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SUPREME COURT  
STATE OF WASHINGTON

No. 81450-3

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BY RONALD R. CARPENTER

*bjd*  
~~IN THE SUPREME COURT OF THE STATE OF WASHINGTON~~  
CLERK

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STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED

1. Under both the Sixth Amendment and article 1, § 22, a defendant's timely, unequivocal request to proceed pro se must be granted as a matter of law unless the trial court has determined that the defendant is incompetent or that his waiver of counsel is not knowing, intelligent and voluntary. Three months before trial, Kurt Madsen stated that he did not want to be screened by the Office of Public Defense and instead wanted to proceed pro se. He renewed his motion to proceed pro se two months before trial, citing article 1, § 22 of the Washington Constitution. Did the trial court err in repeatedly requiring Mr. Madsen to try new counsel instead of proceeding pro se, without finding that he was incompetent or that his waiver was not knowing, intelligent and voluntary?

2. In Indiana v. Edwards,<sup>1</sup> the United States Supreme Court retreated from its earlier position that the competency standard for waiving counsel is the same as that for standing trial, and instead 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.” Given the “severe mental illness” requirement, the subset of defendants that States can deem

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<sup>1</sup> \_\_\_ U.S. \_\_\_, 128 S.Ct. 2379, 2388, 171 L.Ed.2d 345 (2008).

competent to stand trial but incompetent to proceed pro se is necessarily extremely narrow. Because defining that narrow class would likely prove unworkable, and because the Washington Constitution mandates a stronger right to self-representation than the federal constitution, should this Court hold that in Washington, the competency standard for proceeding pro se remains the same as that for standing trial?

3. Even if this Court holds that Washington has a higher standard of competence for waiving counsel than for standing trial, a defendant may not be denied the right to self-representation unless the court finds he has a “severe mental illness.” Edwards, 128 S.Ct. at 2388. The second time Mr. Madsen moved to proceed pro se – two months before trial – the court again required that he try new counsel instead, stating it had “concerns” about Mr. Madsen’s competency. The court disregarded Mr. Madsen’s offer to “take an IQ test or a psychological exam or whatever you need.” Did the trial court err in refusing to grant Mr. Madsen’s request to proceed pro se based on “concerns” about competency, where it did not order a competency evaluation, did not hold a competency hearing, and did not find that he was severely mentally ill?

#### B. STATEMENT OF THE CASE

The State charged Kurt Madsen with three counts of felony violation of a no-contact order based on telephone calls he made. CP 18-

19. Mr. Madsen hired a private attorney, but that attorney moved to withdraw on January 24, 2006 – three months before trial. When the court asked whether Mr. Madsen needed to be screened by the Office of Public Defense, Mr. Madsen said, “No. I want a pro se order, Your Honor.” The court responded, “You want to proceed pro se?” Mr. Madsen answered, “Pro se. Yes. Exactly.” 1/24/06 RP 2-5.

Without conducting a colloquy, the court ordered counsel be appointed, and stated that it would entertain the motion to proceed pro se again if Mr. Madsen still wished to do so after consulting with new counsel. The court denied Mr. Madsen’s request to “at least get an order stating that I could do some research on this for the meantime.” 1/24/06 RP 5-6.

Mr. Madsen tried new counsel as ordered. But on March 7, he again moved to proceed pro se. When the court asked Mr. Madsen what the problem was, he explained that his attorney wanted him to plead guilty, but he wanted to go to trial. Mr. Madsen stated, “I think that I’d be better off representing myself.” He noted that he had a constitutional right to self-representation, and he cited both article 1, § 22, and State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001). 3/7/06 RP 7-9.

The court stated that instead of proceeding pro se or having the same attorney continue to represent Mr. Madsen, there was an “in

between” solution of assigning new counsel. Mr. Madsen stated that if the court had to impose an “in between” solution, it should allow him to proceed pro se and appoint standby counsel. He explained, “I’d rather represent myself, Your Honor, honestly.” 3/7/06 RP 11.

The judge then turned to the fired defense attorney and asked if he had any concerns about Mr. Madsen’s competency. The attorney stated that he did. 3/7/06 RP 12. Mr. Madsen said, “Oh, wow.” He offered to take an IQ test or a psychological exam or “whatever you need.” 3/7/06 RP 13, 16, 19. The court declined the offer; no competency evaluation was ever ordered, and no competency determination was ever made. Mr. Madsen stated, “I am gonna revert to my constitutional rights, Washington State constitutional rights, Article 1, Subsection 22, I have a right to represent myself and that’s what I’m going to move forward with doing....” 3/7/06 RP 13.

