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No. 36552-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

LANCE SMITH,

Appellant.

---

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

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BRIEF OF APPELLANT

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## **A. INTRODUCTION**

Lance Smith suffered a traumatic brain injury and long battled mental health issues including delusional disorder. Believing he had a romantic relationship with Jennifer Bonneru, Mr. Smith began contacting her frequently. Though she was unafraid of Mr. Smith, Ms. Bonneru sought protection orders to prevent Mr. Smith from contacting her. The State eventually charged Mr. Smith with two felony no-contact order violations.

Throughout the proceedings, Mr. Smith remained competent to stand trial, and the court granted his request for self-representation. Following a mistrial after jurors questioned his competency, the court revoked Mr. Smith's pro se status and reappointed counsel, reasoning that his disruptiveness and his mental health prevented him from effectively representing himself. Despite many subsequent requests to reinstate his pro se status, the court failed to engage in any further inquiry as to whether Mr. Smith could represent himself.

Because the trial court improperly revoked Mr. Smith's pro se status and failed to correctly apply the law to his subsequent requests for self-representation, he is entitled to reversal of his convictions and remand for new trial.

**B. ASSIGNMENT OF ERROR**

The trial court deprived Mr. Smith of his right to represent himself in violation of Article I, § 22 and the Sixth Amendment.

**C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Article I, § 22 expressly guarantees the right to self-representation where his request is timely, unequivocal, knowing, voluntary, and intelligent. Similarly, the Sixth Amendment implicitly affords such a right. A court may not deny a motion for self-representation merely because it would be detrimental to the defendant or less efficient for the court. Moreover, if the court believes a defendant's mental health impairs his ability to represent himself, the proper course is to evaluate the defendant's competency. Here, the court was initially satisfied Mr. Smith could represent himself, but later revoked his pro se status due to concerns about his mental health and the likelihood the parties would be able to select a jury. The court did not order a competency evaluation. Did the trial court err by revoking Mr. Smith's pro se status under these circumstances?

#### **D. STATEMENT OF FACTS**

- 1. Mr. Smith suffered a head injury which drastically altered his behavior and mental health. Following his accident, he developed delusions regarding a coworker, which resulted in the issuance of no-contact orders and violations of those orders.**

In 2010, Lance Smith worked as a server at Fat Olives restaurant in Richland. 1/7/19 VRP 238. There, he met Jennifer Bonneru, who worked as a hostess. *Id.* They developed a friendly relationship both at and outside of work. *Id.* at 238-39. The two were never romantically involved. *Id.* at 239. At some point after Ms. Bonneru began working at Fat Olives, Mr. Smith had a snowboarding accident resulting in a head injury. *Id.* at 239. When Mr. Smith returned to work a week later, Ms. Bonneru noticed an immediate change in his behavior. *Id.* at 240. He began “acting strange, saying weird things,” attempted to dig holes in concrete, and peeled off window decals at the restaurant. *Id.* The restaurant fired Mr. Smith for his behavior. *Id.*

Subsequently, Mr. Smith began contacting Ms. Bonneru through text messages, letters, and online messages. 1/7/19 VRP 241. The messages were often lengthy and “it was a lot of nonsense.” *Id.* Ms. Bonneru asked Mr. Smith to stop contacting her and changed her contact information. *Id.* After an incident where Mr. Smith sent her

approximately 200 text messages, Ms. Bonneru obtained a no-contact order. *Id.* at 242-43. Additional no-contact orders were put in place as a result of misdemeanor violations of Ms. Bonneru's no-contact order. *Id.* at 244. Ms. Bonneru found Mr. Smith "annoying" but confirmed he had never physically harmed her. *Id.* at 276. Most of his messages involved proclamations of love or wanting to be friends. *Id.* at 276-77.

