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NO. 50266-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

QUEZON THUNDER,
Appellant.

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

Pierce Cause No. 16-1-00967-2

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Thunder his constitutional right to self-representation.
2. A pretrial delay of nearly 12 months violated Thunder's speedy trial rights under the Sixth Amendment to the United States Constitution, art. I, § 22 of the Washington Constitution and CrR 3.3.
3. The trial court abused its discretion by imposing various community custody conditions that were unauthorized by law.

Issues Presented on Appeal

1. Did the trial court violate Thunder's constitutional right to proceed pro se where he was unequivocal, and made his requests, knowingly, voluntarily and intelligently?
2. Did the trial court violate Thunder's statutory speedy trial rights by granting multiple continuances over Thunder's objection that resulted in a 12 month delay?
3. Did the court abuse its discretion by continuing Thunder's case for 12 months, over his objection?
4. Did the trial court violate Thunder's Federal and State constitutional speedy trial rights by granting multiple continuances beyond speedy trial where Thunder did not contribute to the 12 month delay, he objected to each continuance and he repeatedly urged his attorney to go to trial?
5. Did the trial court err in ordering community custody provisions that are not crime related, such as: not entering sex-related businesses, no possession of sexually-explicit material, no "use" of alcohol, no purchase and possession of alcohol, no alcohol dependency, and no use of the internet

and computers?

6. Should this Court exercise its discretion to deny appellate costs because Thunder continues to be indigent?

B. STATEMENT OF THE CASE

Quezon Poor Thunder (“Thunder”) was charged with four counts of Rape of a Child in the Second Degree for engaging in sexual intercourse with the 13 year-old daughter of his girlfriend. CP 1-3. Thunder testified on his own behalf but offered no witnesses. RP 546 (March 9, 2017). The state provided testimony of the victim, her grandmother, her mother, her cousin, the police officer and nurse involved, and expert testimony regarding the DNA evidence. RP 111 (March 2, 2017); RP 160 (March 6, 2017); RP 279, 338, 397, 413 (March 7, 2017); RP 451, 483 (March 8, 2017). He was convicted on March 13, 2017 following a jury trial. CP 223-226.

a. Orders Continuing Trial Date.

i. First Trial Continuance.

Thunder was arraigned in custody on March 8, 2016. Trial was scheduled for May 3, 2016. Supp. CP, Scheduling Order, March 8, 2016. On April 15, 2016, the court granted Thunder’s first defense

attorney's motion to withdraw and, over Thunder's objection, the court extended the trial date to August 4, 2016. CP 14.

On June 13, 2016, defense counsel requested a 10.77 evaluation. Supp. CP, Order for Examination, June 13, 2016. The evaluator determined Thunder to be competent. Supp CP, Order Regarding Competency of Defendant, June 30, 2016. Trial was subsequently re-scheduled over objection for July 28, 2016. Supp. CP, Scheduling Order, July 25, 2016.

ii. Second Trial Continuance.

On July 25, 2016, over Thunder's objection, the court granted a joint motion for a continuance to September 20, 2016 to permit both attorneys to continue trial preparation. RP 3-4, 6; CP 4.

iii. Third Trial Continuance.

On August 19, 2016, the court granted a joint motion to extend the trial to September 26, 2016, on grounds that counsel had a conflict with a pre-arranged vacation, and the state had not received the results of the DNA analysis collected August 5, 2016. CP 5; RP 3-5.

iv. Fourth Trial Continuance.

On September 26, 2016, the prosecuting attorney requested

a continuance because he was still waiting for DNA results from Washington State Patrol. Defense counsel also sought a continuance for 1.5 weeks or alternatively, that the case be called on time but with a 1.5 week recess. CP 13. The court granted the continuance over Thunder's objection and continued the trial date to November 7, 2016. CP 13.

On September 16, 2016, regarding the DNA analysis, the prosecutor informed the court that he "made sure to furiously seek updates since the last time we were in trial." RP 4; CP 19. On September 30, 2016, the prosecutor informed the court that as of September 28, 2016, the DNA samples had not yet been sent to the lab.

On October 5, 2016, the state informed the court that the DNA samples were sent to the lab in early August 2016. On October 24, 2016, the state provided the defense with a completed copy of the DNA analysis. On November 8, 2016, the defense filed a supplemental motion to dismiss alleging violations of speedy trial and CrR 8.3(b) for arbitrary action or governmental misconduct. CP 70-72. The court denied these motions on November 9, 2016. CP 73.

v. Fifth Trial Continuance.

On November 7, 2016, the state requested and received an Order Continuing Trial to December 9, 2016, based on the state's need for time to respond to Thunder's motions regarding speedy trial and CrR 8.3(b). CP 68, RP 13 (November 7, 2016). Thunder objected to this continuance. CP 68, RP 13 (November 7, 2016).

vi. Sixth Trial Continuance.

On November 9, 2016, the court denied Thunder's own motion to dismiss for violations of speedy trial as well as defense counsel's supplemental motions to suppress results of the DNA test and dismiss the case based on speedy trial rights violations. CP 7-12, 17-20, 73, RP 46, 48-50 (November 9, 2016).

Defense counsel requested, and was granted, a continuance to January 19, 2017, to allow time to obtain expert testimony. RP 48 (November 9, 2016). Thunder again objected. RP 50 (November 9, 2016).

vii. Seventh Trial Continuance.

On December 9, 2016, over Thunder's objection, the court granted a joint motion to continue trial. CP 121. Defense counsel sought the continuance to allow additional time to obtain an expert

witness. The state sought the extension to respond to Thunder's supplemental discovery request. CP 121. The court set the new trial date for February 23, 2017. CP 121.

b. Requests to Continue Pro Se.

i. First Request to Continue Pro Se.

On July 26, 2016, Thunder requested to dismiss his attorney. RP 6. On October 5, 2016, Thunder moved to proceed pro se. RP 3-5 (October 5, 2016). During the colloquy with Thunder, he repeatedly asserted his right to represent himself. The trial court questioned Thunder regarding his education, his knowledge of the legal system, and his ability to prepare for trial. RP 6-8 (October 5, 2016). At the conclusion of this inquiry, the trial court denied Thunder's motion to continue pro se and held that, "this court does not believe that it can allow wild spirit¹ to represent himself in this matter because it would be detrimental for him to do so." RP 8 (October 5, 2016).

ii. Second Request to Continue Pro Se.

On November 7, 2016, Thunder again moved to proceed pro se. CP 69, RP 4 (November 7, 2016). The court engaged Thunder

¹ wild spirit directed the court to use lower case when spelling his name and asked to be called wild spirit rather than Poor Thunder.

in the following colloquy:

THE COURT: All right. How old are you?

THE DEFENDANT: 27.

THE COURT: What's the level of your education?

THE DEFENDANT: I want to represent myself. It doesn't matter what my education level is. I have studied and done research. I have filed my own motions already. I have proceeded to already look through the rules, looked through the courtroom rules. I have filed already a motion on a speedy trial violation because I have been here for over 225 days. They are not answering it. In the upper courts they answered and just acknowledged that. I even sent in two motions. I feel comfortable enough that I can represent myself.