Once again, no colloquy was held on the motion. Once again, the court ordered appointment of new counsel and told Mr. Madsen he would entertain the motion to proceed pro se after Mr. Madsen and new counsel had consulted. Mr. Madsen objected and noted that the court had made the same ruling the last time he moved to proceed pro se. 3/7/06 RP 16-17.

On May 2, 2006, the day before voir dire, Mr. Madsen again moved to proceed pro se, and the trial court again denied the motion.

5/2/06 RP 80, 82, 89; CP 20-22. The case proceeded to trial and the jury found Mr. Madsen guilty as charged. CP 48-50.

On appeal, Mr. Madsen argued that the trial court violated his constitutional right to self-representation. He argued that because his requests to proceed pro se were timely and unequivocal, they should have been granted as a matter of law. Mr. Madsen contended the “competency concern” was a red herring: if the court were actually concerned about competency, it was required to stay the proceedings and order an evaluation, because the competence standard for proceeding pro se was the same as that for standing trial. The fact that the case proceeded to trial belied any claim of incompetence.

The Court of Appeals rejected Mr. Madsen’s arguments. The court reasoned that the trial court did not deny Mr. Madsen’s January 24 and March 7 requests to proceed pro se, but merely “deferred ruling” on the motions while requiring Mr. Madsen to try new counsel instead. Slip Op. at 9-10. The court further reasoned that the trial court had the discretion to require Mr. Madsen to try new counsel again on March 6 because it had “concerns about Madsen’s competency.” Slip Op. at 9-10.

C. ARGUMENT

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

- a. The state and federal constitutions guarantee criminal defendants the right to represent themselves. This Court has long recognized that the Washington Constitution expressly guarantees the right of a defendant to choose to represent himself at trial. Const. art. 1, § 22; State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931). The United States Supreme Court more recently concluded that although there is no such explicit right in the federal constitution, the Sixth Amendment implicitly provides the right to proceed pro se. U.S. Const. amend. 6; Faretta v. California, 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

The right to self-representation is rooted in respect for autonomy. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Although the constitution includes safeguards – like the right to counsel – designed to protect the accused, “to deny the accused in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.” Faretta, 422 U.S. at 815. Thus, “although he may conduct his own defense ultimately to his

own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.” Id. at 834.

In Godinez v. Moran, the U.S. Supreme Court held that “the competency standard for pleading guilty or waiving the right to counsel is [no] higher than the competency standard for standing trial.” 509 U.S. 389, 391, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). This is because “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” Id. at 399 (emphasis in original). Similarly, 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.

The U.S. Supreme Court retreated from Godinez in Indiana v. Edwards, holding 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. However, the Court left it to each state to determine whether it would retain the Godinez competence standard or adopt the

Edwards standard for defendants moving to proceed pro se. Id. at 2385-86.

This Court should hold that Washington retains the Godinez standard of competence for waiving the right to counsel. The Edwards standard is flawed in at least two ways. First, 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. Defining and identifying that narrow class would likely prove unworkable. Indeed, even with only one competency standard, “competency determinations ... have proven notoriously difficult to administer.” Leading Case, The Supreme Court, 2007 Term, 122 Harv. L. Rev. 316, 323 (2008). “Replicating this imprecision by allowing states to create a second competency determination for would-be pro se defendants injects more ambiguity into the criminal trial process for defendants seeking to exercise their constitutional Faretta right.” Id.

Secondly, Edwards undercuts the core value of Faretta: autonomy. See id. at 324-25. Our state constitution provides greater protection for autonomy in many contexts and specifically provides greater protection of the right to self-representation than the federal constitution.<sup>2</sup> Accordingly,

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<sup>2</sup> Furthermore, empirical research now shows that the right to self-representation does *not* sacrifice fairness for autonomy, as was previously assumed. Edwards, 128 S.Ct. at 2388 (citing Hashimoto, Defending the Right of Self-Representation: An Empirical

this Court should reaffirm that in Washington, the competency standard for proceeding pro se remains the same as that for standing trial.

b. The Washington Constitution provides a stronger right of self-representation than its federal counterpart; thus, even though the federal right to proceed pro se may be abridged by a stricter standard of competence, the state constitutional right may not. In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), this Court set forth six nonexclusive criteria for determining whether a provision of our state constitution should be interpreted as providing broader protection in a given context than its federal counterpart. The criteria are: (1) the textual language; (2) differences in the texts; (3) constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Id.* at 58. A review of these factors demonstrates that the Washington Constitution provides a stronger right of self-representation than the federal constitution – a right that should not be infringed by a stricter competency requirement.

i. Text and Textual Differences. The text of article 1, § 22 of the Washington Constitution reads, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel .

