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94681-7

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, PETITIONER

v.

JEROME CURRY, RESPONDENT

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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## I. INTRODUCTION

The right to self-representation is not a lesser right to the right to representation by counsel. Mr. Curry filed a motion to represent himself, and did so long before trial. He had an extensive colloquy with the trial court regarding this request. He had prior pro se experience, both in the trial court and at the appellate level. Mr. Curry unequivocally demanded that he be allowed to represent himself, rather than continuing his trial date. His request was timely, voluntary, unequivocal, and made with a full understanding of the consequences of his decision. The trial court so found.

On appeal, Division Three reversed, stating “this case is much like *Luvene*,” holding Mr. Curry’s demand to represent himself was equivocal:

[t]he record does not suggest Mr. Curry sought an early trial date for strategic reasons. He simply wanted to settle his fate as quickly as possible. Under our case law, this motivation rendered Mr. Curry’s request for self-representation equivocal.

*State v. Curry*, 199 Wn. App. 43, 50, 398 P.3d 1146 (2017).

The State offers that Mr. Curry does not need a “strategic reason” for claiming his right explicitly guaranteed him by article I, section 22, of the Washington State Constitution (“the accused shall have the right to appear and defend in person”). Here, the appellate court improperly used the admonition that courts must indulge every reasonable presumption against waiver of a defendant’s right to counsel to presume away the

applicable standard of review, the abuse of discretion standard, and, in doing so, has failed to give any deference to the trial court. The trial court was in the best position to observe whether Mr. Curry was “clear-eyed” in making his demand for self-representation. The appellate court has simply substituted its own judgment, on a cold record, for that of the lower court.

## **II. STATEMENT OF THE CASE**

On December 29, 2014, in Spokane County, Mr. Jerome Curry was charged with possession of a controlled substance, heroin, with intent to deliver, and possession of a controlled substance, methamphetamine. CP 4. On March 27, 2015, Mr. Elston from the public defender’s office “took over” Mr. Curry’s case from a prior attorney at the same office. CP 48. On April 30, 2015,<sup>1</sup> Mr. Curry filed a motion to proceed pro se. CP 48-58. His attorney’s declaration<sup>2</sup> in support of the motion to proceed pro se averred that Mr. Curry was requesting a motion hearing to allow him to represent himself, or, in the alternative, to obtain a new lawyer. CP 48-51.

The declaration and the attachments in support of the motion established that Mr. Curry had previously represented himself in a multi-

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<sup>1</sup> Mr. Curry was evaluated for competency. The trial court found him competent to stand trial, a finding he does not contest on appeal. (4/3/15) RP 4; CP 34-35.

<sup>2</sup> The declaration was made by Mr. Curry’s appointed trial counsel, Mr. Elston.

count felony trial at the superior court level, and, in part, at the appellate level, “with some success.” CP 49, 52-58. One appellate decision<sup>3</sup> attached to the motion to proceed pro se established that Mr. Curry had represented himself at a previous trial, as well as at the resentencing after he prevailed on a sentencing issue in his first appeal. CP 52. Additionally, at the appellate level, Mr. Curry had raised the issue of whether he was denied his right to counsel after the case was remanded to the Superior Court for resentencing where he, again, represented himself.<sup>4</sup>

In the present case, the trial court granted Mr. Curry’s request to proceed pro se only after engaging in an extensive colloquy with him. (5/7/15) RP 1-20. The trial court also appointed standby counsel to assist Mr. Curry. CP 69-71.

Mr. Curry was convicted of two felony possession of controlled substance charges. CP 127, 128. On appeal, represented by counsel, Mr. Curry argued his waiver of his right to counsel was not valid. The Court

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<sup>3</sup> CP 52-54; *State v. Curry*, 173 Wn. App. 1003, 2013 WL 269029 (2013) (unpublished).

<sup>4</sup> On a prior case, Division Three held that he was not denied counsel after he had effectuated his right to represent himself during the earlier trial because he never requested reappointment of counsel at the resentencing. CP 53; *Curry*, 2013 WL 269029 at \*2.

of Appeals, Division Three, agreed and reversed the case, finding his request for self-representation equivocal. *Curry*, 199 Wn. App. at 50.