THE COURT: Mr. Poor Thunder, before I let you do that, I need to ask you some questions.

THE DEFENDANT: I'm doing this knowingly, voluntarily and intelligently.

THE COURT: Mr. Poor Thunder, I have to ask you some questions.

THE DEFENDANT: Mr. Poor Thunder is not my name. I will only answer to my name.

THE COURT: How do you want me to address you?

THE DEFENDANT: My name is wild spirit.

THE COURT: wild spirit?

THE DEFENDANT: Yes. It's spelled with lower case letters. That's the vessel name. I only claim to be the

vessel.

THE COURT: Is it one word or is it two words?

THE DEFENDANT: It's two words.

THE COURT: All right. Mr. wild spirit, would you mind answering some questions for me so we can get to the issue of you representing yourself?

THE DEFENDANT: I'm ready to proceed.

THE COURT: Okay. What's the level of your education, sir?

THE DEFENDANT: My education does not matter.

THE COURT: Have you ever been treated for any emotional or mental disturbance or disease?

THE DEFENDANT: No.

THE COURT: Okay. Are you under the care of any medical provider at this point, for instance, in the jail?

THE DEFENDANT: No.

THE COURT: All right. Are you receiving any medication?

THE DEFENDANT: No.

THE COURT: Do you understand what the disadvantages are of representing yourself? In other words, giving up your right to an attorney?

THE DEFENDANT: My case has already been thrown out the window due to speedy trial violations of courtroom rule 3.3. I filed it already. They are not accepting it.

THE COURT: Do you understand what the disadvantages are of representing yourself?

THE DEFENDANT: I want to represent myself.

...

THE COURT: All right. Tell me about the nature and complexity of your case.

THE DEFENDANT: What do you mean by "nature and complexity" of my case?

THE COURT: What are you charged with?

THE DEFENDANT: I haven't been charged with anything. I'm innocent until proven guilty.

THE COURT: There is an Information filed in this case, all right, which charges you with Rape of a Child in the Second Degree. Are you aware of that?

THE DEFENDANT: I'm not aware of nothing.

THE COURT: Okay. Have you reviewed the charging documents?

THE DEFENDANT: Huh?

THE COURT: Have you reviewed that charging document?

THE DEFENDANT: I haven't been charged with anything. I'm innocent until proven guilty.

THE COURT: All right. Do you understand how serious that charge is?

THE DEFENDANT: I have not been charged with anything.

THE COURT: All right. Do you understand what the potential consequences of a conviction are?

THE DEFENDANT: What, slavery?

THE COURT: No. You could be sentenced to prison.

THE DEFENDANT: That's slavery.

THE COURT: Do you understand that if you are convicted, you can be sent to prison?

THE DEFENDANT: Slavery.

RP 4-11 (November 7, 2016).

At times, Thunder refused to answer the court's questions, but at all times, he continued to assert his right to self-representation. RP 4-11 (November 7, 2016).

The trial court denied Thunder's motion on grounds that it was not knowing, voluntary and intelligent, and untimely because it was brought on the day of trial. CP 69; RP 11 (November 7, 2016).

iii. Third Request to Continue Pro Se.

On December 9, 2016, during a status conference, Thunder again moved to proceed pro. RP 5 (December 9, 2016). The court continued the matter so it could "be heard by the trial judge." RP 5

(December 9, 2016). This hearing was never noted before the trial judge, but Thunder again moved to proceed pro se on February 27, 2017, and February 28, 2017; noting on February 28, 2017, that he had been asking to represent himself since his arraignment. RP 5, 10, 12 (February 27, 2017), RP 31 (February 28, 2017). Defense counsel further noted Thunder had made “many, many [motions to proceed pro se] in addition to the two that were done formally on the record.” RP 9 (February 27, 2017).

On February 28, 2017, the court conducted the following colloquy with Thunder:

THE COURT: No, listen. Let me go. It's my turn. Look at me, please, so I know you're comprehending. If I allow you to proceed pro se, and I'm going to appoint him as standby, because I'm not going to let you just sit here. You need somebody to assist, to tell you how this thing works, because I don't think you're familiar enough with the rules of evidence. So if I do it, I'm going to appoint standby counsel and it's going to be Mr. Underwood, is that going to be a problem? That's the first question. If you've done all the research I know you've done, you've seen *DeWeese* and the other cases, you know that it pretty much is required.

THE DEFENDANT: Like I said, I'm using myself as a special appearance underneath Rule E8 without granting jurisdiction. I don't grant you guys jurisdiction.

THE COURT: I understand that. You've preserved all those objections.

THE DEFENDANT: I'm going to keep on saying this on the record. I object.

THE COURT: Excuse me. We have a court of record. It's on the record, so your objections are noted. I have noted the objections, and they're on the record, so we don't have to repeat that old stuff. I need you to tell me, because I want to get this moving. I've got jurors downstairs. Question one, is it okay if Underwood, Kent Underwood is standby counsel?

THE DEFENDANT: Like I said, I'm here as a special appearance.

THE COURT: Number two, is notwithstanding special appearance, Uniform Commercial Code, all the other legal stuff, are you going to be able to conduct yourself, and this goes back to the first question, in front of the jury and –

THE DEFENDANT: The jury ain't my peers.

THE COURT: Can you conduct yourself in front of the jury, because I'm going to treat you like a lawyer. Like a lawyer.

THE DEFENDANT: Jury is not my peers or any Civil Right Acts of Indian 1968. I'm supposed to be in front of my Indians, Indian Tribe.

THE COURT: Well, that's not my question.

THE DEFENDANT: Well, that's a violation of the Civil Rights Act of 1968. I have an Indian bloodline certificate. I have proceeded with putting my enrollment number, which is U-050173 on the record to let you guys know.

....

THE COURT: We are again at the day of trial, and I really need an answer to the last two questions, because if it's not going to work. I mean, I think it possibly could, but it's got to be standby counsel. The other thing is it gets back to the first thing I talked to you about. I don't want a situation where we're here in the middle of the trial and you're being disruptive.

THE DEFENDANT: My thing is that Washington State is a nonliving fictitious entity that ain't even a real human being as the plaintiff. How can I be having my accuser on trial? Is that state, is that flag going to take the stand? That flag is representing the State of Washington. Does that make any sense to you?

THE COURT: If you're going to represent yourself, are you ready to proceed to trial?

THE DEFENDANT: They're not my peers. They may not judge me.

THE COURT: Okay.

THE DEFENDANT: Indian Civil Rights Act of 1968, I have case law in my thing. I am essentially strapped down, so it's hard for me to get paperwork.

RP 42-43, 45-46 (February 28, 2017). The court denied Thunder's motion without further inquiry.

THE COURT: What I'm going to do is I'm going to deny the motion to proceed pro se; one, it's not timely; two, I'm concerned about the risk to the defendant trying to represent himself. I don't think he has enough understanding of the law at this time. I don't believe any waiver of counsel is knowing or intelligent and may be voluntary. I indicated earlier I believe that the defendant is competent, no question about that. He has some understanding he says of the law that

he's studied in jail since he has been incarcerated. I don't think that's adequate in this case, and I'm also concerned under *Hemenway* that the conduct in court is going to be an issue, and I can't get any assurance from him otherwise.