In the fall of 2017, Mr. Smith sent Ms. Bonneru Facebook messages in violation of an existing no-contact order. 1/7/19 VRP 250. In January 2018, Mr. Smith saw Ms. Bonneru through the window of a local bar. *Id.* at 284-85. From outside the bar, he began waving at her. *Id.* at 285. Ms. Bonneru's friend asked him to leave and called the police. *Id.* at 285-86. Mr. Smith walked across the street to a parking lot, where police arrested him. *Id.*; 1/8/19 VRP 326.

At trial, the defense admitted the facts and argued Mr. Smith's capacity to form knowledge was diminished by his mental illness. 1/7/19 VRP 236; 1/9/19 VRP 507. The defense expert, Dr. Jameson Lontz, opined Mr. Smith suffered from delusional disorder and schizotypal personality disorder. 1/8/19 VRP 342, 344. According to Dr. Lontz, Mr. Smith suffered from delusions he had a romantic relationship with Ms. Bonneru despite reasonable evidence to the

contrary. *Id.* at 342. Moreover, his schizotypal personality made it difficult to form close relationships because it resulted in “oddness” and “eccentricities” that others might find off-putting. *Id.* at 344. As a result of these diagnoses, Dr. Lontz opined Mr. Smith did not “knowingly, intelligently decide on those behaviors” which constituted the alleged violations of a no-contact order. *Id.* at 348. Mr. Smith’s mental health issues were “a genuine psychological incapacity.” *Id.*

Mr. Smith’s mental health issues caused him to speak out of turn throughout the proceedings, to have “outbursts,” and to have difficulty following the court’s orders not to interrupt. *See, e.g.*, 1/7/19 VRP 167-68; 3/14/18 VRP 40; 3/12/18 VRP 45-46. The jury convicted Mr. Smith of both counts of felony violation of a no-contact order. CP 67-68.

**2. Mr. Smith exercised his right to self-representation, which the court granted and then revoked following a mistrial despite multiple competency findings.**

Mr. Smith was charged with two felony violations of a no-contact order under separate cause numbers, one in 2017 and one in 2018. CP 31-32, 91-92. The matters were eventually joined for trial. CP 16. Throughout the proceedings in both cases, Mr. Smith made repeated and unequivocal motions to represent himself.

At arraignment on the 2017 cause number, the court appointed Mr. Smith counsel. 12/14/17 VRP 6-8. Three weeks later at omnibus, Mr. Smith explicitly requested to represent himself. 1/4/18 VRP 3. When the court inquired as to his motivations, he stated, “I am innocent, and I believe that I will - - to make sure I get proved innocent I know that I’ll have a bigger affect [sic] representing myself for my innocence.” *Id.* at 5. Mr. Smith reassured the court he had “studied the law” and understood it well enough. *Id.* at 5-6. The court denied the request, finding appointed counsel “clearly” had “more experience and more legal knowledge” than Mr. Smith. *Id.* at 6. The court nevertheless invited Mr. Smith to provide “a written basis” for why he should represent himself and “why that would be better . . . than being represented by experienced counsel.” *Id.*

A week later during arraignment on the 2018 matter, Mr. Smith again explicitly requested to represent himself. 1/12/18 VRP 9. The court conducted the following colloquy:

THE COURT: Do you wish to be represented by an attorney?

THE DEFENDANT: I wish to represent myself.

THE COURT: Sir, have you ever represented yourself in a criminal proceeding?

THE DEFENDANT: No. But I have had multiple trials.  
And I do understand enough to represent myself.

THE COURT: Now, sir, those trials were not in -- criminal matters. Those were in civil; correct?

THE DEFENDANT: Either way, I understand. I've looked into it -- asking questions from multiple attorneys and researching enough on the internet and asking people that I know. I one hundred percent have enough power in myself to represent myself.

THE COURT: Sir, you understand that the charge is allegation of felony violation of a protection order?

THE DEFENDANT: Yes, I do.

THE COURT: Have you been charged with that offense in the past?

THE DEFENDANT: No, I have not. I got blackmailed into signing for two of them in those two counts. But I'd like you to know, Judge, that I was blackmailed.

THE COURT: All right. And again you understand that anything you do say that could relate to this charge could be used against you in a future prosecution?

THE DEFENDANT: One hundred percent.

