information with unlawful possession of cocaine. CP 1-2; RCW 69.50.4013(1). After pretrial hearings before the Honorable James R. Orlando on October 18, 2005, the Honorable Rosanne Buckner on November 7, 2005, the Honorable Linda C.J. Lee on December 14, 2005, and the Honorable Lisa Worswick on January 24, 2006, the Honorable Kathryn J. Nelson on February 16, 2006, and the Honorable Frank E. Cuthbertson on May 9, 2006, trial and sentencing were held before Judge Nelson on August 1, 2, 3, 7, 11, 2006.¹ Judge Nelson imposed a standard-range sentence but ordered it to run consecutively with a sentence imposed on another case. CP 68-80.

Mr. Calhoun appealed, and this pleading follows. See CP 93-105.

2. Facts relating to charge

On April 18, 2005, at about 1:30 a.m., a Lakewood city police officer responded to a motel based upon a report of trespassers. 9RP 141. When he arrived, someone named "Mr. Hall" said he had asked "persons

¹There are 13 volumes of transcript, contained in 11 bindings. They will be referred to as follows:

October 18, 2005, as "1RP;"
November 7, 2005, as "2RP;"
December 14, 2005, as "3RP;"
contained in a single volume: January 24, 2006, as "4RP;"
January 25, 2006, as "5RP;"
April 17, 2006, as "6RP;"

February 16, 2006, as "7RP;"
May 9, 2006, as "8RP;"
the five chronologically paginated volumes containing the proceedings of
August 1, 2, 3, 7 and 11, 2006, as "9RP."

going into and leaving Room 12" to leave because they were not registered guests. 9RP 143. He said they had not complied. 9RP 143.

At trial, there was little or no discussion of what happened at the motel, although it was established that the officer approached a car at some point, and that he used a key to go into a room. 9RP 144. Also established was that, at some point, the officer arrested Mr. Abdul-khalif Calhoun. 9RP 123-26.

The officer testified about searching Mr. Calhoun and finding two loose razor blades in his shirt pocket. 9RP 123-29. After the search, the officer took Mr. Calhoun to Pierce County jail, where he was strip-searched. 9RP 129-32. The officer who conducted the search came out with a plastic "baggy" containing a "white rockish or chalky type of substance." 9RP 129-32. The baggy was placed into evidence and its contents ultimately tested, revealing the presence of cocaine. 9RP 129-39, 168, 173-82.

The officer admitted that, when he took Mr. Calhoun into custody, he did not advise Mr. Calhoun of his rights to counsel or other rights, commonly known as the Miranda warnings. 9RP 144.

The officer who produced the "baggy" testified that, after Mr. Calhoun took off his clothes as required, the officer had looked at Mr. Calhoun's anus and had seen what appeared to be a "crunched up little cellophane with some white substance in it." 9RP 150-58. He told Mr. Calhoun to hand it over and, with gloves on, took it and handed it to the other officer. 9RP 159.

D. ARGUMENT

1. MR. CALHOUN'S WAIVER OF HIS RIGHT TO COUNSEL WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT

Both the state and federal constitutions guarantee the accused not only the right to assistance of counsel but also the antithetical right to waive counsel and represent themselves. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001), overruled in part on other grounds by Carey v. Musladin, ___ U.S. ___, 127 S. Ct. 649, 166 L. Ed.2d 483 (2006); State v. Silva, 107 Wn. App. 605, 617-18, 27 P.3d 663 (2001); 6th Amend.; 14th Amend.; Art. 1, § 22. To be constitutional, however, the waiver of counsel and exercise of the right to self-representation must be not only unequivocal but also knowing and voluntary. Godinez v. Moran, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991).

In this case, this Court should reverse, because the trial court erred in finding that Mr. Calhoun had knowingly, voluntarily and intelligently waived his right to counsel when he made his decision to represent himself.

a. Relevant facts

Mr. Calhoun was charged on September 27, 2005. CP 1-2. On September 12, 2005, counsel (Stenberg) was appointed. Supp. CP ___ (notice of appearance, 9/12/05). A few days later, for unspecified reasons, counsel withdrew and new counsel was substituted (Corey). CP 4.

On October 18, 2005, counsel (Corey) appeared with Mr. Calhoun in front of Judge Orlando regarding an “agreed” motion to continue. 1RP 2. Counsel stated that the reason she had advised her client to agree to a continuance was because it was not in his best interests to go forward with trial in this case before trial for a different, very serious case. 1RP 2. Because he would face a far greater sentence with an additional point for the very serious case (involving a home invasion robbery) rather than the drug case, counsel’s strategy was to have him go to trial on the first case in order to have him serve a lesser sentence overall if convicted in both proceedings. 1RP 2.

Counsel (Corey) said she had advised Mr. Calhoun of these facts but he did not want to sign an agreed continuance. 1RP 2-3. Mr. Calhoun then told the court that counsel was incorrect and he did, in fact, wish to sign. 1RP 3-4. When he signed, however, he wrote on the document “signed under duress and inducement.” 1RP 4; CP 6.