Supp. CP, Order Denying Motion to Proceed Pro Se, November 7, 2016; RP 47 (February 28, 2017).

c. Judgment and Sentence.

During the April sentencing hearing, the court entered an order of indigency and sentenced Thunder to 280 months to life with the following challenged community custody conditions set forth in relevant part in Appendix H. CP 270-272, 243-244.

(9) Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material absent approval of treatment provider.

(10) Do not possess, use, access, or view sexually explicit material as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

(11) Do not use or consume alcohol.

(22) Obtain alcohol chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all

program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

(23) No Internet access or use, including email, without prior approval of the supervising CCO.

(24) No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition.

CP 243-246.

Defense counsel objected to all of the above listed conditions on the basis that the conditions were not crime-related or unconstitutionally vague and overly broad. RP 648-652 (April 21, 2017).

Thunder timely appeals. CP 245-246.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THUNDER'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WHEN IT DENIED HIS TIMELY AND UNEQUIVOCAL REQUESTS TO PROCEED PRO SE.

Thunder made three requests to continue pro se and the trial

court's denial of each of these requests was a violation of Thunder's constitutional right to self-representation.

Defendants in a criminal case have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Art. I, § 22 ("the accused shall have the right to appear and defend in person"); *Farretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010). This right exists even though its exercise "will almost always surely result in detriment to both the defendant and the administration of justice." *State v. Vermillion*, 112 Wn. App. 844, 850-51, 51 P.3d 188 (2002).

Despite this explicit right, it is not absolute or self-executing and a request to proceed pro se must be both unequivocal and timely. *Madsen*, 168 Wn.2d at 504. A defendant's request to continue pro se is also a waiver of his right to counsel. *Madsen*, 168 Wn.2d at 504. Thus, the trial court must also determine if the waiver is voluntary, knowing, and intelligent, preferably by colloquy with the defendant. *Madsen*, 168 Wn.2d at 504. The Court may only deny a defendant's request to proceed pro se if defendant's

request is “equivocal, untimely, involuntary, or made without a general understanding of the consequences.” *Madsen*, 168 Wn.2d at 504-05.

This Court reviews a denial of a request to proceed pro se for abuse of discretion. *Madsen*, 168 Wn.2d at 504. Discretion is abused if the decision is manifestly unreasonable or “rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Madsen*, 168 Wn.2d at 504 (quoting *State v. Rorich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). This Court generally defers to the trial court “because the trial court has the opportunity to observe a defendant’s demeanor and nonverbal conduct”. *State v. Floyd*, 178 Wn. App. 402, 410, 316 P.3d 1091 (2013).

Improper denial of the right to represent oneself requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503. This Court reviews each motion to proceed pro se independently. *Madsen*, 168 Wn.2d at 504.

a. First Motion to Proceed Pro Se Improperly Denied was Detrimental To Thunder.

On October 5, 2016, following a brief colloquy with Thunder,

the trial court denied his request to represent himself, stating that it would not allow him to proceed pro se “because it would be detrimental for him to do so.” RP 9 (October 5, 2016). This was an abuse of discretion.

Detriment to the defendant is never an appropriate legal standard for denying a defendant his constitutional right to self-representation. *Madsen*, 168 Wn.2d at 504-05; *Farretta*, 422 U.S. at 834.

[A]lthough 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.”

Farretta, 422 U.S. at 834.

Here, the trial court entered a single finding that cannot support the denial of Thunder’s motion. The court did not enter any findings or conclusions Thunder’s motion was untimely, equivocal, voluntary, knowing or intelligent. The colloquy conducted with Thunder addressed only the basics of his education and his knowledge of trial procedure. RP 5-9 (October 5, 2016). In response, Thunder repeatedly told the court, “I want to represent myself.” RP 5-9 (October 5, 2016).

As a matter of law when denying a motion to proceed pro se,

the trial courts must identify some fact to support its denial, and if no facts are developed by the court during its colloquy with the defendant, “the only permissible conclusion is that [the defendant’s] request is voluntary, knowing and intelligent. *Madsen*, 168 Wn.2d. at 506. Accordingly, here the trial court’s denial was an abuse of discretion requiring reversal where the court did not enter findings that Thunder’s motion was equivocal, untimely or not voluntary, knowing or intelligent. *Madsen*, 168 Wn.2d at 504. The remedy is to reverse and remand for a new trial. *Madsen*, 168 Wn.2d at 510.

If this Court determines the trial court improperly denied Thunder’s first motion to proceed pro se, it need not determine whether the trial court’s subsequent denials were also erroneous. *Madsen*, 168 Wn.2d at 510 (“Because we find that Madsen’s motion to proceed pro se was improperly denied on March 7, 2006, we need not determine whether the trial court’s denial of Madsen’s [later] motion was further error.”).

- b. The Trial Court Improperly Denied Thunder’s Second Motion to Proceed Pro Se as Untimely and not Freely, Intelligently or Voluntarily Given.

On November 7, 2016, Thunder made his second request to

proceed pro se. CP 69; RP 4 (November 7, 2016). The court denied the motion as untimely because it was made on the day of trial, but trial did not commence until March 2017. RP 11 (November 7, 2016); CP 69. The court also denied the motion believing that Thunder did not understand the consequences of his waiver and therefore it was not knowing, voluntary or intelligent. RP 11 (November 7, 2016). The trial court abused its discretion in denying this second motion because it was made four months before trial actually commenced, and it was knowing, voluntary and intelligent. CP 69.

i. Thunder's second motion was timely.

A request to proceed pro se is timely and exists as a matter of law if the request is made well before trial. *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). If the request is made as the trial is about to commence, or shortly before, the existence of the right depends upon the facts of the case and lies within the discretion of the court. *State v. Breedlove*, 79 Wn. App. 101, 107-09, 900 P.2d 586 (1995) (citing *Fritz*, 21 Wn. App. at 361, 363). “[A]s the trial gets closer and once it begins, the interest in the orderly administration of justice becomes weightier.” *Breedlove*,

79 Wn. App. at 108.

The trial court may deny a request for self-representation that is made shortly before trial if it finds either “(1) that the motion is made for improper purposes, i.e., for the purpose of unjustifiably delaying a trial or hearing, or (2) that granting the request would obstruct the orderly administration of justice.” *Breedlove*, 79 Wn. App. at 108 (citations omitted).

In *Vermillion*, the Court remanded for a new trial finding that Vermillion’s five requests to proceed pro se were improperly denied. *Vermillion*, 112 Wn. App. 844. Specifically, the Court rejected the trial court’s finding of untimeliness because the motion was made on the first day of trial. The Court noted that while it was technically the first day of trial, jury selection did not begin until six days later. *Vermillion*, 112 Wn. App. at 855. The court further held that there was nothing in the record to indicate that Vermillion was attempting to delay the proceedings or delay the administration of justice. Without a specific finding that he made the motion for improper purposes, the request was timely. *Vermillion*, 112 Wn. App. at 855.