THE COURT: All right. Do you know what the potential statutory maximums are for this charge, violation of a protection order, felony level?

THE DEFENDANT: No one has told me. No.

THE COURT: Those statutory maximums are up to five years in jail and a fine not to exceed \$10,000. Do you have any formal training in the law?

THE DEFENDANT: Just from what I've received from what you guys have told me, what attorneys have told me, and what I have seen live in court.

And I have actually received some training over at the forensic ward in Eastern State Hospital. Every day I had to go to a class to become competent where a teacher actually showed us videos on law every single day. He showed us all the definitions. He showed us what everybody represents in the court, what we're allowed to say, and what we're allowed to do. I had that training for six months.

THE COURT: Are you familiar with the rules of evidence?

THE DEFENDANT: I'm not, like, greatly familiar with them; but I am familiar with them. But I have no evidence anyways. So I would -- that would seemed to be the last person's problem -- was that I needed to know the rules of evidence. But, I mean, no one has addressed me too much of those.

THE COURT: Are you familiar with the Revised Code of Washington which defines the charge here and determines what the necessary elements are?

THE DEFENDANT: Yes. I do understand that.

THE COURT: All right. So you've already reviewed RCW 26.50.110(5).

THE DEFENDANT: I believe I have reviewed it one time or two times.

THE COURT: Do you understand that, were you to represent yourself, the Court couldn't help you?

THE DEFENDANT: I heard someone -- my attorney that you guys gave me told me that the Court can give you an attorney at your side.

So that's wrong?

THE COURT: Well, as to my first question to you, you understand that the Court itself cannot help you?

THE DEFENDANT: I understand that, yes. Definitely.

...

THE COURT: Well, I'll treat your request in the alternative: So you indicate that you're not familiar with the rules of evidence or the statutes that would apply in this case?

THE DEFENDANT: The statutes to the evidence rule that you're bringing up?

THE COURT: Well, they are different things.

THE DEFENDANT: Like I said, I believe I am a little bit relevant with the statutes, not so much the evidence.

...

THE COURT: Do you have prescribed medication that is prescribed for you to take?

THE DEFENDANT: As of right now, from my Transitions stay that I just got out of, like, a week ago, my last psychological doctor told me I am not bipolar and there is no need for me to take any medications other than Ambien for sleep. That's what my last psychological doctor told me. And I have paperwork at my house stating that.

1/12/18 VRP 8-15.

The court also discussed the concept of "standby counsel" with Mr. Smith, which he understood, and Mr. Smith asked to clarify that he

would still be able to conduct the trial himself even with standby counsel appointed. *Id.* at 12-13. Mr. Smith also indicated he would continue to pursue pro se status in the 2017 matter as well. *Id.* at 15. Despite this extensive colloquy, the court denied Mr. Smith's request to represent himself. *Id.* at 16. The court made no finding other than that it "was not persuaded today . . . that it is appropriate" and appointed counsel over Mr. Smith's objection. *Id.* at 16, 18.

On January 25, 2018, the court ordered a competency evaluation for Mr. Smith. 1/25/18 VRP 2; CP 5-11. The resulting evaluation determined Mr. Smith was competent to stand trial, and the court entered an order of competency on February 15. CP 15. The same day, Mr. Smith again moved to represent himself on both matters. 2/15/18 VRP 13. In response to the court previously asking him "to come up with a good enough basis" for his request, Mr. Smith provided a letter indicating he understood the legal process and stated he understood he had to follow the rules of evidence. *Id.* at 15. His then-assigned counsel was also satisfied Mr. Smith understood his rights and the risks involved in self-representation. *Id.* at 14. The State also reiterated those risks and his potential consequences to Mr. Smith, and Mr. Smith stated

he understood “100 percent.” *Id.* at 16-17. The court granted the request to proceed pro se. *Id.*