Another motion to continue on the same grounds was heard on November 7, 2005, before Judge Buckner. 2RP 3. On that day, counsel told the court that Mr. Calhoun disagreed with the continuance. 2RP 4. She said, however, that she thought it was a strategic decision that she, as the attorney, was entitled to make. 2RP 4.

At the motion to continue, Mr. Calhoun asked the court to discharge his attorney, but the court said Mr. Calhoun would have to bring a “separate motion” on that issue. 2RP 5. The court also asked Mr. Calhoun what “threat, duress, or inducement” he was under. 2RP 5-6. Mr. Calhoun responded that he had asked counsel to get his case to trial

within 60 days and to file “certain motions and documents” on his behalf and she had not. 2RP 5-6. He told the court he felt counsel did not have his best interests in mind. 2RP 5-6.

At that point, counsel told the court she was the “third attorney” who had been appointed for Mr. Calhoun and that she had tried to resolve their disagreements and work with him “patiently” by explaining to him the options. 2RP 6. She asked that any motion regarding her withdrawal be delayed so that the Department of Assigned Counsel (DAC) could be present. 2RP 6-7.

Mr. Calhoun said he understood the situation and reasons why counsel was saying this case should wait but was frustrated that the case seemed to just be “ongoing.” 2RP 7. The court granted the continuance. 2RP 7-8.

In a letter filed on November 8, 2005, Mr. Calhoun indicated that he was filing copies of a letter addressed to counsel and one addressed to the director of the Department of Assigned Counsel (DAC). Supp. CP ____ (letter from defendant, 11/08/05). What was filed instead was three copies of the same cover letter. Supp. CP ____.

On December 14, 2005, the parties appeared, this time before Judge Lee. 3RP 3-4. Mr. Calhoun had several cases pending and the parties talked about scheduling for them. 3RP 4. The most serious case involved three co-defendants. 3RP 4. A continuance was required because the prosecutor for that case was not available. 3RP 4.

Counsel again explained the reason she felt it was important to have the most serious case tried first. 3RP 4-5. She told the court Mr.

Calhoun did not agree with the continuance and in fact wanted to go to trial on the most serious case now but that it was not possible because of the need to coordinate with the other parties. 3RP 4-5. Counsel also said that Mr. Calhoun had spent “a good deal of his time studying the law” but incorrectly thought the cases against him derived from “contract or commerce” and not criminal law. 3RP 5. The court ultimately granted the continuance. 3RP 5-6.

On January 24, 2006, Judge Worswick heard from the parties again. 4RP 3. At the hearing, counsel told the court that she and Mr. Calhoun had been having “difficulties” throughout the case and he had just informed her that he had filed a bar complaint against her. 4RP 3. Counsel had spoken to the bar association and others who had told her that she would have to move to withdraw, because she would have to break the confidentiality of the relationship in order to respond to the complaint. 4RP 4.

Mr. Calhoun told the court that counsel had not been truthful with him and had not visited him several times when promised. 4RP 5. Counsel then said that Mr. Calhoun wanted her to pursue matters she felt were not in his best interests and they had such conflicts there was “really no ability to communicate at this point.” 4RP 5. She also said she could not work with Mr. Calhoun, that he would not speak to her about the merits of the case, and there was “no way” she could adequately represent him. 4RP 6. She told the court she had warned Mr. Calhoun that, at some point, the court might tell him he would have to represent himself without counsel rather than getting new counsel appointed. 4RP 6. She had

arranged with DAC to have new counsel appear the following day, when one of the trials for Mr. Calhoun was scheduled to start. 4RP 7.

Mr. Calhoun then asked the court for new counsel to be appointed “as stand[]by counsel.” 4RP 7-8. The court replied that it was not going to hear a motion for Mr. Calhoun to “go pro se at this time,” but it would hear that motion the following day. 4RP 8.

The next day, all of the parties in the three co-defendant case appeared and one of the attorneys requested a continuance to complete investigation. 5RP 4-5. Regarding Mr. Calhoun, the prosecutor argued that new counsel would not need much time to prepare, because the case was very simple. 5RP 7. Possible new counsel (Schoenberger) said he was concerned that the charges were very serious and he had a busy trial schedule so he might not be the right attorney for the case. 5RP 8.