### **III. ARGUMENT**

#### **A. OVERVIEW OF THE RIGHT TO SELF-REPRESENTATION.**

Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 (“the accused shall have the right to appear and defend in person”); *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. at 834; *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). *Faretta’s* recognition of the right to self-representation was grounded in respect for a defendant’s free choice. “The right to defend is personal,” for it is “[t]he defendant, and not his lawyer or the State, [who] will bear the personal consequences of a conviction.” 422 U.S. at 834.

However, the right to self-representation is not self-executing, but requires an affirmative waiver. *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Accordingly, a criminal defendant’s request to proceed pro se must be (1) timely made and (2) stated unequivocally.

*State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). This requirement of an affirmative waiver of the right to counsel appears to have arisen out of an understanding that the right to counsel is preeminent over the right to self-representation because the former attaches automatically and must be waived affirmatively to be lost, while the latter does not attach unless and until it is asserted. *United States v. Garey*, 540 F.3d 1253, 1264 n. 4 (11th Cir. 2008).

Although it is true that the right to counsel attaches automatically, the United States Supreme Court has never declared the right to counsel “preeminent” over the right to self-representation. To the contrary, *Faretta* clearly stated “there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel.” 422 U.S. at 832. Indeed, as this Court noted in *Madsen*, the right to self-representation is an explicit right under the Washington Constitution. 168 Wn.2d at 503; Wash. Const. art. I, § 22. The right is so important, that “[t]he unjustified denial of this [pro se] right *requires* reversal.” *Madsen*, 168 Wn.2d at 503 (emphasis the court’s) (quoting *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)). Indeed, “the right to counsel is intended as a tool, not a tether.” *Garey*, 540 F.3d at 1263. “[I]t is one thing to hold that every defendant ... has the right to the assistance of counsel, and quite another to say that a

State may compel a defendant to accept a lawyer he does not want.” *Faretta*, 422 U.S. at 833.

**B. APPELLATE REVIEW OF THE TRIAL COURT’S DECISION TO ALLOW SELF-REPRESENTATION IS NOT BASED UPON WHETHER THE APPELLATE COURT WOULD HAVE DECIDED OTHERWISE IN THE FIRST INSTANCE, BUT IS BASED UPON WHETHER THE TRIAL JUDGE WAS JUSTIFIED IN REACHING HIS OR HER DETERMINATION, AFTER ENGAGING IN AN FACE-TO-FACE DISCUSSION WITH THE DEFENDANT.**

This Court has determined that “[t]he ‘ad hoc,’ fact-specific analysis of waiver of counsel questions is best assigned to the discretion of the trial court.” *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014) (emphasis omitted) (citing *State v. Hahn*, 106 Wn.2d 885, 900-01, 726 P.2d 25 (1986)). The trial court’s decision to allow waiver of counsel is reviewed for an abuse of discretion. *Coley*, 180 Wn.2d at 559; *Madsen*, 168 Wn.2d at 504. A decision on a defendant’s request for self-representation will be reversed only if the decision is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *Madsen*, 168 Wn.2d at 504 (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Additionally, the “burden of proof is on the defendant asserting that his right to counsel was not competently and intelligently waived.” *Hahn*, 106 Wn.2d at 901.

However, under the umbrella of the “admonition that we must indulge every reasonable presumption against the waiver of a defendant’s

right to counsel,”<sup>5</sup> Division Three presumed away this abuse of discretion standard and the deference due the trial court, and ultimately due Mr. Curry. The request made by Mr. Curry was simple. He did not want the trial continued. He did not want to lose his home. His attorney had been involved in the case for slightly more than 30 days and needed more time to prepare. Mr. Curry was “fine” with counsel, if counsel could be ready for the scheduled trial date of June 1, 2015, but he was not willing to continue the case to June 29, 2015, the earliest date by which appointed counsel could be prepared. (5/7/15) RP 17.

The trial court explained to Mr. Curry that it felt the choice to proceed pro se was unwise; Mr. Curry *agreed it was unwise*, but stated that he would rather represent himself, as he had done in the past, than have his case continued past June 1, 2015:

THE COURT: I can understand that, but what issues do you have with Mr. Elston? Why you think it’s better to go yourself without having Mr. Elston?

THE DEFENDANT: Because I basically, I mean, if I’ve got to sit and wait until the end of June, I might as well go ahead by myself. Because I -- I mean, send me to prison or release me. One of the two. I mean, I ain’t got time to sit here. I mean, I have obligations on the streets. I’m losing my home. And if I’ve got to lose my home, I might as well defend my own self.