Two weeks later at a consolidated hearing, the court attempted to discourage Mr. Smith from persisting with his self-representation. 2/28/18 VRP 51. Mr. Smith rejected the court’s entreaties, stating, “Ok. That’s your opinion,” and declined to have counsel reappointed. *Id.* The matters proceeded to trial on March 12, 2018 but resulted in a mistrial. 3/12/18 VRP 86-87. During jury selection, some of Mr. Smith’s comments, questions, and gestures caused at least two potential jurors to openly question his competence and his ability to represent himself. *Id.* at 81. After removing the venire, the court expressed concern Mr. Smith’s behavior had “created a situation where this jury will not be fair to you,” and found he was “presently unable to represent” and “that there is no reason for this court to believe that [he] could successfully pick a jury.” *Id.* at 83. Mr. Smith did not believe the jury was irreparable tainted, telling the court, “I understand that, but I believe they will be fair to me, even if it looks that way.” *Id.* Finding the venire “tainted beyond the point of recovery,” the court declared a mistrial. *Id.* at 86-87. The court did not order another competency evaluation.

At a hearing on March 14, the court questioned Mr. Smith's ability to continue pro se. 3/14/18 VRP 32-33. Mr. Smith asked whether he had made a mistake or broken a law during his trial, or whether the court had held him in contempt for his behavior. *Id.* The court could not say that any of those events had occurred. *Id.* Mr. Smith pleaded with the court for another opportunity to conduct his own trial, stating, "If you give me another chance to represent myself . . . [y]ou'll see one hundred percent law and order. I'll follow all the rules. I'll make no mistakes." *Id.* at 36. He reiterated to the court, "I understand your rules. I understand what I'm allowed to do . . . I know it enough to pick a jury. I know enough to question witnesses." *Id.* at 37.

The court found Mr. Smith "simply unable to keep from acting out. And that makes it impossible for [him] to discharge the role of representing [him]self." 3/14/18 VRP 40. The court further found he was sufficiently disruptive such that the parties would not be able to pick a jury, and "there's no reasonable likelihood that [he] can effectively represent [him]self." *Id.* at 40-41. Additionally, the court found Mr. Smith had "waived by conduct" his right to self-representation, and that "mental health not rising to the level of capacity . . . while not an issue originally, through later conduct has

changed the calculus properly considered. It means that it would deny Mr. Smith substantial rights to allow him to continue to represent himself.” *Id.* at 44, 50. The court reappointed counsel to Mr. Smith. 3/14/18 VRP 43.

**3. Mr. Smith subsequently made repeated requests to regain his pro se status.**

Following the court’s revocation of Mr. Smith’s pro se status, he made several additional requests reasserting his right to self-representation. On April 11, 2018, defense counsel moved to obtain an independent competency evaluation. CP 21-25. Dr. Lontz, the defense’s independent evaluator, found Mr. Smith competent and the court entered an order to that effect on July 25. CP 28; 7/25/18 VRP 4-5. That day, the court acknowledged Mr. Smith had sent the court various letters, which Mr. Smith stated were intended to “make a motion . . . to gain my rights back to represent myself as my own attorney.” 7/25/18 VRP 6. The court stayed those motions pending a secondary evaluation for insanity and diminished capacity defenses. *Id.*

As part of the second defense evaluation, the evaluators again assessed competency and found Mr. Smith was fit to stand trial on October 24, 2018. 10/24/18 VRP 90. Mr. Smith declared he had a “civil liberty” to represent himself and asked the court to confirm that

information. *Id.* at 92-93. The court did not address the inquiry and ended the hearing. *Id.* at 93.

On November 5, 2018, Mr. Smith again informed the court, “Self-representation is a civil liberty and not a privilege granted from a judge.” 11/5/18 VRP 20-21. He further correctly stated, “It’s my civil liberty to represent myself.” *Id.* Similarly, on December 19, Mr. Smith asserted, “For the record of the court, attorney Shelley Ajax does not represent me, I represent myself.” 12/19/18 VRP 50.