Mr. Calhoun told the court he was a “third-party intervenor” and wanted a continuance and appointment of counsel. 5RP 9-10. After the court appointed counsel (Schoenberger), Mr. Calhoun said that there had been no omnibus hearing and there were some motions that needed to be heard. 5RP 10. He also asked for the court to “preserve the record verbatim” and make sure the transcript was not “edited or redacted.” 5RP 10. The court told him it always followed the law regarding the court record, and Mr. Calhoun apologized and said he was not trying to “be a hindrance.” 5RP 10. The court then expressed concern about understanding Mr. Calhoun and what he was seeking. 5RP 10. It told him he had an attorney appointed now and he did not have the right to start filing motions on his own behalf but needed to go through counsel. 5RP

10. The court referred to a “stack of documents” Mr. Calhoun had in front of him and said Mr. Calhoun needed to give those to his attorney who would then make any “appropriate legal motions in his professional opinion” needed to be made. 5RP 11, 16. The court continued the case. 5RP 16-18.

Then, on April 17, 2006, before Judge Worswick, the parties reported that the prosecutor was in trial and the case needed to be continued. 6RP 5-6. Counsel for the three co-defendant case objected that the case had been set as a “no-more-continuance” case several continuances ago. 6RP 4-6.

After the court had heard discussion about that and ruled, counsel for Mr. Calhoun told the court that Mr. Calhoun had “made some demands” that counsel was “unable to comply with.” 6RP 6. Counsel asked to have Mr. Calhoun address the court, but another attorney objected. 6RP 6. The court then said it would allow Mr. Calhoun to speak the following day when trial began on the other case, if the prosecutor was present. 6RP 6.

The proceedings in this case did not continue until, on May 19th, in front of Judge Cuthbertson, the prosecutor moved for a continuance because she was having witness problems. 8RP 3. She told the court the request was not opposed by trial counsel. 8RP 3. At that moment, Mr. Calhoun said, “[o]bjection.” 8RP 3. The court asked if Mr. Calhoun was represented by counsel and Mr. Calhoun said he had “waived” counsel “as the attorney of record on numerous occasions.” 8RP 4. The court said it had not ruled on a waiver of counsel in this case and Mr. Calhoun then

asked the court to

enter a judicial determination and rule on the fact that I intelligently, knowingly and voluntarily waive Mr. Schoenberger as the assigned counsel and the assignment of a lawyer, in fact.

8RP 4-5.

The court noted Mr. Calhoun had not said he wanted to go “pro se,” so granting Mr. Calhoun’s motion meant replacing counsel, requiring a continuance. 8RP 6. Mr. Calhoun objected to “being labeled pro se,” but when asked if he was “not intending to go pro se,” he answered, “Self-representation. I stand on my right to self-representation.” 8RP 5. The court said, “Okay. And you’re asking for standby counsel?” 8RP 5. Mr. Calhoun responded, “That is correct.” 8RP 5.

The court told Mr. Calhoun it would consider the motion for standby counsel but there would have to be a continuance for standby counsel to get prepared. 8RP 5-6. Mr. Calhoun did not agree to a continuance and said that it was not his fault that the prosecutor was not ready. 8RP 6. He also said

the attorney that was assigned to represent me. . .has blatantly and [sp] advertently shown misrepresentation time and time again in this case and all of the cases that are pending.

8RP 6-7. The court said it did not want to hear about counsel that morning because it had “heard enough” from Mr. Calhoun about him. 8RP 7. The court clarified that Mr. Calhoun had said he did not want to proceed pro se and instead wanted “other counsel appointed as standby counsel.” 8RP 7. Mr. Calhoun apparently nodded his head. 8RP 7. The court told Mr. Calhoun that standby counsel would still need time to get “up to speed.” 8RP 7.

The court then established that Mr. Calhoun had never studied law in a formal law school, even though he had been reading legal materials recently. 8RP 10. He had also never represented himself in a criminal case before. 8RP 10. When asked, he answered that he knew about the evidence rules, although he did not have a copy. 8RP 10. The court asked if Mr. Calhoun knew what “can come into trial and what doesn’t get in and what can be admitted and what can’t and order of questioning and what documents are admitted and what aren’t.” 8RP 10. Mr. Calhoun said he had “an understanding of that” and wanted standby counsel to help him determine “an affirmative defense in this matter.” 8RP 10. He answered, “Yes,” when asked if he was familiar with the “Rules of Criminal Procedure,” if he realized those rules would govern the trial, and if he understood he would be held to the same standard as “any other counsel in this court” if he tried to represent himself “assisted by standby counsel.” 8RP 10. The court then asked Mr. Calhoun if, knowing “the penalties that you might suffer, if you’re found guilty and in light of all the difficulties in representing yourself, is still your desire to represent yourself and give up your right to be represented by a lawyer?” 8RP 10-11. Mr. Calhoun said, “I adamantly stand on my right to self-representation” and that his decision was “[v]oluntarily, knowingly and intelligently made.” 8RP 11.

The court granted a continuance would be granted to appoint new standby counsel and have that person get up to speed on the case. 8RP 11. Mr. Calhoun then asked to have the sheriff’s office to deliver documents to the court for him because he could not afford the mail. 8RP 11-12. He also started to ask to have a “study room” made available, but the court cut

him off, saying it would not make “additional orders at this time” but Mr. Calhoun could discuss any additional orders he was seeking with standby counsel once that person was appointed. RP 12.

