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Court of Appeals  
Division I  
State of Washington

72157-7

NO. 72157-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

FELIX SPEAKS,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR..... 2

    1. The court failed to make a meaningful inquiry into Mr. Speaks’ competency to proceed to trial. .... 2

    2. The court failed to determine whether Mr. Speaks was competent to represent himself. .... 2

    3. The court abused its discretion by allowing Mr. Speaks to proceed pro se once trial had commenced. .... 2

    4. Failure to provide Mr. Speaks with subpoena and investigative services denied him a meaningful opportunity to represent himself. . 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR .. 2

D. STATEMENT OF THE CASE ..... 3

E. ARGUMENT..... 5

    1. The Court failed to determine whether Mr. Speaks was competent to proceed to trial..... 5

        a. Where there is reason to doubt the mental competency of an accused person, the court must hold a competency hearing..... 5

        b. The trial court failed to meaningfully inquire into Mr. Speaks’ mental competency. .... 7

        c. Mr. Speaks is entitled to a new trial. .... 11

    2. Waiver of counsel was not meaningfully made because the court failed to consider Mr. Speaks’ mental competency before allowing him to represent himself..... 12

        a. Due process requires a separate inquiry into mental competency when a defendant chooses to represent himself. .... 12

            i. Federal due process authorizes a separate inquiry into a defendant’s mental competency to appear pro se. .... 14

ii.	Washington’s right to self-representation is limited when competency is at issue. ....	15
iii.	Washington’s constitution provides greater protection for a mentally ill person than do federal due process rights. ....	16
iv.	The due process right to counsel and waiver of counsel is violated when the waiver is not voluntary, intelligent and knowing. ....	20
b.	The trial court failed to conduct a meaningful inquiry into whether Mr. Speaks was mentally competent to represent himself.	22
c.	Mr. Speaks is entitled to a new trial after his competency to proceed is determined. ....	26
3.	Mr. Speaks’ constitutional right to self-representation was violated when he was denied the opportunity to investigate his case and serve subpoenas. ....	27
a.	The right of self-representation for pre-trial detainees includes the right to reasonable access to state provided resources. ....	27
b.	The failure to provide subpoena services and other basic necessities of trial preparation denied Mr. Speaks a meaningful opportunity to proceed pro se. ....	28
c.	To make the right to proceed pro se meaningful, Mr. Speaks is entitled to a new trial where he should be provided with investigative and subpoena services. ....	30
4.	It was an abuse of discretion to allow Mr. Speaks to proceed pro se once trial had commenced. ....	31
a.	The right to self-representation is not absolute and may be limited in the interest of due process. ....	31
b.	Mr. Speaks should not have been allowed to proceed to trial pro se. ....	31
c.	Mr. Speaks is entitled to a new trial. ....	32
F.	CONCLUSION. ....	33

## TABLE OF AUTHORITIES

### Cases

Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695, 257 P.3d 570 (2011) .....	17
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) .....	21, 31
City of Seattle v. Gordon, 39 Wn. App. 437, 693 P.2d 741 (1985) .....	13
Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) .....	5, 12
Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) .....	5, 12
Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) .....	12, 14, 21
In re Det. of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999) .....	31
In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001).....	6, 7, 13
In re Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011).....	passim
Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) .....	passim
Iowa v. Tovar, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004)	21
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938) .....	21, 26
McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) .....	28
State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984).....	17
State v. Bebb, 108 Wn.2d 505, 740 P.2d 829 (1997) .....	27
State v. Coley, 180 Wn.2d 543, 326 P.3d 702 (2014) .....	6, 13
State v. De Weese, 117 Wn.2d 369, 816 P.2d 1 (1991) .....	21
State v. Englund, 186 Wn. App. 444, 345 P.3d 859 (2015) .....	12
State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998).....	19
State v. Fritz, 21 Wn. App. 354, 585 P.2d 173 (1978) .....	31
State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).....	16, 19
State v. Hahn, 106 Wn.2d 885, 726 P.2d 25 (1986).....	passim
State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968). 15, 18, 20, 21	
State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010).....	13, 21, 31
State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001) .....	28
State v. Ortiz, 104 Wn.2d 479, 706 P.2d 1069 (1985) .....	7