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Look at the Pro Se Felony Defendant, 85 N.C.L.Rev. 423, 427, 447, 428 (2007)). Indeed, pro se defendants “appear to have achieved higher felony acquittal rates than their represented counterparts”). *Id.*

...” Const. art. 1, § 22. In contrast, the Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. 6. The textual differences between these provisions is of “great significance.” Silva, 107 Wn. App. at 619. The Washington Constitution expressly guarantees the right of self-representation, id. at 617-18, while the federal constitution merely implies it. Faretta, 422 U.S. at 814. Accordingly, Gunwall factors one and two cut strongly in favor of a more robust right to self-representation in our state.

ii. Constitutional and Common Law History. Gunwall factor three – constitutional and common law history – also supports a stronger right to proceed pro se in Washington. The framers of the state constitution rejected not only the language of the Sixth Amendment, but also the language of the Oregon and Indiana Constitutions, which provide the right to defend in person “and” through counsel. Proposed 1878 Const. art. V, § 13; Ore. Const. art. 1, § 12; Ind. Const. art. 1, § 13; B. Rosenow, ed., The Journal of the Washington State Constitutional Convention 1889 at 511-12 (1999). This indicates that our founders did not consider the language of these constitutions or the federal constitution

“to adequately state the extent of the rights meant to be protected by the Washington Constitution.” Silva, 107 Wn. App. at 619.

As for common law history, “[i]t was never the rule at common law that a defendant could be competent to stand trial and yet incompetent to either exercise or give up some of the rights provided for his defense.” Edwards, 128 S.Ct. at 2391 (Scalia, J., dissenting). And the only tribunal in British history to have “forced counsel upon an unwilling defendant” was the Star Chamber, an institution that “for centuries symbolized disregard of basic individual rights.” Faretta, 422 U.S. at 821.

iii. Structural Differences. Gunwall factor five – structure – always cuts in favor of an independent state constitutional analysis. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

iv. Preexisting State Law and Matters of Particular State or Local Concern. Factors four and six overlap and may be considered in tandem. Gunwall, 106 Wn.2d at 67. In determining whether an issue is a matter of state or local concern, this Court looks to whether the United States Supreme Court has deferred to the States on the issue in question. See id. at 62 n.11; State v. Brown, 132 Wn.2d 259, 597-98, 940 P.2d 546 (1997). The Supreme Court did just that in Edwards, holding that it was up to each State to determine whether it would permit or deny “gray area” defendants to represent themselves. Edwards, 128 S.Ct. at 2385. Given

Washington's preexisting law, our State should permit defendants who are competent to stand trial to represent themselves if they so choose.

Consistent with Washington's constitutional language and history, preexisting state court decisions have recognized that article 1, § 22 provides a greater right to self-representation than its federal counterpart. See, e.g., Hardung, 161 Wash. at 383 ("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, § 22 affords a pro se pretrial detainee a greater right of access to courts than the federal constitution provides). Again, this robust right of self-representation is rooted in a respect for autonomy. DeWeese, 117 Wn.2d at 375.

Even if the defendant [is] likely to lose the case anyway, he has the right--as he suffers whatever consequences there may be--to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

State v. Breedlove, 79 Wn. App. 101, 110-11, 900 P.2d 586 (1995).

The self-representation context is one of many in which Washington residents value and enjoy a stronger right to autonomous decision-making than citizens of other states. For instance, following the passage of Initiative 1000 in November of 2008, Washington is one of only two states in the nation that allows terminally ill patients to choose to

hasten their own deaths. Relatedly, this Court held over 25 years ago that in the interest of protecting individual autonomy and dignity, a patient in a persistent vegetative state has a constitutional right to refuse life-sustaining treatment. In re the Welfare of Colyer, 99 Wn.2d 114, 660 P.2d 738 (1983). The decision was based in part on the Washington Constitution, id. at 120, and was issued seven years before the U.S. Supreme Court issued a similar ruling in Cruzan v. Missouri Department of Health, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990). Similarly, in State v. Koome, 84 Wn.2d 901, 904, 530 P.2d 260 (1975), this Court invalidated a statute requiring parental consent before a minor could exercise her free choice to obtain an abortion. Although the Court relied on both the federal and Washington due process clauses, id. at 904, no controlling federal authority compelled the result at that time.