Here, Thunder made his November 7, 2016, motion to

proceed pro se, but moments later the trial court continued the trial to December 9, 2016, after counsel informed the court that jury selection could not begin until a week later. RP 12 (November 7, 2016). Consequently, Thunder's motion to proceed pro se was no longer made on the day of trial, and well in excess of the 6 days determined to be timely in *Vermillion*.

Also, here, as in *Vermillion*, there is also nothing in the record to indicate that Thunder made his November motion for any improper purpose or that his motion would delay the administration of justice. The trial court abused when after granting a continuance it denied Thunder's motion as untimely without a finding that he made his motion for improper purposes. *Vermillion*, 112 Wn. App. at 855.

- ii. Thunder's second motion was knowing, intelligent, and voluntary.

A request to proceed pro se is knowing, voluntary and intelligent when the defendant understands the risks of self-representation and the nature and seriousness of the charges against him. *Vermillion*, 112 Wn. App. at 856-57. The record in this case establishes that the court explained the risks and dangers, the

nature and seriousness of the charges and Thunder, while frustrated and objecting to jurisdiction by refusing to acknowledge the charges, nonetheless understood them. RP 4-18. Thunder insisted that he had not been charged because he was “innocent until proven guilty”. RP 7. Thunder appears to simply confuse the charging document with a conviction, and explained to the court that he did not know certain legalese words. RP 10. Thunder informed the court:

I want to represent myself. It doesn't matter what my education level is. I have studied and done research. I have filed my own motions already. I have proceeded to already look through the rules, looked through the courtroom rules.

RP 4-11 (November 7, 2016).

While Thunder is clearly frustrated by the proceedings, refers to his potential prison sentence as “slavery” and objects to being tried in a state court rather than a tribal court, he remains throughout the inquiry resolute and clear in his desire to represent himself. RP 5-10 (November 7, 2016). Thunder’s personal belief that as a Native American he should not be subjected to state law and his belief that incarceration was akin to slavery do not

undermine the validity of his request to proceed pro se because these beliefs do not implicate the criteria for proceeding pro se.

The trial court unconstitutionally denied Thunder's second motion to proceed pro se because he timely and unequivocally made a knowing, voluntary and intelligent request to proceed pro se.

c. The Trial Court Improperly Denied Thunder's Third Motion to Proceed Pro Se as Untimely and not Given Knowingly or Intelligently.

On February 28, 2017, the trial court denied Thunder's third motion to proceed pro se on grounds that it was untimely and not knowing or intelligent and that Thunder lacked adequate legal skills. RP 46-47 (February 28, 2017). On March 13, 2017, Thunder filed a motion to proceed pro se clarifying his understanding of the risks of proceeding pro se. CP 168.

i. Thunder's third motion was timely.

The trial court abused its discretion by denying Thunder's third motion as untimely as of February 28, 2017, because Thunder first raised this motion on December 9, 2016. RP 47 (February 28, 2017); RP 5 (December 9, 2016). When the trial court defers a

ruling on a request to proceed pro se, the issue of timeliness must be examined from the time of the first request. *Madsen*, 168 Wn.2d at 508.

In *Madsen*, the defendant made three unequivocal requests to proceed pro se over a five-month period. *Madsen*, 168 Wn.2d at 501. The trial court deferred ruling on the first and second request and finally denied his third motion three months later finding Madsen was disruptive, had an inability to follow directions, and his motion was equivocal and untimely. *Madsen*, 168 Wn.2d at 500-02. In overturning the Court of Appeals, the Supreme Court held Madsen's motion was timely since "fairness" requires the court look back to the date of the initial request. *Madsen*, 168 Wn.2d at 508 (*citing* Breedlove, 79 Wn. App. at 101). The trial court erred in determining that Thunder's third motion was untimely because under *Madsen*, the court was required to consider Thunder's first motion for matters of timeliness: December 9, 2016. *Madsen*, 168 Wn.2d at 508

- ii. Thunder's third motion was knowingly, voluntary and intelligent.

The trial court also denied Thunder's third motion on

grounds that Thunder did not understand the “risk” of self-representation due to Thunder’s his lack of understanding of the law, even though the court acknowledged that Thunder studied the law in jail, read “DeWeese and other cases” and informed Thunder that he knew what was required. RP 47 (February 28, 2017).

Thunder discussed Black’s Law, a motion he filed and wished to discuss, and Thunder also filed a comprehensive motion to dismiss the charges for speedy trial violations on November 7, 2016, which demonstrated Thunder’s ability to research, present issues and argue the applicable law. CP 68.

Thunder was cautioned, about the risk of appearing pro se and the seriousness of the charges, and steadfastly indicated that he was prepared to proceed pro se. RP 45-47 (February 28, 2017). Considering Thunder’s knowledge of the law, the record demonstrates that Thunder made a knowing, voluntary and intelligent request to proceed pro se. The trial court abused its discretion in finding otherwise.

To protect Thunder’s right to proceed pro se, this Court must reverse the convictions and remand for a new trial.

2. A 12-MONTH DELAY AND SEVEN CONTINUANCES VIOLATED THUNDER'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

Thunder's state and federal statutory and constitutional rights to a speedy trial was violated by the 12 month delay between arraignment and trial. At all times, Thunder objected to each continuance.

a. Constitutional Speedy Trial Right.

Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy trial. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend.VI. A Sixth Amendment speedy trial claim is reviewed de novo and the analysis is identical with art. I, § 22 of the Washington State Constitution. *State v. Iniguez*, 157 Wn.2d 273, 280, 217 P.3d 768 (2009). The constitutional right to a speedy trial is not violated at the expiration of a fixed time, but rather, the expiration of a reasonable time. *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997).

The constitutional right to speedy trial commences when a

charge is filed or an arrest is made, whichever occurs first. *State v. Shemesh*, 187 Wn. App. 136, 144, 347 P.3d 1096 (2015). To determine whether an unconstitutional delay has occurred, the Court considers the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 522-530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The *Barker* factors are: (1) the length of the delay; (2) the reasons for the delay; (3); whether the defendant objected to the delay; (4) and any resulting prejudice to the defendant. *Barker*, 407 U.S. at 530. While these factors assist in determining whether a particular defendant has been denied his right to a speedy trial, none is sufficient or necessary to find a violation. *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013).

b. Presumptive Prejudice and Length of Delay.

To “trigger this [*Barker*] analysis, the defendant must first demonstrate that the “interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” *Shemesh*, 187 Wn. App. at 145 (quoting *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). This Court considers the conduct of both attorneys, the duration of pretrial custody, the complexity of the

charges, and the extent to which a case involves a reliance on eyewitness testimony. *Barker*, 407 U.S. at 529-30; *Ollivier*, 178 Wn.2d at 827; *Iniguez*, 167 Wn.2d at 291-92.

In *Iniguez*, the Court found presumptive prejudice based upon a delay of more than eight months where: (1) the defendant was in custody throughout this period; (2) the charges against him were not complex; and (3) such a lengthy delay “could result in witnesses becoming unavailable or their memories fading,” thus impairing his defense. *Iniguez*, 167 Wn.2d at 292. The Court in *Iniguez* explained that the eight-month delay was, “just beyond the bare minimum needed to trigger the *Barker* inquiry.” *Iniguez*, 167 Wn.2d at 293; See also *Ollivier*, 178 Wn.2d at 828 (23-month delay enough to trigger *Barker* analysis).

