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STATE OF WASHINGTON
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No. 88111-1

RECEIVED BY E-MAIL

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BLAYNE COLEY,

Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. INTRODUCTION

The State has no legitimate interest in trying an incompetent person on criminal charges. Indeed, the Due Process Clause of the Fourteenth Amendment protects the individual from such prosecution. Consistent with these two points, once a person has been found incompetent, the Legislature has placed the burden on the State to prove that the person's competency has been restored before the prosecution can proceed to trial.

B. STATEMENT OF THE CASE

Shortly after charges were filed in 2008 defense counsel voiced to the court his concerns regarding Blayne Coley's competency. 7/8/08 RP 1. Based on counsel's concerns, the court ordered Mr. Coley to undergo a competency evaluation at Eastern State Hospital(Eastern). Following that evaluation, the court found Mr. Coley competent. 12/9/08 RP 1.

At a hearing in February 2009, Mr. Coley made a motion to represent himself. 2/10/09 RP 5. After a brief colloquy the court granted that request. *Id.* at 5-12. The court designated defense counsel as stand-by counsel. *Id.* at 11.

At a subsequent hearing, Mr. Coley made a motion to "resign my pro se counsel" coupled with a motion to waive his presence at future hearings. 3/9/09 RP 3. The court promptly and with minimal comment

reappointed counsel for Mr. Coley. *Id.* 3. The court did not rule on Mr. Coley's request to waive his presence.

Following yet another continuance, sought by defense counsel over Mr. Coley's objection, Mr. Coley requested that he be permitted to return to his pro se status. 3/31/09 RP 5; 4/20/09 RP 1. The trial court engaged in a brief conversation with Mr. Coley regarding his request. 4/20/09 RP 6-8. Following that conversation, the court expressed concern that Mr. Coley was not competent. *Id.* at 13. Thus, rather than rule on Mr. Coley's pro se request, the court sent him for further evaluation at Eastern. *Id.* at 16.

On July 16, 2009, at the recommendation of the staff at Eastern the court found Mr. Coley incompetent. CP 38-39. The court ordered an additional 90-day commitment to permit possible restoration of competency. *Id.*

In October 2009, the court received a report from Eastern in which the staff opined Mr. Coley was now competent. 10/27/09 RP 2. Defense counsel, however, noted he had obtained a separate evaluation of Mr. Coley that concluded Mr. Coley was incompetent. 10/27/09 RP 1. The court responded that because the report from Eastern reached an opinion of competency there was no longer reason to doubt Mr. Coley's competency and thus the burden was on the defense to note a hearing and contest that conclusion. 10/27/09 RP 2.

After numerous continuances the court conducted a competency hearing on June 11, 2010. At that hearing the court determined that Mr. Coley had the burden of proving his continuing incompetency. 6/11/10 RP 9. Following the hearing the court determined Mr. Coley failed to prove his continuing incompetency. CP 40-41.

A jury convicted Mr. Coley as charged. CP 61-62.

C. ARGUMENT

It is unquestionably a fundamental right not to be tried while incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996); *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (accused person's competency to stand trial is "fundamental to an adversary system of justice"); U.S. Const. amend. XIV. A person is competent to stand trial only when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

Through the statutory scheme of RCW 10.77 the Legislature has allocated to the State the burden of proof. This legislative intent is critical. Because competency proceedings arise out of criminal proceedings the

process which is due is generally that provided by relevant statutes unless “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Medina v. California*, 505 U.S. 437, 445, 112 S. Ct 2572, 120 L. Ed. 2d 353 (1992); *State v. Hurst*, 173 Wn.2d 597, 602-03, 269 P.3d 1023 (2012). *Medina* determined the familiar test of *Mathews v. Elridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), should generally not apply to federal court review of state criminal proceedings. Instead, *Medina* reasoned, because criminal procedure is an issue of particular state concern, the court would apply a more deferential analysis to a state’s legislative choice of which procedure to employ in competency proceedings. 505 U.S. at 445-46. Applying that framework, *Medina* concluded that California’s competency statute did not offend due process where it specifically allocated the initial burden of proving incompetency on a defendant. 505 U.S. at 452-53.