Most importantly, this Court held in 1986 that a defendant who is competent to stand trial is competent to represent himself. Hahn, 106 Wn.2d at 893. Again, this was many years before the U.S. Supreme Court appeared to issue the same holding in Godinez. Thus, our preexisting state law supports a stronger right to self-representation than the federal constitution, and that right should not be diminished by fluctuating U.S. Supreme Court jurisprudence. This Court should reaffirm that in

Washington, the competence standard for waiving counsel is the same as that for standing trial.

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

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 rights were violated, and he is entitled to a new trial.

When a defendant makes a timely, unequivocal request to proceed pro se, the trial court must engage in a colloquy to determine whether he is waiving his right to counsel knowingly, intelligently, and voluntarily.

Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. In order to make

this determination, the court must apprise the defendant of the nature of the charge, the possible penalties, and the disadvantages of self-representation. State v. Woods, 143 Wn.2d 561, 587-88, 23 P.3d 1046 (2001). Unless the court finds the waiver is invalid, it must grant a timely, unequivocal motion to proceed pro se. State v. Barker, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994).

Mr. Madsen's requests to proceed pro se were timely and unequivocal. Accordingly, the trial court was required to grant the request after ensuring that the waiver of counsel was knowing, intelligent and voluntary. The trial court failed to do this, and therefore Mr. should be granted a new trial.

Mr. Madsen first asked to proceed pro se on January 24, 2006. His request was clearly timely because it was made before his case had even been set for trial and over three months before his trial actually started.

Mr. Madsen's request was also unequivocal. After his retained counsel was allowed to withdraw, the following exchange occurred:

COURT: Counsel, you're withdrawing. I assume the next step in the proceeding would be for him to be screened by OPD?

MR. MADSEN: No. I want a pro se order, Your Honor.

COURT: You want to proceed pro se?

MR. MADSEN: Pro se. Yes. Exactly.

1/24/06 RP 4-5. The court denied the motion, stating that Mr. Madsen could renew his motion after discussing it with new counsel. 1/24/06 RP 5.

At the later hearing on Mr. Madsen's motion for a new trial, the judge deemed this demand to proceed pro se equivocal because it was made in connection with the withdrawal of counsel. 8/9/06 RP 22. But that is not the test. A defendant can only proceed pro se if his counsel withdraws, so withdrawal of counsel cannot render an unequivocal request for self-representation equivocal. See, e.g., Breedlove, 79 Wn. App. at 105 (defense attorney asked to withdraw and defendant moved to proceed pro se; court of appeals reversed conviction because trial court improperly denied defendant's request to proceed pro se).

Courts have even deemed requests to proceed pro se unequivocal where the trial court denied the defendant's request for new counsel and limited the defendant's choices to current counsel or self-representation. See, e.g., Barker, 75 Wn. App. at 238 (conviction reversed for improper denial of request to proceed pro se, even though defendant's first choice was appointment of new counsel); DeWeese, 117 Wn.2d at 372 (grant of request to proceed pro se affirmed even though defendant's first choice was appointment of new counsel). Even a defendant's "remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent

himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver.” Id. at 378. Mr. Madsen never made such remarks or requested new counsel at all, so if the requests to proceed pro se in Deweese and Barker were unequivocal, Mr. Madsen’s certainly was.

Because his request was timely and unequivocal, Mr. Madsen was entitled to proceed pro se as a matter of law unless the trial court determined, after a proper colloquy, that his waiver of counsel was not knowing, intelligent, and voluntary. Barker, 75 Wn. App. at 241; Faretta, 422 U.S. at 835; Breedlove, 79 Wn. App. at 111. The trial court did not engage in such a colloquy – nothing in the record reveals that the judge advised Mr. Madsen of the nature of the charges or the possible penalties before denying his request on January 24. Nor did the court find that Mr. Madsen’s waiver was not knowing, intelligent, and voluntary. There is no legal basis for the court’s requirement that Mr. Madsen give new counsel a chance before being allowed to proceed pro se. Mr. Madsen’s request was timely and unequivocal, so he was entitled to represent himself as a matter of law.

On March 7, 2006, Mr. Madsen again moved to dismiss counsel and again requested to proceed pro se. He stated, “I think that I’d be better off representing myself.” He went on, “According to the

Washington Constitution I have a right to represent myself. Under Article 1, Section 22 I have a right to represent myself.” 3/7/06 RP 8.