When Mr. Calhoun was given the relevant order to sign, a corrections officer told the court Mr. Calhoun was putting something else on it. 8RP 12. Mr. Calhoun said he was putting his “signature and endorsement on the instrument, on the presentment.” 8RP 13. The court asked if he was refusing to sign it and Mr. Calhoun said, “pursuant to RCW 62A341, that is a signature, in fact,” and it was his “authentication of the document.” 8RP 12-13.

- b. Mr. Calhoun did not knowingly, voluntarily and intelligently waive his constitutionally protected right to counsel and the court erred in accepting the waiver and allowing self-representation

There is an inherent tension between the right to effective assistance of counsel and the right to self-representation. DeWeese, 117 Wn.2d at 375. It is well-recognized that a citizen accused of a crime has the right to use his “free will to make his own choice, in his hour of trial, to handle his own case.” State v. Breedlove, 79 Wn. App. 101, 110-11, 900 P.2d 586 (1995). At the same time, however, it is also recognized that exercising that right and waiving the right to counsel will virtually always result in prejudice to the defendant at trial. See McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); Martinez v. Court of Appeals, 528 U.S. 152, 161, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000); State v. Vermillion, 112 Wn. App. 844, 857, 51 P.3d 118 (2002), review denied, 148 Wn.2d 1022 (2003); State v. Hornton, 85 Wn. App.

415, 419, 932 P.2d 1276, review denied, 133 Wn.2d at 1011 (1997).

In resolving this tension, courts have decided in favor of the fundamental right to counsel. See Martinez, 528 U.S. at 161, 193; DeWeese, 117 Wn.2d at 375. As a result, courts are required to indulge all reasonable presumptions *against* waiver of that right, regardless how fervent the defendant's desire to engage in self-representation. Martinez, 528 U.S. at 161, 93; see Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). Further, only an unequivocal request to waive the right to counsel will suffice, and that request must be knowing, voluntary and intelligent. DeWeese, 117 Wn.2d at 377; see Woods, 143 Wn.2d at 586.

In this case, the request did not meet those requirements. As a threshold matter, there is a question about the proper standard of review. Some Washington courts have indicated that the "abuse of discretion" standard applies to the question of whether the defendant has knowingly and voluntarily waived his constitutional right to counsel and exercised the right to self-representation. See, e.g., DeWeese, 117 Wn.2d at 376; State v. Hahn, 106 Wn.2d 885, 900-901, 726 P.2d 25 (1986); State v. James, ___ Wn. App. ___, 159 P.3d 102 (2007) (slip opinion at 6-7); Silva, 108 Wn. App. at 539; Breedlove, 79 Wn. App. at 106; State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987); State v. Chavis, 31 Wn. App. 784, 787, 644 P.2d 1202 (1982).

But none of these cases, their progeny or antecedents conducts any analysis or reaches a reasoned conclusion on that point. Indeed, some of

the cases cite no authority. See Breedlove, 79 Wn. App. at 106. Or they cite cases which cite no authority, like James, ___ Wn. App. at ___ (slip opinion at 6-7), which cites State v. Hemenway, 122 Wn. App. 787, 792, 95 P.3d 408 (2004), which cites Vermillion, 112 Wn. App. at 855, which cites only Breedlove, which, again, cites no authority.

Other cases citing the “abuse of discretion” standard ultimately rely on State v. Kolocotronis, 73 Wn.2d 92, 102, 436 P.2d 774 (1968), and State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). DeWeese cites only Sinclair for the “abuse of discretion” standard. DeWeese, 117 Wn.2d at 376. Sinclair - and Silva, too- cite only Chavis, 31 Wn. App. at 787. Silva, 101 Wn. App. at 549; Sinclair, 46 Wn. App. at 437. And Chavis cites only Kolocotronis and Fritz. Chavis, 31 Wn. App. at 787; see also, Hahn, 106 Wn.2d at 898 (citing Fritz).

Kolocotronis and Fritz, however, did not hold that abuse of discretion was the proper standard of review in all cases involving self-representation. In Kolocotronis, the issue was whether the lower court erred in finding the defendant was mentally incompetent to exercise his right to self-representation and appointing counsel for him over his objection. 73 Wn.2d at 102. The Court held that the trial court must have some discretion to act in the interests of justice if it is clear the defendant was not competent to represent himself and needs the assistance of counsel. 73 Wn.2d at 101-102. Kolocotronis did not hold, however, that abuse of discretion is the proper standard to be used any time a court reviews a waiver of the right to counsel and exercise of the right to self-

representation. 73 Wn.2d at 101-102. The cases citing Kolocotronis for that proposition appear based upon a misreading or misunderstanding of the actual holding.