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<sup>5</sup> *Curry*, 199 Wn. App. at 48.

THE COURT: Okay. And I recall you saying substantially that earlier. Let's say Mr. Elston informs you and the court and the prosecutor that he is willing and able to do the best he can on the current trial dates, what's your response to that?

THE DEFENDANT: For June 1st, there's no way.

THE COURT: I'm not sure I understand your response. You've got trial dates set, right, June 1st, and on all matters, with pretrials of May 15th. So, if your counsel says, yes, he will be ready to represent you on that date, are you saying you still prefer to represent yourself or something else?

THE DEFENDANT: If he's ready on June 1st, we have no problem. But, I mean, there's evidence that we can't get, because we're being delayed on that.

THE COURT: Okay. Let me say this to you, Mr. Curry, sir, I don't think it's a wise choice to represent yourself. You're facing a lot of --

THE DEFENDANT: Well, I know it's not.

THE COURT: You're facing a lot of downside here if convicted, given your points that you currently have, as I understand it, and the danger of being convicted of these matters would result in a lot of prison time. So, I don't think it's a very wise choice, number one. So, with that in mind, if your counsel says he is willing to do the best he can on June 1st, I think I understand you to say that that would be fine with you, and you would prefer to keep Mr. Elston.

THE DEFENDANT: Yes, but at -- if we've got to go past June 1st, I'd rather just do it myself. I mean....

THE COURT: Okay.

THE DEFENDANT: That's all I got is time, so, I'll just learn the law more better.

(5/7/15) RP 13-14.

The trial court did not abuse its discretion by granting Mr. Curry's request. His request was unequivocal. Both the trial court and Mr. Curry fully recognized the risks involved if Mr. Curry represented himself, as he had done in the past. Mr. Curry's choice was plain, he would rather proceed to trial pro se, as scheduled, on June 1, 2015, than have the case continued for a month.<sup>6</sup>

THE COURT: Okay. Thank you. And so with that in mind, Counsel -- is there anything further you want to say, Mr. Curry, in terms of why you want to represent yourself?

THE DEFENDANT: No, I don't.

THE COURT: Thank you. Counsel, the court has conducted, I believe, an appropriate colloquy with Mr. Curry about the potential pitfalls and detriments to self-representation in this particular matter. There are minimal benefits to Mr. Curry, from the court's view. It's important that all persons have a good, competent defense, and that's why attorneys work for persons who are accused of criminal matters. In this particular matter, Mr. Curry faces great jeopardy upon conviction. In reference to his background and education and experience, Mr. Curry has not had the benefit of a lot of formal education, however he has represented himself on a prior occasion. It's just the one occasion, right, Mr. Curry, at the trial?

THE DEFENDANT: Yes.

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<sup>6</sup> Appointed counsel Mr. Elston informed the trial court the very earliest he could be prepared would be June 29, 2015. (5/7/15) RP 17.

THE COURT: And then in the appellate courts; is that right?

THE DEFENDANT: Yes.

THE COURT: So Mr. Curry -

THE DEFENDANT: Well I also had an appellate attorney in the appeals also.

THE COURT: Okay. So you didn't represent yourself completely in the appellate process, is that what you're saying?

THE DEFENDANT: Yes.

THE COURT: Okay. And to continue on, Mr. Curry has had the benefit of that experience. And it sounds as though, at least as we speak, it's been a partially successful effort on Mr. Curry's part. In reference to representation by counsel, the court is aware of Mr. Elston's background. I know him to be a careful, diligent legal practitioner. I'm confident that he would give his very best effort towards becoming adequately prepared to represent Mr. Curry if that were the outcome here today. **At the same time, Mr. Curry is saying he's -- he would prefer to represent himself given the current dates and time frames of these particular matters before the court. Mr. Curry further indicates that he's aware that there are dangers and pitfalls of self-representation, as I've described. Is that right, Mr. Curry?**

THE DEFENDANT: Yes.

THE COURT: Nonetheless, he indicates it's his voluntary and steadfast decision at this time to proceed.

THE DEFENDANT: Well, it's not voluntary.

THE COURT: Pardon me?

THE DEFENDANT: It's not voluntary. It's I have no choice in the matter.