On January 7, 2019, the first day of Mr. Smith’s second trial, he informed the court, “I believe it is a civil liberty for me to represent myself as my own attorney.” 1/7/19 VRP 99. The court interpreted Mr. Smith’s statements as a request to proceed pro se, which it denied without any reasoning. *Id.* at 99-100. Mr. Smith reiterated, “I want my rights,” to no avail. *Id.* at 101. The court informed him that it had previously ruled Mr. Smith had abused his right to self-representation, and that to allow him to continue would “seriously affect and/or prevent the administration of justice.” *Id.* at 119. During jury selection, Mr. Smith announced to the venire that he wanted to fire his attorney, and he was a pro se defendant. *Id.* at 161. The court found Mr. Smith’s

exclamations were not “a volitional choice on [his] part” and that he “can’t even control it.” *Id.* at 164.

On January 9 and 10, 2019, the last day of trial and sentencing respectively, Mr. Smith again reiterated his desire to represent himself and his dismay that the court had repeatedly refused his requests.

1/9/19 VRP 517; 1/10/19 VRP 531.

#### **E. ARGUMENT**

**The court erred when it terminated Mr. Smith’s pro se status and when it failed to consider his subsequent repeated requests to reinstate his pro se status.**

*1. Mr. Smith had an explicit, fundamental right to represent himself.*

Criminal defendants have an explicit, fundamental right to self-representation under Article I, § 22 of the Washington Constitution. Const. art. I, § 22 (“the accused shall have the right to appear and defend in person”); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). Similarly, the Sixth Amendment implicitly provides defendants a right to proceed pro se. *Faretta v. California*, 522 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is afforded regardless of its “potentially detrimental impact on both the defendant and the administration of justice.” *Madsen*, 168 Wn.2d at 503 (citing *Faretta*, 422 U.S. at 834). An unjustified denial of an

accused's right to self-representation "*requires reversal.*" *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added). The denial of a request for pro se status is reviewed for abuse of discretion. *Id.* at 504

Although trial courts must employ reasonable presumptions "against a defendant's waiver of his or her right to counsel," that does not "give a court carte blanche to deny a motion to proceed pro se." *Madsen*, 168 Wn.2d at 504 (citing *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)). Where a request for pro se status is unequivocal, timely, voluntary, knowing, and intelligent, courts may not deny a defendant his right to self-representation. *See id.* at 504-05.

"A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly" than if the defendant utilized counsel. *Madsen*, 168 Wn.2d at 505. Moreover, the court "may not deny pro se status merely because the defendant is unfamiliar with legal rules or . . . is obnoxious. Courts *must not sacrifice constitutional rights on the altar of efficiency.*" *Id.* at 509 (emphasis in original).

Likewise, the defendant’s “skill and judgment” is simply not a basis for rejecting his request to represent himself. *State v. Hahn*, 106 Wn.2d 885, 890 n.2, 726 P.2d 25 (1986). Indeed, technical legal knowledge is not “relevant to an assessment of [a defendant’s] knowing exercise of the right to defend himself.” *Faretta*, 422 U.S. at 836. “It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts.” *Id.* at 834. But, “it is the defendant, not his lawyer or the State” who bears “the personal consequences of a conviction.” *Id.* Although “he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)).

Importantly, concern regarding an accused’s competency or mental health alone is insufficient to deny a pro se request; if the court has such concerns, “the necessary course is to order a competency review.” *Madsen*, 168 Wn.2d at 505 (quoting *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001)); RCW 10.77.060(1)(a);<sup>1</sup>*see also*

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<sup>1</sup> “Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional

*In re Detention of Rhome*, 172 Wn.2d 654, 665, 260 P,3d 874 (2011) (“[A] defendant’s mental health status is but *one* factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel”).

2. *Mr. Smith’s requests to proceed pro se were timely, unequivocal, knowing, intelligent, and voluntary.*

On February 15, 2018 the court granted Mr. Smith’s motion to proceed pro se in both matters. This request, as well as two prior requests on January 4 and 12, 2018 was undoubtedly timely and unequivocal, occurring at least a month prior to trial. Mr. Smith provided a letter to the court which defense counsel described as “very concise” and showed “his understanding of the legal process.” 2/15/18 VRP 13-14. Throughout the proceedings, Mr. Smith never wavered from his desire to represent himself.