Here the almost 12 month delay establishes presumptive prejudice because it considerably exceeds the 8 month “bare minimum”. Also, as in *Inguiez*, the case was not complex, Thunder objected to the many continuances for defense counsel to become prepared and several continuances were due to government mismanagement in obtaining DNA analysis. None of the reasons for the delay could be attributable to Thunder. Under the *Barker*

factors, this Court must find that these delays exceeded the bare minimum because none were needed, justified or endorsed by Thunder. *Barker*, 407 U.S. at 529-30.

i. Reasons For Delay.

Reviewing the reasons for the delay, courts are necessarily compelled to adopt an ad hoc balancing test in speedy trial cases. *Iniguez*, 157 Wn.2d at 283. The reviewing court examines the conduct of both the state and the defendant and engages in a balancing test to determine whether speedy trial rights have been denied. *Id.* The question looks at fault: who is to blame for the delay. That is, whether the government or the defendant is more to blame. *Barker*, 407 U.S. at 530.

Here trial counsel and the state repeatedly requested and were granted time to prepare for trial. Thunder however did not endorse this need and objected. He was also prepared to proceed pro se without delay. This fact distinguishes Thunder's case from *Ollivier*.

When the Court analyzed the *Barker* "delay" factor, it did so in the context of lack of objection from the defendant, and the Court cited to cases where the defendants either requested or agreed to

the continuances. *Ollivier*, 178 Wn.2d at 803 (citing, *U.S. v. Larson*, 627 F.3d 1198, 1210 (10th Cir. 2010)) (defendant did not assert right to speedy trial during any of many motions to continue) *U.S. v. Lane*, 561 F.2d 1075, 1076 (2nd Cir. 1977) (defendant requested most of continuance due to ill wife who was a defense witness); *Gattis v. Snyder*, 278 F.3d 222, 229-30 (2002) (defendant requested most of continuances for medical testing); *U.S. v. King*, 483 F.3d 969, 973-74 (9th Cir. 2007) (most of continuances requested by defendant and no purposeful manipulation of speedy trial by government).

Reviewing *Ollivier* and the cases cited to therein, it appears that for a motion for a continuance to be attributable to the defendant, the defendant must either agree with defense counsel's request for a continuance or remain silent. *Ollivier*, 178 Wn.2d at 829-30.

In *Ollivier*, the Court determined the requests for continuances were attributable to the defense and the delays were reasonable based on the complexity of *Ollivier's* case, the need for forensic computer analysis, and the need for forensic experts. *Ollivier*, 178 Wn.2d at 830-31. The Court relied on large part on the

fact that counsel requested the continuances to be prepared for trial. *Id.*

Here unlike in *Ollivier*, Thunder's case was not complex, there was no need for forensic experts (other than competency evaluation) and he was at all times prepared to proceed to trial without counsel. Under these circumstances, the reasons for the delays - unprepared counsel - cannot be attributable to Thunder and must weigh against the state.

ii. Government Mismanagement.

"Where there is evidence of negligence on the government's part, but no bad faith, the Supreme Court has declared that a presumption of prejudice may arise, *depending upon the length of the delay.*" *Ollivier*, 178 Wn.2d at 841 (*citing Doggett*, 505 U.S. at 657). Negligence is not

automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him...*Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. Although *negligence is obviously to be weighed more lightly than a deliberate intent to harm* the accused's defense, *it still falls on the wrong side* of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that *the weight we assign to official negligence compounds over time as the*

presumption of evidentiary prejudice grows....
Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority....

Ollivier, 167 Wn.2d 841 n.11 (citing *Doggett*, 505 U.S. at 656-68).

Here, the government mismanagement was not intentional but it was negligent, and accordingly cannot to be tolerated. *Id.* Several of the state's requested continuances were based on its own mismanagement of DNA evidence.

In *Michielli* the state delayed adding four serious charges until three days before trial, without any justification. The Court found the defendant was prejudiced in his right to a fair trial because he was forced to choose between waiver of his speedy trial right and his right to effective assistance of counsel. *State v. Michielli*, 132 Wn.2d 229, 245, 937 P.2d 587 (1997).

In *State v. Sherman*, 59 Wn. App. 763, 770, 801 P.2d 274 (1990), the Court dismissed the charges against the defendant for governmental mismanagement holding that that a defendant should not have to choose between seeking continuance to obtain state

controlled evidence and effective assistance of counsel. *Id.* (citing *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Similarly, here Thunder's counsel was forced to choose between seeking a continuance to wait for the delayed DNA evidence and proceeding without being prepared. Even though Thunder was ready to proceed without counsel, he was prejudiced because his attorney was forced to move for a continuance or proceed unprepared. In *Sherman* the Court declared that Sherman would have been prejudiced if forced to proceed to trial because "the right to counsel is an ingredient of a fair trial." *Sherman*, 59 Wn. App. at 772 (citing *State v. Burri*, 87 Wn.2d 175, 183, 550 P.2d 507 (1976)).

In sum, the reasons for the delays were not attributable to Thunder because his attorney moved for continuances over Thunder's objection and any violation of speedy trial for counsel to prepare constituted an impermissible Hobson's choice. *Id.* Consequently, this factor weighs in Thunder's favor.

iii. Assertion of Speedy Trial Rights.

In *Ollivier*, there was no evidence that the defendant objected to any of defense counsel's continuances and Ollivier did

not raise any concerns with effective assistance of counsel. *Ollivier*, 178 Wn.2d at 819-22.

Thunder's case stands in stark contrast to *Ollivier* and the cases cited therein. Thunder moved to proceed pro se and he objected to each and every continuance. Several of the continuances were also directly related to the state's mismanagement of its case. In particular the state's failure to timely produce DNA results.

Defense counsel and the prosecutor joined in many of the requests for continuances, but always over Thunder's objection and simultaneous to Thunder's repeated requests to proceed pro se. Consequently, this factor weighs in Thunder's favor.

iv. Particularized Prejudice.

In *Ollivier*, the Supreme Court clarified that in addition to meeting the threshold showing of presumptively prejudicial delay, the defendant can also establish "particularized prejudice" which exists in the case of extraordinary delay, where the government's conduct is more egregious than mere negligence. *Doggett*, 505 U.S. at 654; *Ollivier*, 178 Wn.2d at 840, 842.

Three types of particularized prejudice may arise from delay:

oppressive pretrial incarceration, anxiety of the accused, and impairment to the defense. *Iniguez*, 167 Wn.2d at 295. Some form of incarceration and anxiety are always present with pre-trial, incarcerated defendants but this factor becomes oppressive when there is some special harm which distinguishes the defendant's case from other usual cases. *Ollivier*, 178 Wn.2d at 844-45.

The Supreme Court held that a defendant is not required to substantiate actual prejudice to his ability to defend himself because 'excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. Courts presume this prejudice intensifies over time. *Doggett*, 505 U.S. at 652, 655.