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).....	19
State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001) .....	17, 20, 27
State v. Wicklund, 96 Wn.2d 798, 638 P.2d 1241 (1982).....	6
State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001) .....	31
United States v. Ferguson, 560 F.3d 1060 (9th Cir. 2009), cert denied. 558 U.S. 910 (2009) .....	14
Statutes	
RCW 10.77.050 .....	6
RCW 10.77.060 .....	6, 13
RCW 10.77.086 .....	7
Treatises	
Utter, Justice Robert, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 71 U. Puget Sound L. Review 491 (1984) .....	17
Constitutional Provisions	
Const. art. I, § 22 .....	27
Const. art. I, § 3 .....	16
U.S. Const. amend. V .....	17
U.S. Const. amend. VI.....	14
U.S. Const. amend. XIV .....	5, 14, 17, 18

## A. INTRODUCTION

When the court began to inquire into Mr. Speaks request to proceed without an attorney, it became clear there were questions about his mental competency. Mr. Speaks had difficulty staying on track, referenced experiences he had in military academies which do not exist, and on trials which took place on television. He spoke about his time in Fort Sumter, and when asked whether he wanted standby counsel, instead began speaking about Pearl Harbor and October. Frequently off track, he spoke several times about Snow White and Peter Pan instead of answering questions from the court.

Prior to being relieved, defense counsel raised concerns regarding Mr. Speaks mental competency. While arranging discovery for him in the jail, the court discovered he was living in the mental health wing and had been found incompetent in an infraction hearing. Despite this record, the court never conducted a hearing to determine whether he was competent to proceed to trial, let alone represent himself.

Waiver of the right to counsel cannot occur until the court determines the waiver has been voluntarily, intelligently and knowingly made. A person who is mentally incompetent is not capable of validly

waiving the right to counsel. The court's failure to make a meaningful inquiry into the mental competency to waive counsel is a denial of due process. Permitting a defendant who lacks mental competency to conduct their own defense does not affirm the dignity of the court and instead undermines the requirement that proceedings not only be fair, but also "appear fair to all who observe them."

#### B. ASSIGNMENTS OF ERROR

1. The court failed to make a meaningful inquiry into Mr. Speaks' competency to proceed to trial.
2. The court failed to determine whether Mr. Speaks was competent to represent himself.
3. The court abused its discretion by allowing Mr. Speaks to proceed pro se once trial had commenced.
4. Failure to provide Mr. Speaks with subpoena and investigative services denied him a meaningful opportunity to represent himself.

#### C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court commit error by failing to hold a hearing to determine whether Mr. Speaks was mentally competent when competency was brought to the attention of the court?

2. Did the court violate Mr. Speaks due process rights by failing to make a meaningful inquiry regarding his waiver of counsel when the court failed to conduct a hearing on his mental competency?

3. Did the court abuse its discretion when it allowed Mr. Speaks to proceed pro se after trial had already commenced and a jury had been selected?

4. Was Mr. Speaks right to meaningful self-representation denied when he was not given access to investigative resources and subpoena services?

#### D. STATEMENT OF THE CASE

Felix Speaks was charged with malicious mischief in the second degree and felony harassment. 5/28/14 RP 3-4.<sup>1</sup> A charge of assault in the third degree was added when Mr. Speaks choose to exercise his right to trial. *Id.* at 16.

Trial commenced on May 27, 2014 with the selection of a jury. 5/27/14 RP 116. After a jury had been selected, Mr. Speaks asked to have his lawyer dismissed. *Id.* at 200. Mr. Speaks renewed his motion to proceed pro se the next day court was in session. 5/28/14 RP 6.

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<sup>1</sup> The record is divided into volumes by date. This brief refers to the record by the date found on the cover page of each volume and then by page number. *E.g.*, 5/28/14 RP 3-4.

Mental competency issues quickly became clear. Defense counsel informed the court there were “potential mental health issues” when the court inquired about whether Mr. Speaks should waive some of his constitutional rights. 5/27/14 RP 20. When the court inquired about his legal training, Mr. Speaks told the court he had attended military academies and had been a juror in fictional trials. *Id.* at 14. Many of the other answers he gave were either non-responsive or referred to historical or fictional events. *See, Id.* at 48-49, *see also*, 5/28/14 RP 122. The court also learned Mr. Speaks had been found incompetent at an infraction hearing held in the jail. *Id.* at 3-4.

Despite the clear indications Mr. Speaks may not have been mentally competent to stand trial and lacked the capacity to voluntarily, knowingly and intelligently waive his right to counsel, the court never conducted a hearing on his mental competency, instead allowing him to proceed to trial without an attorney. 5/27/14 RP 48-49.