**THE COURT: Well, it's either your freewill choice of doing this, or somehow there's been some pressure put on you. And the only pressure I recall you saying is the time pressure; that is, that you believe you don't have a choice because you don't want an extension of the trial date, since you have other affairs that you believe you need to take care of. And you'd rather have an outcome quicker rather than later on. That's what I understand you to say. Is that accurate?**

**THE DEFENDANT: That's -- that's accurate.**

THE COURT: Okay. So, with all that, the court finds it is appropriate to permit Mr. Curry to represent himself. The court will appoint standby counsel, given the issues here that have been discussed, and so I do appoint Mr. Elston as standby counsel in these matters currently set for the dates again referenced. I'll sign that order, Counsel, and I would ask that you prepare that, please, Mr. Lindsey.

(5/7/15) RP 17-19 (emphasis added).

Mr. Curry was clear about his desire to represent himself. After being fully informed of (1) the nature of the charges against him, (2) the possible penalties, and (3) the disadvantages of self-representation, he unequivocally expressed his desire to waive assistance of counsel. He was faced with two alternatives, and he believed he only had one choice of the two alternatives. The trial court had no good reason to deny his constitutional request and, therefore, could not do so. As this Court noted:

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 were represented by counsel. Similarly, concern regarding a defendant's competency alone is insufficient; if the court doubts the defendant's competency, the necessary course is to order a competency review. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); RCW 10.77.060(1)(a).

*Madsen*, 168 Wn.2d at 505.

However, the appellate decision sets a new requirement of a "legally strategic reason" for invoking one's constitutionally guaranteed right of self-representation, stating: "Mr. Curry never identified any strategic reason for preferring an early trial date," *Curry*, 199 Wn. App. at 49; that "for a valid waiver to occur, the record as a whole must demonstrate the defendant is clear-eyed in his strategy..." *Id.* at 50; and, finally, "the record does not suggest Mr. Curry sought an early trial date for strategic reasons." *Id.* Besides begging the question of whether self-representation would *ever* be a *good* strategy, the appellate court arrogates to itself the ability to divine what is best for Mr. Curry, and, in doing so, paternalistically substitutes its opinion of what is "best" for him, as if he were unable to self-determine his best interests - his home and his time. This arrogation is irreconcilable with this Court's directive expressed in *Madsen*:

This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Faretta*, 422 U.S. [806,] at 834 [95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)], 95 S.Ct. 2525; *State*

*v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002). ‘The unjustified denial of this [pro se] right *requires* reversal.’ *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).”

*Madsen*, 168 Wn.2d at 503 (emphasis the Court’s).

Discretion is abused if a decision is manifestly unreasonable or “rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Mr. Curry timely set a special hearing, wherein the trial court conducted an extensive colloquy with him. The record supports the trial court’s finding that Curry unequivocally exercised his fundamental right to self-representation; and the trial court did not abuse its discretion in making that determination.

**C. THIS CASE IS CONTROLLED BY MADSEN, NOT LUVENE.**

Curry’s case has more in common with *Madsen* than with *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995). However, even *Luvene* can be harmonized with the present case. In *Luvene*, after establishing that the right to self-representation is guaranteed, but that the assertion of the right to proceed pro se must be unequivocal, this Court dispensed with Mr. Luvene’s claim regarding self-representation in a single paragraph:

While Mr. Luvene did state that he was “prepared to go for myself”, he also stated, “I’m not even prepared about that”, and “[t]his is out of my league for doing that”. Taken in the context of the record as a whole, these statements can be seen

only as an expression of frustration by Mr. Luvene with the delay in going to trial and not as an unequivocal assertion of his right to self-representation.

*Luvene*, 127 Wn.2d at 698-99.

In other words, Mr. Luvene had neither clearly asserted his right to self-representation, nor met his burden of establishing the trial court abused its discretion in continuing the case and denying his “request.” Moreover, the brevity of the treatment of this assignment of error does not account for what is obvious under an abuse of discretion review; a reviewing court may reach a different opinion as to what *it* would have done in a given situation, as reasonable minds may differ. However, with deference to the trial court, the abuse of discretion standard requires the reviewing court only find error when the trial court’s decision adopts a view that no reasonable person would take and is, thus, manifestly unreasonable; or rests on facts unsupported in the record and is thus based on untenable grounds; or was reached by applying the wrong legal standard and is, thus, made for untenable reasons. This standard is well-considered because the trial judge may make his determination of a defendant’s request from many things, including the defendant’s appearance, demeanor, and conduct. The trial court is in the best position to interpret body language, the defendant’s sincerity in his request, his thoughtfulness, and his resolve. *See State v. Sisouvanh*, 175 Wn.2d 607, 620-624, 290 P.3d 942 (2012)

(adopting abuse of discretion standard for review of a trial court's determination of the underlying adequacy of a statutory competency evaluation and discussing the application of, and rational for, the abuse of discretion standard).