Here, Thunder was exposed to special harm distinguishable from other cases because he was subjected to heightened anxiety and concern that were exacerbated and compounded by the trial court's forcing Thunder to accept extensions of time to proceed with unwanted counsel, and to remain incarcerated due in part to government mismanagement. These facts when weighed under the *Barker* factors establish particularized prejudice that distinguishes Thunder's case from others. *Ollivier*, 178 Wn.2d at 844-45.

Thunder respectfully asks this Court to find that his state and federal constitutional rights to a speedy trial were violated under the Sixth Amendment and art. I, § 22. Thunder respectfully requests dismissal on all counts.

- c. The delay violated CrR 3.3, which required Mr. Thunder's trial commence within 60 days of arraignment or charging.

CrR 3.3 requires that a defendant who is in custody be brought to trial within 60 days, or the trial court must dismiss the charge. The speedy trial period excludes continuances based "on motion of the court or a party" where the continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(e)(2); (f)(1), (2).

Although the rule is "not a constitutional mandate," its purpose is to protect the constitutional right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). "[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." *Id.* (quoting *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)). "Failure to strictly comply

with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice.” *State v. Raschka*, 124 Wn. App. 103, 112, 100 P.3d 339 (2004) (citing *State v. Adamski*, 111 Wn.2d 574, 582, 761 P.2d 621 (1988)). If the court finds

that the time for trial deadline has passed and the defendant's objection was properly raised, the court has no discretion in deciding whether to dismiss the charges. The charges “shall” be dismissed with prejudice.

State v. Swenson, 150 Wn.2d 181, 186, 75 P.3d 513 (2003).

- i. Thunder did not waive his objection to the delay.

Because the party who moves for continuance “waives that party's objection to the requested delay,” a motion for continuance made by defense counsel is generally presumed to waive objection on behalf of the defendant. CrR 3.3(f)(2); *State v. Vicuna*, 119 Wn. App. 26, 33, 79 P.3d 1 (2003), *rev. denied* 52 Wn.2d 1008 (2004). But this rule is not limitless. Where a defendant repeatedly objects to further continuances and insists upon his right to a speedy trial, that request must be respected. The Court of Appeals has therefore dismissed a conviction for a CrR 3.3 violation despite defense

counsel's agreement to continuances beyond the speedy trial period. *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009).

In *Saunders*, defense counsel requested 2 continuances for the purpose of investigation or preparation for trial, 2 were agreed motions purportedly for the same purpose, and 2 were requested by the state without adequate explanation – but Saunders personally objected to all 7 and refused to sign each and every continuance form, and moved to dismiss pro se. *Saunders*, 153 Wn. App. at 212-15. The Court reversed and dismissed the charges because the court did not provide adequate explanation for the continuances and Saunders “consistently resisted extending time for trial,” *Saunders*, 153 Wn. App. at 220-21.

Like Saunders, here, defense counsel's prepared requests for continuance cannot be attributed to Thunder, because he like Saunders, personally objected to all 7 and refused to sign each and every continuance form, and moved to dismiss pro se. *Saunders* is indistinguishable on these facts and accordingly, controls the outcome of this case which requires dismissal on all counts.

By contrast, in *State v. Franulovich*, the Court found defense

counsel waived his client's objection on the facts of that case: the defendant never objected to a continuance, but only moved to dismiss afterwards, through new counsel. *Franulovich*, 18 Wn. App. 290, 290-91, 293-94, 567 P.2d 264 (1977), *rev. denied*, 90 Wn.2d 1001 (1978). However, the Court also recognized "counsel does not possess... 'carte blanche under any and all conditions to postpone his client's trial indefinitely. Counsel's power in this regard is not unlimited.'" *Franulovich*, 18 at 294 (*quoting Townsend v. Superior Court*, 15 Cal.3d 774, 781-82, 126 Cal.Rptr. 251, 543 P.2d 619 (1975)).

Unlike *Franulovich*, Thunder made clear objections for almost 12 months. The defense counsel requested 5 continuances for the purpose of investigation or preparation for trial, there were 3 agreed motions purportedly for the same purpose, and 3 more were requested by the state mostly for trial preparation— but Thunder personally objected to all 11 refused to sign each and every continuance form, and moved to dismiss pro se. CP 4, 5, 13, 68, 73, 121.

Far from waiving his CrR 3.3 right, there is nothing more Thunder could have done to preserve it. Defense counsel's motions

for continuance not only failed to waive Thunder's speedy trial right, but may have been inconsistent with his ethical obligation. Under RPC 1.2(a), counsel "shall abide by a client's decisions concerning the objectives of representation and... shall consult with the client as to the means by which they are to be pursued."

Because "the client controls the goals of litigation," where the client's goal is to go to trial and the client has rejected further negotiation, a strategy to delay trial for further negotiation is a breach of the attorney's ethical duties.

Saunders, 153 Wn. App. at 218, n 9.8.

Although in *Saunders*, the specific issue was whether to negotiate, whereas here it was the choice between preparation and trial, in both cases the "fundamental decision" was whether to go to trial. Thunder never acquiesced or requested counsel to move for continuances to prepare for trial. At all times, Thunder was frustrated by the pace of his attorney's investigation and wanted to proceed pro se. He signed each order of continuance with language indicating his objections and verbally objected whenever possible.

- ii. The court abused its discretion by granting continuances which were manifestly unreasonable.

Although the application of CrR 3.3 is reviewed de novo, a trial court's decision to grant a continuance is reviewed for abuse of discretion. *Kenyon*, 167 Wn.2d at 135. However, this discretion must be considered within the context of three principles: (1) a defendant has a fundamental right to a speedy trial under the Sixth and Fourteenth Amendments and art. I, § 22 (2) "a defendant has no duty to bring himself to trial;" and (3) the trial court bears the ultimate responsibility for ensuring a speedy trial. *Barker*, 407 U.S. at 527; *State v. Lemley*, 64 Wn. App. 724, 728, 828 P.2d 587, rev. denied, 119 Wn.2d 1025 (1992); CrR 3.3(a). Here, the court abdicated that duty by allowing a manifestly unreasonable delay.

In *Saunders*, the trial court abused its discretion by granting continuances where the prosecutor who made the motions could not articulate "adequate basis or reason," but apparently expected their motions to be granted because they asked. *Saunders*, 153 Wn. App. at 220. The Court found the three continuances in question were "manifestly unreasonable, and exercised on untenable grounds and for untenable reasons." *Saunders*, 153 Wn.

App. at 221. *See also State v. Nguyen*, 131 Wn. App. 815, 822-4, 129 P.3d 21 (2006) (trial court abused its discretion by granting a continuance because the prosecutor wanted to “track” the defendant’s case with a string of similar robberies, without evidence of a connection).

State v. Campbell, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169 (1985), case the state might cite to is easily distinguished. There, the trial court did not abuse its discretion in granting a continuance requested by defense counsel to prepare for trial, even over the defendant’s objection. *Campbell* involved three counts of aggravated first degree murder, aggravating factors, the death penalty, and large amounts of complex forensic physical evidence, but the trial was delayed for only six months and the defendant objected to only a single continuance.