For all of the reasons discussed above with respect to the January request to proceed pro se, the March request was also unequivocal. Yet the trial court once again denied the request and once again stated that Mr. Madsen would have to accept the appointment of new counsel and discuss his issues with new counsel first. 3/7/06 RP 16-17.

The March 7<sup>th</sup> denial did contain one new twist: the court raised a concern about Mr. Madsen’s competency. 3/7/06 RP 12. It is true that a defendant must be competent to waive the assistance of counsel and proceed pro se, but at the time of these hearings, Godinez was the law. The standard for competency to proceed pro se was the same as that for standing trial or pleading guilty: the accused must merely have possessed the capacity to understand the proceedings and to assist counsel in his defense. Godinez, 509 U.S. at 391; accord Hahn, 106 Wn.2d at 893; State v. Vermillion, 112 Wn. App. 844, 848, 51 P.3d 188 (2002) (“If a person is competent to stand trial, he is competent to represent himself”). The court was required to order a competency evaluation, hold a competency hearing, and make a competency determination if it had reason to doubt the defendant’s competence. Godinez, 509 U.S. at 402 n.13; Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v.

Robinson, 383 U.S. 375, 377, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); RCW 10.77.060; In re the Personal Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). The trial court did not take these required steps.

Even if this Court adopts the higher standard of competence allowed under Edwards, the trial court still would have had to find that Mr. Madsen suffered from “severe mental illness” such that he “lack[ed] the mental capacity to conduct his trial defense unless represented.” Edwards, 128 S.Ct. at 2385-86, 2388. The trial court here did no such thing. Mr. Madsen offered to undergo psychological testing and IQ testing, but the trial court did not order any evaluations, did not hold a competency hearing, and never mentioned competency again.<sup>3</sup> In Edwards, the defendant had several psychiatric evaluations and three competency hearings, after which the trial court determined he was incompetent to represent himself. Edwards, 128 S.Ct. at 2382. But the trial court here simply denied Mr. Madsen his right to self-representation based upon an inchoate hunch that Mr. Madsen might be incompetent. This denial was unconstitutional under any standard.

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<sup>3</sup> The Court of Appeals’ opinion erroneously states that on March 9 Madsen’s new counsel stated that she “had no concerns about his competency.” Slip Op. at 4. Competency was never mentioned at that hearing. 3/9/06 RPI-10. Indeed, nothing in the record indicates that competency was ever mentioned except at the March 7<sup>th</sup> denial of the motion to proceed pro se.

The Court of Appeals erred in concluding that Mr. Madsen's constitutional right to self-representation was not violated because the trial court repeatedly "deferred ruling" on the motion rather than denying it. Slip Op. at 9-10. The court's logic is flawed because a repeated refusal to grant a motion constitutes a de facto denial. Thus, in both Breedlove and Vermillion, new trials were ordered on Faretta grounds even though the trial court had technically "deferred ruling" on the motions initially. Breedlove, 79 Wn. App. at 109; Vermillion, 112 Wn. App. at 855.

The Court of Appeals further erred in concluding that Mr. Madsen's requests were equivocal based on his failure to renew his motion repeatedly at every possible hearing. Slip Op. at 10-11. Mr. Madsen was, of course, following the trial court's order to try new counsel first. He vociferously objected when the trial court ordered him to try new counsel *again* when he renewed his motion on March 7. 3/7/06 RP 17.

Finally, the Court of Appeals erred in condoning the trial court's refusal to grant the second motion to proceed pro se because of "competency" concerns. As discussed above, under either Edwards or Godinez/Hahn, a trial court may not deny a defendant his constitutional right to self-representation based on bare assertions of incompetence. Under either standard, the trial court violated Mr. Madsen's constitutional right to proceed pro se, and his convictions must be reversed.

D. CONCLUSION

For the reasons set forth above, Mr. Madsen respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted this 15th day of January, 2009.

  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Petitioner

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )

Respondent, )

v. )

KURT MADSEN, )

Petitioner. )

NO. 81450-3

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF JANUARY, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

WILLIAM DOYLE  
KING COUNTY PROSECUTING ATTORNEY  
APPELLATE UNIT  
516 THIRD AVENUE, W-554  
SEATTLE, WA 98104

U.S. MAIL  
 HAND DELIVERY

SIGNED IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF JANUARY, 2009.

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