The issue here is narrower than that in *Medina*. This case does not require this Court to decide which party bears the burden of proving competency at an initial competency hearing. Instead, the only issue here is whether after a person has been found incompetent which party bears the burden of proving that competency has been restored such that the incapacity has ceased. Mr. Coley contends the Legislature has allocated to

the State the burden of proving the restoration of competency.

Alternatively, if this Court cannot discern the Legislature's choice, Mr. Coley contends a due process analysis leads to the conclusion that the State must bear the burden of proof.

1. The Legislature has allocated the burden of proving restoration to the State.

The relevant statutes require a court order a competency evaluation whenever there is reason to doubt the person's competency. RCW 10.77.060(1). If, following an evaluation a court determines the person to be incompetent, the court may order the person committed in an effort to restore his competency. RCW 10.77.084(1)(a). RCW 10.77.050 provides "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." This language indicates the status quo, the adjudication of incompetency under RCW 10.77.084(1)(a), continues until the alternative is established. The statute provides a means by which to establish the alternative.

Following the restoration period, a court must hold a hearing to determine whether competency has been restored. RCW 10.77.084(1)(b). But importantly, the person is legally incompetent until that finding has been made. At that hearing, the trial court must make one of three findings: (1) competency has been restored; (2) competency has not been

restored and is unlikely to be restored; or (3) competency has not been restored but is likely to be restored. RCW 10.77.084(1)(b). The required finding in order to proceed is “competency has been restored.” RCW 10.77.084(b). The Legislature did not frame the necessary finding in the negative. As such, this Court should conclude the Legislature did not intend for a court to require an incompetent person to prove the negative.

Looking to other provisions of the statutory scheme illustrates further the Legislature’s intent that the State bears the burden of proof.

Where there is reason to doubt a person’s competency the court must “designate a qualified expert or professional 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) (emphasis added). The Legislature’s decision to afford prosecutors the right to approve the appointment indicates the placement of the burden of proof upon the State. Indeed, in *State v. Wicklund* this court found the provisions of former RCW 10.77.060¹ regarding the appointment of experts could not be waived over the State’s objection precisely because the State had the burden of proving competency. 96 Wn.2d 798, 805, 638 P.2d 1241 (1982).

¹ The former statute required appointment two qualified persons to conduct the evaluation and mandated the state’s approval of at least one of those persons. The current statute requires appointment of only one evaluator who must be approved by the state.

The Legislature has expressly allocated the burden of proof to a defendant in other instances involving the person's mental status. For example a defendant asserting he was insane at the time of the crime must prove that defense. RCW 10.77.030(2). When it has intended a defendant to bear the burden of proof, the Legislature has said so.

Here, nearly a year prior to the June 11, 2010 hearing, the court had determined Mr. Coley was incompetent and the court committed him for an initial restoration and treatment. Because the court had not entered any intervening finding that Mr. Coley's competency had been restored, Mr. Coley remained legally incompetent and the court had to follow the procedures of RCW 10.77.084(1)(b). Yet, rather than address the questions posed in the statute, i.e., whether restoration had occurred, the Court instead returned to RCW 10.77.060(1)(a) and asked whether there was reason to doubt Mr. Coley's competency.

Further, the court did not seem to apprehend the statutory requirement that a hearing was necessary. Rather, the court stated that because the treatment providers deemed Mr. Coley to then be competent nothing more was required, unless Mr. Coley noted a hearing to contest that conclusion. 10/27/09 RP 2. That is plainly contrary to the statutory requirement that upon the end of the initial restoration period "the defendant shall be returned to court for a hearing." RCW 10.77.084(1)(b).