Campbell does not stand for the proposition that defense counsel may postpone trial indefinitely, over her client’s objection, merely by asserting the continuances are needed to prepare for trial. Because the trial court has the duty to ensure a speedy trial, at some point the delay becomes so unreasonable the court must end

it. As *Saunders* cautioned, trial courts should tread carefully and provide adequate explanation before granting a continuance where defense counsel moves for a continuance for further negotiation and the defendant objects to a continuance that will delay trial-- that the state agrees to such a continuance does not relieve the trial court of its burden. *Saunders*, 153 Wn. App. at 218, n9.

Similarly, here, the court should have tread carefully and provided adequate explanation for the multiple continuances for trial preparation in a simple case, where Thunder objected and was ready to proceed pro se. The trial court must also consider “counsel’s duty under RPC 1.2(a) and its own duty to see that [the defendant] receive[s] a timely trial,” and abuses its discretion if it fails to do so. *Id.* at 218.

Here, the trial court abused its discretion by granting continuance after continuance long past the point of reasonableness, and by failing to exercise its discretion to ensure Thunder’s defendant’s speedy trial right was respected. The “administration of justice” is not an incantation to negate any CrR 3.3 violation; it must have an articulable, adequate basis. Our Supreme Court held, if that phrase “can be invoked at any time to

grant a continuance, then ‘there is little point in having the speedy trial rule at all.’” *Nguyen*, 131 Wn. App. at 824 (*quoting Adamski*, 111 Wn.2d at 580).

Here similar to *Saunders* and *Nguyen*, the defense and prosecution paid lip service to the need for time to prepare in a simple case that did not require much time for preparation. The use of “preparation” as grounds for granting a continuance where none was truly warranted is no different than granting a continuance to “track” a case” or to simply grant one assuming the moving part would not have asked unless the continuance was needed. *Saunders*, 153 Wn. App. at 220; *Nguyen*, 131 Wn. App. at 822-24.

The trial court’s repeated granting of continuances without a valid basis and over Thunder’s objections violated Thunder’s CrR 3.3 speedy trial rights. Accordingly, this Court should remand for dismissal of all counts.

3. THE COURT ACTED WITHOUT STATUTORY AUTHORITY BY IMPOSING SIX COMMUNITY CUSTODY CONDITIONS THAT WERE NOT CRIME-RELATED.

The trial court imposed numerous community custody provisions related to sexually-explicit materials, alcohol and the

Internet that were unrelated to Thunder's crimes and not authorized by statute. CP 243.

A defendant may raise a challenge to community custody conditions for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). This Court reviews de novo whether the trial court had statutory authority to impose a specific condition. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). If the court has statutory authorization to impose a condition, this Court reviews the condition for abuse of discretion. *Johnson*, 180 Wn. App. at 326. A trial court abuses its discretion if it imposes a sentencing condition without statutory authority. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

A trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. *Johnson*, 180 Wn. App. at 325. Any sentencing condition that is not expressly authorized by statute is void. *Johnson*, 180 Wn. App. at 325.

RCW 9.94A.703 provides the court with authority to impose community custody conditions that are listed in the statute. In addition to the specific list of permitted conditions within RCW

9.94A.703, the sentencing court may also impose “crime-related” conditions under RCW 9.94A.703(f); *State v. Irwin*, 191 Wn. App. 644, 658, 364 P.3d 830 (2015). A condition is “crime-related” only if it “directly relates to the circumstances of the crime.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 17 (2008); *Irwin*, 191 Wn. App. at 656; RCW 9.94A.030(10).

While the condition must be directly related, it need not be causally related to the crime. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related conditions of community custody must be supported by evidence showing a “nexus between the crime and the condition imposed.” *State v. Norris*, ___ Wn. App. ___, 404 P.3d 83, 89 (2017); *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (crime-related conditions must be supported by evidence showing the factual relationship between the crime punished and the condition imposed).

In *Warren*, 165 Wn.2d at 32, the Supreme Court discussed community conditions that interfere with fundamental constitutional rights. *Id.* The Court held that these crime-related conditions “must be **reasonably** necessary to accomplish the essential needs of the

State and public order.” *Warren*, 165 Wn.2d at 32 (emphasis added).

- a. The conditions pertaining to sex-related businesses and sexual explicit materials are not authorized by statute.

The trial court ordered the following conditions:

(9) Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material absent approval of treatment provider.

(10) Do not possess, use, access, or view sexually explicit material as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 243. This Court must strike both conditions because RCW 9.94A.703 does not explicitly authorize either of them and neither are crime-related.

- i. Sex Related Businesses.

Recently, the Court in *Norris* addressed the same challenged condition (9) with the exception that Thunder’s sex-related business condition contains the language, “absent approval of treatment provider.” *Norris*, 404 P.3d at 88-89; CP 243. *Norris* pled guilty to three counts child molestation in the second degree

where she repeatedly had sex with a minor in various private residences. *Norris*, 404 P.3d at 85-86. Norris appealed her conditions on grounds that they were not crime-related or authorized by statute. *Norris*, 404 P.3d at 88-89.

The Court of Appeals in *Norris* rejected Division Three's ruling in *Magana* which upheld this condition prohibiting entering a sex-related businesses on grounds that it is crime-related in all sex offenses. *Norris*, 404 P.3d at 88-89; *State v. Magana*, 197 Wn. App 189, 201, 389 P.3d 654 (2016).

The Court in *Norris* held to the contrary that in all sex offenses "there must be some evidence supporting a nexus between the crime and the condition." *Norris*, 404 P.3d at 88-89. In *Norris*, the Court held that entering adult sex-businesses was not related to the child sex offense because there was "no evidence in the record that frequenting sex-related businesses is 'reasonably' related to the circumstances of the crime." *Norris*, 404 P.3d at 89.

The Court in *Norris* conflated the concept of "reasonably" and "directly". However, the term "reasonably" does not replace the term "directly" when related to crime-related conditions. Rather, the term "reasonably relates to "Conditions that interfere with

fundamental rights which “must be ‘sensitively imposed’ so that they are ‘**reasonably** necessary to accomplish the essential needs of the State and public order.” (Emphasis added) *In re Pers. Restraint. of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (quoting *Warren*, 165 Wn.2d at 32).²

The analysis of crime-related conditions in Thunder’s case are not impacted by this error because even though the Court in *Norris* should have used the term “directly” rather than “reasonably”, the conditions in Thunder’s case were neither reasonably nor directly crime-related.

Norris is other-wise both legally and factually on point. In Thunder’s case, as in *Norris*, Thunder was convicted of having sexual intercourse with his girlfriend’s 13 year old daughter in private residences. CP 1-3. There was no evidence that Thunder’s crimes were directly related to frequenting adult, sex-related businesses. Under *Norris*, this condition must be stricken because it is not crime related.

² *C.f. Irwin*, 191 Wn. App. at 656 (citing, *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014) (citing *State v. Autrey*, 136 Wn. App. 460, 468, 150 P.3d 580 (2006))) (discussing “reasonably related conditions in terms of conditions limiting constitutional due process freedom of association rights rather than simply crime-related). None of these cases cite to the Supreme Court decision in *Warren*,.

ii. Viewing Sexually Explicit Material.