Similarly, cases citing Fritz as supporting application of the “abuse of discretion” standard in every case do not withstand review. In Fritz, decided shortly after Faretta, the Court examined general principles regarding the right to self-representation and noted that some courts have adopted a continuum of “timeliness” for exercise of the right. 21 Wn. App. at 361. Relying on California precedent, the Court held that the scope of a defendant’s right to self-representation depends upon the timeliness of the request. Id. If the defendant makes the request prior to trial and asks for no continuance, the defendant has an absolute right to self-representation, so long as his request is unequivocal and knowingly, voluntarily and intelligently made. Id. If he makes the request the day of trial or just shortly before, the existence of the right depends upon the facts and the trial court has a “measure of discretion” to deny a request for self-representation, even if the defendant unequivocally requests it and makes a constitutionally sound waiver. Id. And if the defendant asks to represent himself after trial has started, the request is considered “untimely” and the right to self-representation rests “largely in the informed discretion” of the trial court. 21 Wn. App. at 361.

Thus, Fritz *did* hold that the trial court has some discretion on this issue, if the request is made the just before, the day of or during trial. But the discretion in Fritz only exists if the request is not timely made. Like Kolocotronis, Fritz does not support the conclusion that abuse of

discretion is the proper standard of review in every case where there is an issue of waiver of the constitutional right to counsel. The cases citing Fritz and Kolocotronis as providing for the “abuse of discretion” standard of review to this issue do not retain currency under close review.

In addition, application of de novo rather than deferential review proper where, as here, constitutional rights are at stake. See State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Manro, 125 Wn. App. 165, 170, 104 P.3d 708, review denied, 155 Wn.2d 1010 (2005); see also, United States v. Fabela, 882 F.2d 434, 437 (9th Cir. 1989), overruled on other grounds by United States v. ProTovar, 975 F.2d 592 (9th Cir. 1992).

Notably, many other states which have addressed this issue have concluded that de novo review should be employed in order to ensure protection of the important constitutional rights involved. See e.g., Hartman v. Delaware, 918 A.2d 1138, 1140 (Del. 2007) (Delaware); Maine v. Watson, 900 A.2d 702, 712-13 (Me. 2006) (Maine); Wellston v. Horsley, 2006 Ohio 4386 (2006 Ohio App. LEXIS 4282) (Ohio); People v. Alengi, 148 P.3d 154, 159 (Colo. 2006) (Colorado); Utah v. Pedockie, 137 P.3d 716, 724-25 (2006) (Utah); Michigan v. Russell, 471 Mich. 182, 187, 684 N.W. 2d 745 (2004), cert. denied, 543 U.S. 1095 (2005) (Michigan); Hill v. State, 773 N.E. 2d 336, 342 (Ind. 2002), modified in part on other grounds, 77 N.E. 2d 795, cert. denied, 540 U.S. 832 (2003) (Indiana); Trujillo v. State, 2 P.3d 567, 571 (Wyo. 2000) (Wyoming); State v. Rater, 568 N.W. 2d 655, 657-58 (Iowa, 1997) (Iowa); State v. Merina, 915 P.2d

672, 693-94 (Haw. 1996) (Hawaii).

Many federal courts also apply de novo review. See, e.g., United States v. Jones, 421 F.3d 359, 363 (5th Cir. 2005); United States v. Taylor, 113 F.3d 1136, 1139 (9th Cir. 1997); United State v. Singleton, 107 F.3d 1091, 1097 n. 3 (4th Cir. 1997); United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995).

Further, since Fritz, the U.S. Supreme Court has clarified that “voluntariness” is not a factual issue but rather an issue upon which the Court is “not bound” by trial court findings and makes an “independent” review of the record on its own. See Arizona v. Fulminante, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Miller v. Fenton, 474 U.S. 104, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985).

Watson, supra, provides a good example of another state court recently in the position this Court is in now. In Watson, the Court noted that it had previously applied the abuse of discretion standard in reviewing the waiver of the right to counsel and exercise of the right to proceed pro se. 900 A.2d at 712-13. That standard had been adopted based upon pre-Miranda caselaw which had held that the question of whether a person had knowingly, voluntarily or intelligently waived a right was purely a question of fact. 900 A.2d at 712-13.

In deciding that, instead, de novo review should be used, the Watson Court noted that the law was now clear that the question of whether a waiver of a right is knowing, voluntary and intelligent is actually a mixed question of law and fact. 900 A.2d at 712-13. The Court also noted that “[d]eciding whether, under the totality of circumstances, a

criminal defendant has made an effective waiver of the right to counsel has a 'uniquely legal dimension' . . . which is in the nature of a legal conclusion that warrants de novo review." 900 A.2d at 713 (quoting Miller, 474 U.S. at 116).

The Watson Court recognized, however, that any findings of fact underlying the court's decision which should be given deference on review. Watson, A.2d at 713. Thus, the Court adopted a two-part analysis: "clear error" for the findings of fact and de novo review for legal conclusions. Id.