The appellate decision improperly compares this case to *Luvene*. While there is no talismanic formula for a *Faretta* inquiry, the differences between Luvene's situation and Curry's are striking. In contrast to Luvene, who made his request to proceed on his own while his attorney was simultaneously arguing to continue his death penalty case, here, Curry personally requested his attorney set a motion hearing to allow him to argue to the trial court regarding his desire and right to represent himself,<sup>7</sup> and did so *long* before trial, as early as April 24, 2015. CP 49. Thereafter, Curry made his request in writing on April 30, 2015, a full month before trial. CP 48-58. The motion was heard a week later, on May 7, 2015. (5/7/15) RP 1-20. At this point, his right to self-representation existed as a matter of law. *See Madsen*, 168 Wn.2d at 508 (noting that if the demand for self-representation is made "*well before the trial and unaccompanied by a motion for a continuance, the right of self representation exists as a matter*

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<sup>7</sup> Or, in the alternative, to get a new lawyer.

of law.” (Emphasis the court’s). Here, Curry’s demand was more than timely.

Additionally, Curry had thought his request through; he had prior experience in this type of request and the law surrounding the request. In direct contrast, Luvene did not establish that he understood the seriousness of the charge, that he was familiar with court rules, or that he was in any way prepared to adequately represent himself. *Luvene*, 127 Wn.2d at 698-99. Rather, his request was impulsive, confusing, and unreliable. Unlike Luvene, Curry engaged in an intelligent discussion with the court. He unequivocally expressed his desire to represent himself and responded to the trial court’s colloquy with an understanding of court procedure and his legal rights. He was advised on the record of the penalties involved,<sup>8</sup> acknowledged that he fully understood them,<sup>9</sup> and knew when his trial dates were scheduled.<sup>10</sup> Thereafter, Curry engaged in a colloquy with the court regarding prior charges where he had conducted the trial by himself, with some success at the trial level. (5/7/15) RP 8-12.

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<sup>8</sup> (5/7/15) RP 4-6.

<sup>9</sup> (5/7/15) RP 6.

<sup>10</sup> (5/7/15) RP 7.

Division Three's reliance on *Luvane* is misplaced and is opposite to this Court's much later opinion in *Madsen*. It cannot be an *abuse of discretion* to grant a pro se request under these circumstances, even if a different judge would have ruled differently. "Unequivocal" does not mean you liked your options. A bad choice with limited options is not the absence of a choice. Curry made a choice between two unattractive options; that is not "equivocation." The trial judge was in the best position to make this decision.

Indeed, with the record at hand, if the trial court had denied the request for self-representation made more than a month before trial, after the considered and full colloquy it conducted with Mr. Curry, *Madsen* could dictate that the conviction be reversed because Curry's demand was unequivocal, though ill-advised. The decision of the appellate court should be reversed.

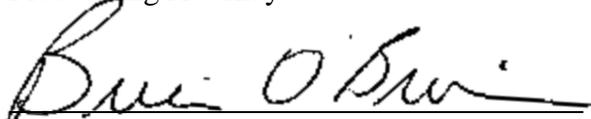
#### **IV. CONCLUSION**

For the above reasons, this Court should reverse the appellate decision and hold that Mr. Curry effectively asserted his constitutional right

to self-representation as guaranteed under article I, section 22, of the Washington State Constitution.

Dated this 3 day of November, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEROME CURRY, JR.,

Appellant.

No. 94681-7

COA 33990-4-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 3, 2017, I e-mailed a copy of the Supplemental Brief of Petitioner in this matter, pursuant to the parties' agreement, to:

Marie Trombley  
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11/3/2017

(Date)

Spokane, WA

(Place)



(Signature)

**SPOKANE COUNTY PROSECUTOR**

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