In *Norris* the Court upheld the condition (10 here) prohibiting sexually explicit materials as “reasonably” related to the crime because in *Norris* the state presented evidence that Norris sent the victim sex-related text messages that contained a sexually explicit photo of Norris. *Norris*, 404 P.3d at 89.

Norris is factually distinguishable on this condition because in this case, unlike in *Norris*, here, the state did not present any evidence that Thunder accessed sexually explicit materials, erotic materials, or materials depicting a person engaged in sexually explicit conduct. CP 1-3. This Court must strike condition 10 because under *Norris*, and RCW 9.94A.703, because there is no nexus between the condition and the crime sufficient to make the condition “crime-related”.

Thunder also requests this Court clarify that the correct standard is “directly” crime-related, rather than “reasonably” crime-related.

iii. The portion of the condition requiring Thunder not “use” alcohol is not authorized by statute.

The “use” portion of the community custody condition not to

“use or consume alcohol” is not statutorily authorized in this case because Thunder’s crimes were not alcohol related. CP 243. RCW 9.94A.703(3)(e). RCW 9.94A.703(3)(e)

A trial court is statutorily authorized to order an offender refrain from “*possessing* or *consuming* alcohol regardless of whether alcohol contributed to the offense, but may not order a defendant not to *use* alcohol, unless the crime is alcohol related. (Emphasis added) *Norris*, 40 P.32d at 90 (crimes not alcohol related); RCW 9.94A.703(3)(e)).

“Use” of alcohol is different from the consumption of alcohol. Because former RCW 9.94A.703(e) authorizes the imposition of a condition only on “consuming alcohol,” on remand, the court shall strike the words “use or” from condition 12.

Norris, 40 P.32d at 90.

Here, there the state did not present any evidence that Thunder’s crimes were alcohol related. Accordingly, as in *Norris*, the provision prohibiting the “use” of alcohol must be stricken.

- iv. The conditions requiring Thunder obtain an alcohol and chemical dependency evaluation is not authorized by statute.

The lower court imposed the following condition:

(22) Obtain alcohol chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator.

CP 244.

Under RCW 9.94A.703(3)(c), the court may impose “crime-related treatment or counseling services”. Additionally, RCW 9.94A.607(1), specifically authorizes the trial court to impose a chemical dependency evaluation and follow- **if** the crime involved drug use. RCW 9.94A.030(10); *Jones*, 118 Wn. App. at 207-09; *State v. Munoz-Rivera*, 190 Wn. App. 870, 891-94, 361 P.3d 182 (2015). The court may not however order a chemical dependency evaluation or an alcohol evaluation for a crime that involved neither alcohol nor drugs. *Id.*

In *Jones*, the Court of Appeals struck the community custody conditions requiring the defendant to participate in alcohol and mental health treatment and counseling where there were no findings that these conditions were crime-related. *Jones*, 118 Wn. App. at 207-09. The Court held that conditions imposed as “rehabilitative programs” or “affirmative conduct” must be supported by evidence in the record or found by the trial court to be related to the underlying offense. *Jones*, 118 Wn. App. at 208.

The court reasoned that allowing trial courts to order a rehabilitation program, regardless of the program's relationship to the underlying offense, would render superfluous former RCW 9.94A.700(5)(c) (2003), which, like former RCW 9.94A.505(8), provided that trial courts could order an offender to “participate in crime-related treatment or counseling services.” *Jones*, 118 Wn. App. at 207-08.

In *Munoz-Rivera*, the Court struck the community custody condition ordering a chemical dependency evaluation where there was no evidence that substances other than alcohol contributed to Mr. Munoz–Rivera's crimes. *Munoz-Rivera*, 190 Wn. App. at 891-94.

This Court must strike condition (22) in Thunder’s case, because his crimes were not alcohol or drug related, and subsequently, the trial court was unauthorized to impose these conditions. *Munoz-Rivera*, 190 Wn. App. at 891-94; *Jones*, 118 Wn. App. at 208.

- v. The conditions requiring Thunder refrain from use of the Internet are not authorized by statute.

The Court imposed the following conditions without statutory authority. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

(23) No Internet access or use, including email, without prior approval of the supervising CCO.

(24) No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches)....

CP 244.

A prohibition on access to the Internet or possession of computer storage drives, digital cameras is a “prohibition” on conduct that must be crime-related. RCW 9.94A.703(3(f); *O’Cain*, 144 Wn. App. at 774. A condition is not crime-related if there is no evidence linking the prohibited conduct to the offense. *O’Cain*, 144 Wn. App. at 775.

In. *O’Cain*, the court struck down a similar condition barring *O’Cain* from using the Internet because there was no evidence that he used the Internet to facilitate commission of the crime. *O’Cain*,

144 Wn. App. at 774.

Here too, in Thunder's case, there was no evidence that Thunder used the internet to facilitate the commission of his crimes. Accordingly, this Court must strike this provision. *O'Cain*, 144 Wn. App. at 774-75; *C.f., Irwin*, 191 Wn. App. 644 (court upheld a similar condition where the presentence investigation contained evidence defendant took and stored pornographic images during his molestation of underage females.)

4. APPEAL COSTS SHOULD NOT
BE AWARDED.

The appellate courts have broad discretion under RCW 10.73.160(1), to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Grant*, 196 Wn. App. 644, 651, 385 P.3d 184 (2016).

Ability to pay is a significant consideration in the discretionary imposition of appellate costs. *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). "[T]he imposition of costs against indigent defendants raises problems that are well documented — e.g., 'increased difficulty in reentering society, the doubtful recoupment of money by the government, and in equities in administration.'" *Sinclair*, 192 Wn. App. at 391 (*quoting State v.*

Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)).

Once indigency is established, there is a presumption of continued indigency throughout review. *Sinclair*, 192 Wn. App. at 933 (appellate costs stricken for 66 year old, serving 20 year minimum prison sentence); RAP 15.2(f); (Accord *Grant*, 196 Wn. App. at 651-52) (appellate costs stricken- no change in indigency status).

RAP 15.2(f) specifically provides that a defendant is presumed to remain indigent “throughout the review,” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent.” the court should exercise its discretion to waive appellate costs. RAP 15.2(f).

Here, the trial court determined Thunder is indigent and there is no evidence that Thunder’s financial status has changed. CP 846; RAP 15.2(f). In light of Thunder’s indigent status, the fact that there has been no change in his circumstances and the presumption under RAP 15.2(f) that he remains indigent “throughout the review,” this Court should exercise its discretion to waive appellate costs.

D. CONCLUSION

Thunder respectfully requests this Court dismiss his convictions with prejudice for violation of his speedy trial rights. In the alternative, he requests the Court vacate the convictions and remand for a new trial based on the denial of Thunder's right to self-representation. In the alternative, he requests this Court remand for resentencing to strike the offending community custody provisions and deny appellate costs.

DATED this 28th day of November 2017.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Quezon Thunder/DOC#317650, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on November 28, 2017. Service was made by electronically to the prosecutor and Quezon Thunder by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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