Similarly, here, this Court should hold that the issue of whether a defendant has knowingly, voluntarily and intelligently waived his constitutional right to counsel and exercised his right to self-representation is subject to de novo review. Only the lower court's factual findings should be given deference, not the court's conclusion that such waiver has occurred. Only by adopting this standard will the Court properly honor the importance of the rights involved. And only that standard is consistent with the presumption against the waiver of the right to counsel.

Regardless whether abuse of discretion or de novo review is used in this case, however, reversal is required, because Mr. Calhoun did not make a knowing, voluntary and intelligent waiver of his constitutional right to counsel. To ensure such a waiver, the trial court must inform the defendant of the facts he needs to make his decision. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984); Faretta, 422 U.S. at 835 (quotations omitted). In addition to being informed of the nature of the charges against him and the possible range of punishment, the defendant

must be “advised . . . in unequivocal terms of the technical problems he may encounter in self-representation,” or that the judge has “explained and explored the risks of self-representation.” Acrey, 103 Wn.2d at 209.

Indeed, the trial court must assume responsibility for ensuring that decisions regarding the waiver of counsel are made with knowledge of these facts. Acrey, 103 Wn.2d at 211. If there is any doubt as to whether the defendant is truly making a proper choice to proceed without counsel, that doubt must be resolved in favor of the right to counsel. See Chavis, 31 Wn. App. at 792-93.

The preferred method for the trial court to carry out this duty is a colloquy with the defendant. Acrey, 103 Wn.2d at 211. Indeed, it is “only rarely” that a record will be adequate to support the waiver of the right to counsel without such a colloquy. Id. The colloquy is important because it not only tests the defendant’s understanding of the implications of the waiver but also provides this Court with an objective basis to review the waiver on appeal. See Strozier v. Newsome, 926 F.2d 1100, 1104 (11th Cir.), cert. denied, 502 U.S. 930 (1991).

There is no formal script the court must use in the colloquy, although several have been set forth in caselaw as models. See Hahn, 106 Wn.2d at 896 (setting forth the court’s “textbook” examination of the defendant and citing with approval an advisory list of questions set forth in State v. Christensen, 40 Wn. App. 290, 295 n.2, 698 P.2d 1069, review denied, 104 Wn.2d 1003 (1985)); State v. Buelna, 83 Wn. App. 658, 661, 922 P.2d 1371 (1996) (recommending review of Christensen for guidance in proper colloquy). The point is that the trial court must ensure that the

defendant has all the critical information material to his decision, because absent that information even the most skilled defendant could not make an intelligent choice. Silva, 108 Wn. App. at 541.

Further, the trial court must not just accept a declaration that the defendant knows of his rights and wants to waive them. See Acrey, 103 Wn.2d at 210-11. Instead, the judge must make a “searching” inquiry of the defendant in order to ensure a valid, knowing waiver. Id.; see Chavis, 31 Wn. App. at 790 (the judge must “make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently”).

One crucial part of the colloquy involves the court making the defendant aware of the “dangers and disadvantages of self-representation”. State v. Nordstrom, 89 Wn. App. 737, 743, 950 P.2d 946 (1997). The information given by the court must let the defendant know not only that he would be required to follow technical rules but also that the court could not assist him, that having a lawyer was very important and waiving one was not a good idea. See State v. Imus, 37 Wn. App. 170, 176-79, 679 P.3d 376, review denied, 101 Wn.2d 1016 (1984).

Thus, in Imus, the Court found the defendant was properly informed prior to making his decision because he was informed that his conviction could lead to life in prison and was “repeatedly and strenuously warned of the danger and disadvantages of self-representation.” 37 Wn. App. at 177. The defendant had been told below that he was making a “big, big mistake” in representing himself, that he was substantially increasing the likelihood that he would be convicted, that he did not know

what he was talking about and was out of his “element” in thinking about representing himself, that he was making the “biggest mistake” of his life if he represented himself, that he needed the assistance of an attorney, and that the judge, in the same position but with far more experience at trial, would not go to trial without a lawyer if accused of a crime because it would be such a big mistake to do so. 37 Wn. App. at 176-78.

In contrast, in Nordstrom, the court told the defendant that trying a jury trial was difficult and that the court could not assist him. 89 Wn. App. at 742. It also told him the procedure for trying a case, that there were “technical rules” and that he could not simply tell his story. 89 Wn. App. at 743-44.

Those warnings were found deficient. 89 Wn. App. at 743-44. The warnings told the defendant it was difficult to proceed pro se but did not adequately inform him “of the *risks* he faced in foregoing the assistance of counsel.” 89 Wn. App. at 743 (emphasis added). And while they told him there were certain rules and it was not just telling his story, the court’s warnings “did not explain the connection between the technical rules and the dangers of proceeding pro se.” 89 Wn. App. at 743.

