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AUG 08 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

No. 81450-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Petitioner.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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## A. PROCEDURAL HISTORY

Kurt Madsen was convicted of three counts of violating a no-contact order for three telephone calls he made to a protected party. CP 123-30. He appealed, arguing that his convictions must be reversed because the trial court improperly refused to grant his multiple unequivocal motions to proceed pro se, which he made months before trial, and during which he cited article 1, section 22, State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001), and other relevant law.

The Court of Appeals affirmed the convictions, holding that the trial court's inchoate "concerns" about Mr. Madsen's competency constituted a sufficient basis for refusing to grant Mr. Madsen's motions for self-representation. Slip Op. at 10. Although Mr. Madsen had offered to undergo psychological examinations and IQ testing, the trial court did not take him up on these offers, did not order a competency evaluation, did not hold a competency hearing, and never questioned Mr. Madsen's competence to stand trial. 3/7/06 RP 12-19. The trial judge refused to grant Mr. Madsen's motion to represent himself simply because he was "concerned" about Mr. Madsen's competence, and the Court of Appeals upheld this ruling. Slip Op. at 10.

In his petition for review, Mr. Madsen argued that the lower courts' rulings must be reversed because under Godinez v. Moran, 509

U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), the competency standard for self representation is the same as that for standing trial or pleading guilty. In Mr. Madsen's case, the trial court never even ordered a competency evaluation, let alone found that Mr. Madsen was incompetent to be tried.

After Mr. Madsen filed his petition, the United States Supreme Court decided Indiana v. Edwards, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). There the Court limited Godinez to the guilty plea context, and held that states may require a slightly higher standard for competence to proceed pro se than for standing trial. Id. at 2388. This Court then granted Mr. Madsen's motion for leave to file a supplemental brief in support of his petition for review, to address Edwards.

## B. ARGUMENT

### 1. **This Court should grant review and reaffirm that in Washington State, the competency standard for proceeding pro se is the same as that for standing trial.**

In Edwards, the Supreme Court held that “the [federal] Constitution permits States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” Edwards, 128 S.Ct. at 2388. Because of the “severe mental illness” requirement, the subset of defendants that States

can deem competent to stand trial but incompetent to proceed pro se is necessarily extremely narrow. Partly because defining that narrow class will likely prove unworkable, but more importantly because independent state law demands it, this Court should hold that in Washington, the competency standard for proceeding pro se remains the same as that for standing trial.

Unlike the federal constitution, the Washington Constitution expressly guarantees the right of self-representation: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .” Const. art. 1, § 22. Significantly, the framers rejected not only the language of the Sixth Amendment, but also the language of the Oregon and Indiana Constitutions, which provide the right to defend in person “and” through counsel. Proposed 1878 Const. art. V, § 13; Ore. Const. art. 1, § 12; Ind. Const. art. 1, § 13; B. Rosenow, ed., The Journal of the Washington State Constitutional Convention 1889 at 511-12 (1999). This insistence on a clear right to proceed pro se is makes sense given Washington’s populist origins. R. Utter and H. Spitzer, The Washington State Constitution: A Reference Guide, 11-12 (2002).

Consistent with the constitutional language and history, both this Court and the Court of Appeals have properly recognized that article 1, section 22 provides a greater right to self-representation than its federal

counterpart. See, e.g., State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931) (“In this state, a defendant may conduct his entire defense without counsel if he so chooses”); Silva, 107 Wn. App. at 609 (holding that article 1, section 22 affords a pro se pretrial detainee a greater right of access to courts than the federal constitution provides). This Court held over twenty years ago that a defendant who is competent to stand trial is competent to represent himself. State v. Hahn, 106 Wn.2d 885, 893, 726 P.2d 25 (1986). Notably, this was seven years before the U.S. Supreme Court appeared to issue the same holding in Godinez.

In sum, the text, history, and structure of our constitution, as well as prior caselaw, support the proposition that the standard for competence to proceed pro se in Washington is the same as that to stand trial. In a future supplemental brief on the merits, Mr. Madsen can expand on this analysis. See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Because Mr. Madsen was competent to stand trial and his requests to proceed pro se were denied based on mere “concerns” about competency, his convictions must be reversed.

**2. Regardless of the standard this Court adopts, the standard the lower courts applied to Mr. Madsen is unconstitutional.**

Washington cannot impose a higher burden on the exercise of the right to proceed pro se than the United States Supreme Court allows under

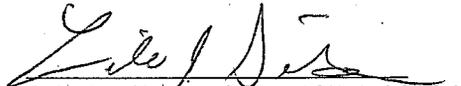
the federal constitution. State v. Fritz, 21 Wn. App. 354, 356-57, 585 P.2d 173 (1978), rev. denied, 92 Wn.2d 1002 (1979). In Edwards, the Court held that even though states may impose a higher competency standard for self-representation than for standing trial, a defendant must be allowed to represent himself unless he has a "severe mental illness." Edwards, 128 S.Ct. at 2388. Because Mr. Madsen was never referred for a competency evaluation and never given a competency hearing, he was not even found to be slightly mentally ill, let alone severely mentally ill. Thus, even if this Court decides to impose a higher standard for competence in the self-representation context, Mr. Madsen's convictions must be reversed.

C. CONCLUSION

For the reasons set forth above and in his petition for review, Mr. Madsen respectfully requests that this Court grant review.

DATED this 7<sup>th</sup> day of August, 2008.

Respectfully submitted,

  
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Attorneys for Petitioner

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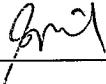
**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 7<sup>TH</sup> DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 7<sup>TH</sup> DAY OF AUGUST, 2008.

X \_\_\_\_\_ 

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