Mr. Speaks was also denied the ability to present a defense. Mr. Speaks asked the court to have witnesses appear on his behalf and subpoenas were prepared for him. 5/29/14 RP 3-4; 6/2/14 RP 5. The court did not provide Mr. Speaks with subpoena services or ask that the

sheriff serve his subpoenas. 6/2/14 RP 7. As a result, no witnesses appeared at this trial.

He was also unable to listen to audio recordings prepared in anticipation of trial. Because Mr. Speaks was held in the mental health unit, his ability to listen to recordings was limited. 5/28/14 RP 3. While the court offered Mr. Speaks use of the courtroom to listen to the interviews, he declined when he discovered potential video or audio recordings of the incident had not been preserved. 5/28/14 RP 121-22.

Mr. Speaks was found not guilty of malicious mischief and felony harassment. 6/3/14 RP 7-8. He was found guilty of assault in the third degree. *Id.*

#### E. ARGUMENT

##### **1. The Court failed to determine whether Mr. Speaks was competent to proceed to trial.**

- a. Where there is reason to doubt the mental competency of an accused person, the court must hold a competency hearing.

Due process prohibits the conviction of a person who is not competent to stand trial. U.S. Const. amend. XIV. An individual who lacks mental competency may not be tried. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam), *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Washington provides even greater protection, such that so long as the incapacity continues, no person may be tried, convicted or sentenced for the commission of a crime. RCW 10.77.050; *see also In re Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). Believing those with mental illness are better served by rehabilitative programs that provide medical treatment and support than with punitive measures, the state legislature codified the procedures a court must engage in when there is a question of competency. *State v. Coley*, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).<sup>2</sup> RCW 10.77 governs the procedures and standards trial courts use to judge the competency of a person to stand trial. *State v. Wicklund*, 96 Wn.2d 798, 801, 638 P.2d 1241 (1982).

When there is a reason to doubt a person's competency to stand trial, the court must order an expert evaluation to determine if the defendant has the capacity to understand the nature of the proceedings against him and assist in his own defense. RCW 10.77.060. The question of mental competency may be raised by the court's own motion or the motion of any party. *Id.* The two-part test for legal competency for a criminal defendant in Washington is (1) whether the

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<sup>2</sup> RCW 10.77 eliminates the wide discretion courts had to fashion procedures for competency determinations, which were guided only by broad federal due process protections. *See, Wicklund*, 96 Wn.2d at 801.

defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. *Fleming*, 142 Wn.2d at 862 (citing *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986); *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985)). Where the court finds a defendant to be mentally incompetent, it must stay the proceedings and commit that person for treatment. RCW 10.77.086.

b. The trial court failed to meaningfully inquire into Mr. Speaks' mental competency.

Serious questions existed regarding Mr. Speaks competency to proceed to trial, let alone proceed pro se. Before defense counsel was dismissed, he raised the issue of competency with the court. Counsel told the court "As far as [Mr. Speaks] decision to proceed with a jury or bench trial, my concern is that, *because of potential mental health concerns*, whether that would be an appropriate decision at this point." 5/27/14 RP 20 (emphasis added).

This concern was consistent with Mr. Speaks behavior in the courtroom. Many of the responses Mr. Speaks made to the court's inquiry with regard to his desire to proceed pro se should have caused the court to order a competency evaluation. When the court asked Mr. Speaks about his education, Mr. Speaks told the court:

DEFENDANT: I attended all the academies, Navy Seal Academy, Marine Academy, I did the Air Force Academy, all the academies all the way up to criminal justice, to paralegal status. I served on the Perry Mason and also Telly Savalas and Kojak trials.

5/27/14 RP 14.

The court asked Mr. Speaks about his understanding of the Rules of Evidence. Mr. Speaks told the court "I know the ground bases. I know how to get to second and third and who's on fourth, if I have to get to the home plate." 5/27/14 RP 14.

On many occasions, Mr. Speaks was unable to track the questions the court posed to him. When the court warned him about the wisdom of proceeding pro se, he responded by telling the court:

I understand that. Like I said, I have a spine injury. I can't keep doing the handcuffs on behind my back. It's starting to affect my hips. I could have a spleen injury. I have three medical releases in my possession from that detention center that it says no way are you being treated, going to be treated, or have x-rays involving treatment. I have documents in my possession.

5/27/14 RP 16. His colloquy continued with further comments

unrelated to his ability to represent himself:

Right. I say this with kindness, that I don't want to be paralyzed. If I do get out of this, if I do get out of this, I don't want to end up paralyzed based on something I said, that they said I did. I don't want to end up like that. I have no criminal history or background in 52 states. I am no threat to society or any matter based off of 60 day sentence. It shows that I am no threat to

society or have no other warrants in 51 states. So that says impeccable to me.