Additionally it is contrary to the directive that the restoration decision be made “after notice and hearing.” *Id.*

The State’s petition echoes this misapprehension of the statutory requirements when it contends

There is no reason that due process requires the burden of proof to shift With a new report from the same agency that previously declared the defendant incompetent now declaring him competent, the burden should remain with the defendant to prove otherwise.

Petition at 8. That claim misses much as nowhere in the statutory scheme has the Legislature vested Eastern or any other agency with the authority to adjudicate a person’s competency or restoration. Instead, the provisions of RCW 10.77 place that authority solely with the trial court. *See In re the Personal Restraint of Fleming*, 142 Wn.2d 853, 863-64, 16 P.3d 610 (2001).

Contrary to the trial court’s reasoning and the State’s argument in its petition, the question in this case is not which party bears the burden of proof at an initial hearing to determine whether a defendant is competent. Instead, because the trial court had already determined Mr. Coley was incompetent, CP 38-39, the only question presented is after a defendant has been found incompetent which party bears the burden of proving his competency has been restored.

In its briefing below and in its petition, the State has contended that a defendant is presumed competent and thus the burden at any stage is on the defendant. However, the Legislature has never adopted such a presumption. Because *Medina* directs the statutes control the procedure to be employed, the absence of a statutory presumption means none exists. And even if such a presumption did exist, that presumption certainly could not survive a judicial determination of incompetency.

A commitment for competency restoration impinges on an accused person's rights because it allows the State to delay a trial, involuntarily commit a person, and potentially administer forced medication. *See Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972) (violates due process to hold person indefinitely based on incompetence to stand trial). Consequently, a person like Mr. Coley, who believes he is competent and wishes to proceed with trial, suffers the impairment of his rights to have a speedy trial, to be at liberty rather than confined while the State attempts to "restore" competency, and to decline unwanted treatment.

Applying a presumption of competency at any point after the court found there was reason to doubt competency poses a significant constitutional dilemma for the State. Specifically, if the law presumes the person's competency there is no justification to permit the curtailment of

his liberty for either the initial evaluation or any subsequent period of treatment and restoration. Instead, the law tolerates that impairment because the person is no longer presumed competent or, in cases such as Mr. Coley's, has been adjudicated incompetent, and the State's interest in rendering those individuals competent permits the intrusion on their liberty. *See Sell v. United States*, 539 U.S. 166, 178-79, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). The claimed existence of a presumption of competency is both lacking in statutory and constitutional support and irrelevant to the analysis of this case.

The trial court misapplied the statute. The reasoning of the Court of Appeals is readily supported and dictated by the statutory structure governing competency proceedings.

2. If the Court determines the Legislature has not allocated the burden of proof, it should determine the due process requires that it be placed on the State.

While the Legislature's judgment generally governs the procedures that apply when competency is at issue, it is of no use and illogical to apply that deferential standard in the absence of a legislative choice. *Medina* illustrates this point. There the California statute codified a presumption of competency and placed the burden of proving incompetency on the defendant. *Medina's* refusal to apply *Matthews* stemmed entirely from the Court's federalism concerns – a reluctance to

dictate state criminal procedures. 505 U.S. at 445. Instead of dictating the procedures which states must follow, the Court sought to determine whether the choice the California legislature made offended deeply-rooted “principle of justice.” *Medina*, 505 U.S. a 446 (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)). Thus, the Court’s analysis focused only on whether the expressed allocation of the burden fell within the range of constitutional options. *Medina*, 505 U.S. at 446.

Hurst provides another example. RCW 10.77.086 specifies that the State bears the burden of proving by a preponderance of the evidence that continued commitment for restoration was appropriate. *Hurst* contended however, the Due Process Clause required the State bear a heightened standard of proof. Because the Legislature had determined the preponderance standard was sufficient to protect the defendant’s rights this Court properly applied *Medina* to concluded that election was constitutionally sufficient.