In reaching its conclusion, the Court gave an example from the lower court proceedings where the issue of admissibility of evidence came up and the trial court had not advised the defendant “that his ignorance regarding the admissibility of evidence” was likely to “put him at a substantial disadvantage in proceeding to trial without the assistance of counsel.” 89 Wn. App. at 744. The appellate court concluded that, under the circumstances, the record did not reflect “that the accused was advised

that the decision to proceed to trial without the assistance of counsel carries with it substantial risks and disadvantages.” 89 Wn. App. at 744.

Similarly, here, Mr. Calhoun was not fully advised of the substantial risks and disadvantages of self-representation. While the court informed him that he would be subject to court rules and held to the same standard as an attorney, it never told him it would not assist him in any way. Further, while the court told Mr. Calhoun he would be subject to the rules it did not tell him he would be significantly prejudiced in presenting his case because of his complete lack of experience with those rules. And while Mr. Calhoun was informed that he faced two years and potentially significant fines if convicted, the court never once told Mr. Calhoun that it would be much better for him to proceed with counsel, that he was far more likely to be convicted if he represented himself, or even that it was not a “good idea” for him to waive counsel and represent himself.

Thus, the court gave Mr. Calhoun only part of the information he needed to make a knowing, voluntary and intelligent waiver of his fundamental right to counsel. As a result, Mr. Calhoun did not truly comprehend the magnitude of the decision, because he did not understand the extremely grave consequences of self-representation. And it is not sufficient that he was given standby counsel. See Buelna, 83 Wn. App. at 661-62 (standby counsel’s presence “does not obviate the need for establishing” a knowing, voluntary and intelligent waiver of the right to counsel).

Notably, the court also never told Mr. Calhoun that his decision was “for keeps,” and if he chose to waive counsel and represent himself at

that moment he was going to be stuck with that decision for good unless the court itself decided differently. See, e.g., DeWeese, 117 Wn.2d at 375-77 (decision for reappointment of counsel after a waiver is discretionary with the court).

Mr. Calhoun did not knowingly, voluntarily and intelligently waive his right to assistance of counsel. The trial court erred in holding otherwise.

The improper deprivation of the right to counsel can never be harmless. Silva, 108 Wn. App. at 8. Indeed, it is “fundamental that ‘deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.’” Id. Because Mr. Calhoun did not knowingly, voluntarily and intelligently waive his constitutional right to the assistance of counsel, this Court should reverse.

2. THE SENTENCE WAS IMPOSED UNDER A STATUTE WHICH VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION

The sentence in this case also requires reversal. At sentencing on August 11, 2006, the prosecutor asked for the sentence imposed to be ordered to run “consecutive” to those for other offenses charged under separate cause numbers and involving acts committed in July of 2005. 9RP 239. The prosecutor argued that there would be a “free crime” if the court imposed a concurrent sentence and that the court had discretion not to order concurrent sentencing. 9RP 240. The court imposed the sentence to run consecutively to another case recently sentenced. 9RP 243.

The court erred in imposing the consecutive sentence, because the

statute upon which the court relied violated Mr. Calhoun's state and federal rights to equal protection.

Both the state and federal constitutions provide citizens with those rights. State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993); Fourteenth Amend.; Art. 1, § 12. Because the Washington and federal equal protection clauses are "substantially identical," the same analysis is used for each. Shawn P., 122 Wn.2d at.559-60. Under both clauses, equal protection means that persons similarly situated with respect to the legitimate purpose of a law are treated alike. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). While identical treatment is not required in all circumstances, equal protection does require that "a distinction made have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966).

Under RCW 9.94A.589(3), when someone is being sentenced for a felony, there is a presumption that the sentence in the current case "shall run concurrently with any felony sentence which has been imposed" subsequent to the commission of the current crime. There is an exception, however, permitting the court imposing the current sentence to impose a consecutive sentence, if the court simply "expressly orders that they be served consecutively." RCW 9.94A.589(3).

The discretion granted under subsection 3 in deciding whether to impose a sentence consecutively or concurrently is wholly unfettered. State v. Klump, 80 Wn. App. 391, 396, 909 P.2d 317 (1996); State v. Linderman, 54 Wn. App. 137, 139, 772 P.2d 1025, review denied, 113 Wn.2d 1004 (1989). Indeed, the discretion is so extreme that the court

need not even declare a reason for its decision. State v. Shilling, 77 Wn. App. 166, 175-76, 889 P.2d 948, review denied, 127 Wn.2d 1006 (1995). Nor are written findings or conclusions required, as usually needed to ensure meaningful appellate review of decisions. See State v. Kern, 55 Wn. App. 803, 780 P.2d 916 (1989), review denied, 114 Wn.2d 1003 (1990); see State v. Mewes, 84 Wn. App. 620, 621-22, 929 P.2d 505 (1997) (findings are necessary for such review). Instead, the court must simply declare that it will be departing from the presumption of concurrent sentences without explaining or even stating its reasons for ordering it so. Shilling, 77 Wn. App. at 175-76.