The record here demonstrates there were independent, identifiable facts showing Mr. Smith’s request was voluntary, knowing, and intelligent, rendering a colloquy unnecessary. *See Madsen*, 168 Wn.2d 515 n.2. Nevertheless, the court engaged in a colloquy to ensure the request was knowing, intelligent, and voluntary. Mr. Smith assured

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person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.” RCW 10.77.060(1)(a).

the court he understood he would be bound by the rules of evidence and would refresh himself accordingly, the proper roles of the court and standby counsel, and the associated risks and potential consequences of his decision. 2/15/18 VRP 14-15. With all of those considerations in mind, Mr. Smith stated he “100 percent” desired to represent himself. On this record, Mr. Smith’s requests to represent himself were clearly timely and unequivocal, as well as knowing, intelligent, and voluntary.

*3. The court erred when it terminated Mr. Smith’s pro se status based on concerns about the administration of justice and Mr. Smith’s mental health.*

A trial court may impose sanctions for a pro se defendant’s improper behavior, and in some circumstances it may terminate pro se status if a defendant “deliberately engages in serious and obstructionist misconduct,” or if delay becomes the defendant’s chief motive.

*Faretta*, 422 U.S. 834-35 n. 46; *Madsen*, 168 Wn.2d at 515 n. 4.

However, even persistent disruptions impairing the administration of justice are insufficient to justify terminating a defendant’s constitutional right to self-representation. *Madsen*, 168 Wn.2d at 509.

In *Madsen*, the defendant moved to represent himself, which the trial court delayed considering for several months. *Madsen*, 168 Wn.2d at 501-02. When the court finally ruled against Madsen, it found he had

been “extremely disruptive,” “repeatedly addressed the court at inopportune times,” and “consistently showed an inability to follow or respect the court’s directions.” *Id.* at 502 (internal quotation marks omitted). The Court of Appeals affirmed the court’s denial of Madsen’s pro se motion, finding his “persistent disruptions impaired the orderly administration of justice.” *Id.* at 509 (internal quotation marks omitted).

The Supreme Court found that reasoning insufficient:

Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The values of respecting this right outweighs any resulting difficulty in the administration of justice.

*Id.* at 509.

Here, Mr. Smith’s behavior mirrored that described in *Madsen*.

He spoke out of turn, interrupted the court and counsel, and had difficulty following directions. *See, e.g.*, 1/7/19 VRP 167-68; 3/14/18 VRP 40; 3/12/18 VRP 45-46. The court found Mr. Smith had “a consistent pattern in hearings and sessions in court of being unable to . . . keep from acting out.” 3/14/18 VRP 40. Moreover, the court found that “continued representation by Mr. Smith of himself on this matter

has in the past and would likely continue into the future seriously affect and/or prevent the administration of justice.” 1/7/19 VRP 119.

As in *Madsen*, the trial court’s primary concern was the perceived inability to efficiently choose a jury and the “orderly administration of justice.” 168 Wn.2d at 509. However, the *Madsen* Court held that these concerns are not sufficient to deny a person his “enshrined” constitutional right to self-representation. *Id.* The *Madsen* Court anticipated and understood that a trial conducted with a pro se defendant would necessarily include delays and inefficiencies, and the Court specifically rejected these concerns as a basis for denying a request for self-representation. *Id.*

If denial of a defendant’s right to self-representation may not be based on concerns about efficiency and the orderly administration of justice, then it defies logic that those same reasons could be sufficient to terminate a defendant’s pro se status. “The value of respecting [the right to self-representation] outweighs any resulting difficulty in the administration of justice.” *Madsen*, 168 Wn.2d at 509. Therefore, it was error for the trial court to terminate Mr. Smith’s pro se status due to interference with the “orderly administration of justice.”