The deferential standard of review employed by *Medina* stems entirely from the demands of federalism, *i.e.*, that states be permitted to define their own procedures on matters of particular state interest within constitutional limits. Those concerns are not present where a state court is

determining whether its state's procedures to determine whether the comport with due process.

In any event, *Medina* is of no use where the Legislature has not made a choice and has instead remained silent on a critical point of procedure such as which party has the burden of proof. In such a void, the Court should revert to a *Matthews*-type analysis to determine what due process requires. If the Court determines the Legislature's intent is not clear, it should determine that the rights and interests at stake require the State carry the burden of proof.

Matthews set forth a list of factors a court should consider when determining what procedural protections the Fourteenth Amendment requires:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

424 U.S. at 335.

a. The interest at stake is fundamental.

The United States Supreme Court has repeatedly recognized the fundamental right not to be tried while incompetent. *Cooper*, 517 U.S. at

354; *Drope*, 420 U.S. at 171-72. A person facing a restoration hearing under RCW 10.77.084 is by definition incompetent. As in Mr. Coley's case, a court only reaches that hearing after having found the person incompetent. The outcome of a restoration hearing will determine whether the case may proceed to trial. Thus, the interest at stake is a fundamental right.

b. The risk of erroneous deprivation of the right is substantial if an incompetent person must bear the burden of proof.

Maintaining he was competent, Mr. Coley vehemently objected to the Court's decision to return him to Eastern for evaluation in light of the court's significant doubts as to his competency. 4/20/09 RP 15-16. He disputed any contention that he was incompetent even after the State's experts and the trial court found him incompetent. 6/11/10 RP 130.

If he were required to bear the burden of proof throughout the proceedings it is apparent he would have offered no evidence to meet that burden. Simply put Mr. Coley would not have proved what the State's experts knew to be true. And the result of that process is in essence a finding of competency by default, not based upon any proof at all but rather a failure of proof even where the evidence if offered would readily do so.

Permitting a finding of competency by default is little different than permitting a finding of competency based upon the agreement of the parties. This Court has already found that this is plainly not permitted by due process. *Fleming*, 142 Wn.2d at 864.

In addition, placing the burden of proof on an incompetent person is illogical. Addressing which party bears the burden at the initial competency determination on court noted:

It would be both basically unfair as well as contradictory to say that a defendant who claims he is incompetent should be presumed to have the mental capacity to show that he in fact is incompetent. It simply cannot be assumed . . . that a defendant who may be incompetent possesses "sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp."

United States v. Hollis, 569 F.2d 199, 205 (3d Cir. 1977) (citing *United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976)). That unfairness is multiplied where, as in a case such as this, the court has already determined the person incompetent.

The risk of error is unacceptably high where a person who is incompetent is required to prove his competency has not been restored.

c. Because the State has equal or greater access to the necessary evidence, the State's interests are in no way frustrated if it bears the burden of proving restoration.

Certainly, the State has an important interest in bring an accused person to trial. *Sell*, 539 U.S. at 180. But it is equally true that the State

does not have any interest in trying an incompetent person. *Id.* (“the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one”). Requiring the State to prove competency has been restored does not frustrate, and instead furthers, the State’s interest in bringing only competent persons to trial.

Moreover, the burden on the State is minimal as it will have equal or greater access to the relevant evidence. As discussed above, RCW 10.77.060(1) requires the court appoint an expert once it finds reason to doubt a person’s competency. Importantly the prosecutor, but not the defendant, must approve the appointed expert. *Id.* That order of appointment gives the evaluator access to the defendant’s medical records. RCW 10.77.060(2). The evaluator must provide her report to the court and prosecutor. RCW10.77.060(3). If a person is deemed incompetent they may be committed by the court for treatment. RCW 10.77.084(1). Prior to any subsequent hearing, the evaluator or treatment provider must provide another detailed report to the court. RCW 10.77.084(5). The Legislature has provided the State with equal or greater access to the necessary evidence.