There are no published decisions examining RCW 9.94A.589(3) in light of an equal protection challenge. However, this Court has previously noted that imposition of consecutive, nonexceptional sentences for current offenses sentenced in separate proceedings would likely violate equal protection. See State v. Whitehead, 51 Wn. App. 841, 845 n. 4, 755 P.2d 852 (1988). This Court was right.

The first step in any equal protection challenge to a statute is to determine whether the defendant is similarly situated with others, and then determine the proper level of scrutiny to be applied to the question of whether the defendant's right to equal treatment was violated. See Gausvik v. Abbey, 126 Wn. App. 868, 882, 107 P.3d 98, review denied, 120 P.3d 577 (2005). This is determined by looking at the nature of the interest affected or the characteristics of the class created by the legislation. See State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002 (1998).

Although there is a liberty interest involved whenever a person is in custody, the Washington Supreme Court has held that the “rational relationship” test applies when physical liberty is affected unless there is a semi-suspect class also involved. Coria, 120 Wn.2d at 170. A statute will not pass the “rational relationship” test if the statute “rests on grounds wholly irrelevant to achievement of legitimate state objectives.” State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (citations omitted). Further, even a valid law will violate equal protection if it is administered in a manner that unjustly discriminates between similarly situated people. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990).

In this case, RCW 9.94A.589(3) creates a group of persons similarly situated with regard to the apparent purpose of the law. The law applies to a specific group of people - those convicted of committing felony crime A when not under a sentence for another felony, but who are subsequently convicted and sentenced for felony crime B, prior to sentencing on crime A. Within that group, the statute creates a class of people who are ordered to serve their sentences consecutively, under RCW 9.94A.589(3), rather than concurrently, as presumed under the same statute.

Thus, under RCW 9.94A.589(3), someone with exactly the same criminal history and current crime as Mr. Calhoun who committed an identical current crime may be treated differently, despite the fact that their circumstances are exactly the same. The statute not only fails to make a *rational* distinction between the two members of the greater class - it fails to require *any* distinction between them, except that the court chose, for

whatever reason, to order a particular sentence for one and not the other.

As a result, defendants who are in exactly the same position because they were not under sentence of felony when they committed the current crime are treated vastly differently. Some defendants are given a sentence far less onerous than others. Effectively, the SRA's presumption of concurrent sentences is erased for the latter while the former still enjoys it. And Subsection 3 requires no meaningful difference in the circumstances and situations between a defendant whose sentences are concurrent and those who are not.

Indeed, “[n]either the statute nor the official comments thereto require that the trial judge specify any reason whatsoever behind such a decision, let alone that the reason conform to any particular policy.” Linderman, 54 Wn. App. at 139. While there is no evidence in this case of any racial bias contributing to the trial court's decision, because the statute requires absolutely no reasons and provides no standards for the exercise of the court's discretion, it is certainly possible that such decisions have been made on that basis. In fact, Division One has noted that the statute's utter lack of limits on the trial court's discretion on this issue “creates an awesome power and responsibility in the trial court,” a power at least one trial court apparently used on an improper basis. Shilling, 77 Wn. App. at 176 n.5.

Thus, under RCW 9.94A.589(3), people in exactly the same situation with respect to the legitimate purposes of the law receive disparate treatment, based upon the unreviewable decision of a court. The result is that some people - like Mr. Calhoun - will spend more time in

custody than others who have exactly the same record and commit essentially the same crimes. RCW 9.94A.589(3) permits unequal treatment even for such things as racial bias, because it provides no standard under which the trial court's decision is to be made. Further, the statute provides for absolutely no oversight to ensure fairness in such decisions, as the trial court need not even state reasons orally for its decision and thus make at least some record for appellate court review.

RCW 9.94A.589(3) thus creates a "purely arbitrary" distinction between defendants and ensures that they are treated differently. See Coria, 120 Wn.2d at 172. Further, the classifications created by the statute and leading to the disparate treatment are "wholly irrelevant" to the achievement of any legitimate state objectives, because there is absolutely no reason for treating the different defendants with the same record and current crime differently. See, e.g., Coria, 120 Wn.2d at 172-73 (upholding school bus route stop sentence enhancements because it furthers the legitimate purposes of keeping drug dealers away from children and in particular from children actually at bus stops heading to school). RCW 9.94A.589(3) violates both the state and federal rights to equal protection and the order making the sentence in this case consecutive should be reversed.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Calhoun the relief to which he is entitled, as argued in this brief.

DATED this 26th day of July, 2007.

Respectfully submitted,



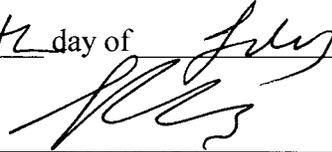
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Abdul-khalif Calhoun, DOC 785278, WCC, P.O. Box 900,
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DATED this 26th day of July, 2007.



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