Additionally, while Mr. Smith did cause some potential jurors to be concerned about his mental health, he informed the court he did not share its concerns they might be unfair to him. 3/12/18 VRP 83. The court did not conduct a colloquy to determine if Mr. Smith understood how or why the jury pool might have been tainted by his behavior and the risks of going forward with such a jury. Nor did the court offer Mr. Smith a second chance to conduct jury selection after he assured the court he would follow its directions. The right to self-representation always carries a risk that it will be detrimental both to the defendant and the administration of justice. *Madsen*, 168 Wn.2d at 503. The right is afforded regardless of these potential disadvantages.

Mr. Smith made a timely, unequivocal, and knowing request to proceed pro se, which the court granted. He assumed and understood the risk that jurors might be dismayed by his presentation. That the court was concerned the jurors might be unfair to him and it would be difficult to pick a jury is insufficient to deny him his right to self-representation, particularly where Mr. Smith knowingly and intelligently disagreed with the court's assessment the venire was tainted. Indeed, jurors' concerns about Mr. Smith's mental health may well have been beneficial to his defense or an intended strategy.

Certainly, had appointed counsel generated such concerns about Mr. Smith's mental health during jury selection, or had Mr. Smith behaved similarly during trial while represented, the court would not have declared a mistrial. Moreover, if the court had concerns about Mr. Smith's competency, as noted by members of the venire, the necessary course would have been to order a competency evaluation, which the court did not do. *Madsen*, 168 Wn.2d at 505.

On this record, the trial court erred when it terminated Mr. Smith's pro se status due to concerns about competency, the potential detriment to Mr. Smith, and the orderly administration of justice. This Court should reverse.

*4. The court failed to correctly apply the law when it refused to consider Mr. Smith's subsequent requests to represent himself.*

Even where a trial court has denied or delayed ruling on a defendant's motion to proceed pro se, it must still consider any subsequent motions for self-representation. *See Madsen*, 168 Wn.2d at 506 (trial court delayed ruling on defendant's first motion to proceed pro se but considered second motion for self-representation); *see also State v. Lawrence*, 166 Wn. App. 378I, 271 P.3d 280 (2012) (trial court granted motion to proceed pro se, reappointed counsel at defendant's

request, denied a second motion to proceed pro se, then granted defendant's third motion for self-representation).

Here, after the court terminated Mr. Smith's pro se status, he made repeated, unequivocal requests to reinstate that status throughout the rest of the proceedings. In July 2018, he sent the court letters which he told the court were intended as a "motion . . . to gain [his] rights back to represent [himself] as [his] own attorney." 7/25/18 VRP 6. The court did not consider this motion or engage in any colloquy with Mr. Smith. On at least three other occasions, Mr. Smith asked about his "civil liberty," and asserted his right to represent himself. 10/24/18 VRP 93; 11/5/18 VRP 20-21; 12/19/18 VRP 50. Likewise, the court failed to conduct a colloquy or apply the law. Each of these requests occurred months before trial.

On the first day of trial, Mr. Smith again requested to proceed pro se, but the court refused to entertain the motion. The court found it had "previously ruled that [the right] had been abused and that . . . continued representation by Mr. Smith of himself on this matter has in the past and would likely continue into the future seriously affect and/or prevent the administration of justice." 1/7/19 VRP 119. The

court again failed to conduct a colloquy and refused to address the motion anew.

The court's failure to consider Mr. Smith's subsequent timely and unequivocal requests to proceed pro se is an abuse of discretion.

This Court should reverse.

**F. CONCLUSION**

For the reasons stated above, this Court should reverse Mr. Smith's convictions and remand for new trial.

DATED this 1<sup>st</sup> day of October 2019.

Respectfully submitted,

/s Tiffinie B. Ma  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36552-2-III
	)	
LANCE SMITH,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1<sup>ST</sup> DAY OF OCTOBER, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> LANCE SMITH 1645 COLUMBIA PARK TRAIL RICHLAND, WA 99352	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**Washington Appellate Project**  
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# WASHINGTON APPELLATE PROJECT

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**Appellate Court Case Title:** State of Washington v. Lance Theopolis Smith  
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