On balance, the State must bear the burden of proving competency has been restored.

3. If this Court reverses the Court of Appeals regarding its resolution of the restoration question this Court should remand the matter to that court with direction to reverse the conviction in light of this Court's decision in *State v. Madsen*.

Because the Court of Appeals found the trial court erred in its determination of Mr. Coley's competency the court did not reach Mr. Coley's claim regarding the erroneous denial of his right to represent himself. The trial court's ruling is in direct conflict with this Court's decision in *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to "appear and defend in person, or by counsel." *Madsen*, 168 Wn.2d at 503. The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

It is the defendant who suffers the consequences of a conviction, and,

It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1978)).

While the trial court's discretion to grant a criminal defendant's request for self-representation "lies at a continuum" based on the timeliness of the request, if the request is made well before trial unaccompanied by a request for a continuance "the right of self-representation exists as a matter of law. *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002).

On April 20, 2009, Mr. Coley requested that he be permitted to waive his right to be represented by counsel and represent himself. 4/20/09 RP 1-2. The court briefly discussed the matter with Mr. Coley but the court determined its concerns for Mr. Coley's competency required the court refer him for further evaluation at Eastern. *Id.* at 4/29/09. The court did not resolve Mr. Coley's request to waive counsel.

Following a lengthy confinement at Eastern State Hospital, Mr. Coley was again before the court in November 2009, at which time he continued to voice his displeasure with his attorney. 11/9/09 RP 8.

After several lengthy delays, a competency hearing was finally held in June 2010. At that hearing, Mr. Coley again stated he wished to represent himself. 6/11/10 RP 140-42. Although the court had still not ruled on Mr. Coley's April 2009 motion to represent himself, and did not rule on the request then in front of it, the Court told Mr. Coley he would need to renew the motion at a later date. 6/11/10 RP 143-44, 162.

Mr. Coley made his request to proceed pro se roughly 20 months prior to the commencement of trial.

There is no requirement that a request to proceed pro se be made at every opportunity. Further, a trial court's finding of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.

Madsen, 168 Wn.2d at 507. Nonetheless, Mr. Coley made and renewed his motion several times. Yet the court never ruled on the motion. Indeed, the initial motion was followed by Mr. Coley's commitment for a competency evaluation. "Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. However, simply deferring ruling is incorrect as a matter of law." *Madsen*, 168 Wn.2d at 509

Despite the plain holding of *Madsen*, on appeal the State has responded that Mr. Coley's motion was not denied, but rather his "April 20, 2009, request was put in abeyance and then later abandoned." Brief of Respondent at 13. First, the State makes no effort to provide a legally significant distinction between holding the motion in "abeyance" and "deferring" ruling on it. Mr. Coley maintains there is none, whatever the term, the court is not ruling on his motion as required. As *Madsen* makes clear, the trial court's failure to address the motion "is incorrect as a matter of law." 168 Wn.2d at 509.

Second, Mr. Coley did not abandon his motion. The record makes clear that following his lengthy confinement at Eastern, Mr. Coley renewed his request at subsequent hearings. 6/11/10 RP 140-42. Mr. Coley timely, repeatedly and unequivocally requested to represent himself. The trial court never ruled on his requests. Thus, if this Court reverses the Court of Appeals opinion, this Court should remand the matter to the Court of Appeals with direction to reverse in light of *Madsen*.

D. CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals opinion. Alternatively, as set forth above this Court should remand to the Court of Appeals with direction to reverse in light of *Madsen*

Respectfully submitted this 14th day of June, 2013.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 APPELLANT,)
)
 v.) NO. 88111-1
)
 BLAYNE COLEY,)
)
 RESPONDENT.)

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State v. Blayne Coley
No. 88111-1

Please accept the attached documents for filing in the above-subject case:

Supplemental Brief of Respondent

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