*Id.*

When asked by the court whether he would like to have standby counsel appointed to assist him, Mr. Speaks told the court, “My decision is October and Pearl Harbor.” 5/27/14 RP 49. Despite these non-answers, the court found the waiver to be “knowingly, intelligently and voluntarily made.” 5/27/14 RP 52.

After counsel was removed, questions of Mr. Speaks’ competency continued. At one point Mr. Speaks asked the court whether an “internal affairs deputy”<sup>3</sup> could “represent me in this case.” 5/28/14 RP 27. The court told Mr. Speaks, “That’s not their job, to represent you.” *Id.* Mr. Speaks then told the court “They can, because of my paralegal status.” *Id.* The court then asked Mr. Speaks whether the information Mr. Speaks was giving the court “comes from your experience in the Navy Seals?” *Id.* Mr. Speaks told the court he had learned he could be represented by an internal affairs deputy in “the academy.” 5/28/14 RP 29.

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<sup>3</sup> Mr. Speaks described the Internal Affairs Deputy as “the prosecutor that examines everything, including the documents and certification of everything that happened from the crime scene all the way down to insistence of knowing where the judge has to be when it’s over.” 5/27/14 RP 28.

Other evidence raised questions regarding whether or not Mr. Speaks was competent to proceed. The court discovered Mr. Speaks had been found incompetent by the jail during an administrative infraction hearing held on May 10, 2014, just days before the trial was set to begin. 5/28/14 RP 3. Mr. Speaks had committed an infraction while being held in the “psych unit.” 5/28/14 RP 3-4. He was not sanctioned for this infraction, as he was found to be not competent by the jail. *Id.*

Questions of Mr. Speaks’ competency continued throughout the trial. When the court asked Mr. Speaks if he would like to review taped recordings of interviews with witnesses before they testified, Mr. Speaks told the court,

I’m blurry when it comes to fiction. So I think I will just leave things the way they are. Like I said, I like Snow White and the dwarfs and Peter Pan and all that, too. But I think I will pass on the examination.

5/28/14 RP 122. The court again attempted to get Mr. Speaks to listen to the interviews. *Id.* Mr. Speaks remained fixated upon Snow White and Peter Pan, telling the court,

Like I said, there's a difference between Snow White and Peter Pan. Something has to be removed from Peter Pan in order to see Snow White. The dwarfs could also cut down one tree so Snow White knows the difference between both trees. When I said the dwarfs would remove one tree for a reason, just to show

both dwarfs stand up and build up sidewalks and stand all the way up, is what I meant.

*Id.* Mr. Speaks made further references to Snow White during his closing argument. 6/2/14 RP 121-22.

At no time did the court ever order a competency evaluation or hold a hearing regarding Mr. Speaks mental competency.

c. Mr. Speaks is entitled to a new trial.

Even before the court granted Mr. Speaks' request to represent himself, Mr. Speaks competency to stand trial was in doubt. The court was made aware of mental health concerns by defense counsel. Mr. Speaks' colloquy with the court demonstrated he might not be competent. These concerns continued throughout the trial.

When the court was made aware that there were questions regarding Mr. Speaks competency, the court was obligated to conduct a hearing on the issue. The failure of the court to determine whether Mr. Speaks was competent to proceed was a violation of his due process rights. Because the court failed to make a meaningful inquiry into Mr. Speaks' competency, this court should reverse his conviction and order a new trial.

**2. Waiver of counsel was not meaningfully made because the court failed to consider Mr. Speaks' mental competency before allowing him to represent himself.**

- a. Due process requires a separate inquiry into mental competency when a defendant chooses to represent himself.

“[A] defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.” *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Competency to stand trial “does not automatically equate to a right to self-representation” because the standard for determining competency to stand trial assumes the defendant will “assist in his defense, not conduct his defense.” *State v. Englund*, 186 Wn. App. 444, 457, 345 P.3d 859 (2015) (citing *In re Rhome*, 172 Wn.2d 654, 660, 260 P.3d 874 (2011); *Indiana v. Edwards*, 554 U.S. 164, 174-75, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008)). Competency includes the ability to consult with counsel. *See, Dusky*, 362 U.S. at 402 (whether defendant has “sufficient present ability to consult with his lawyer”); *Drope*, 420 U.S. at 171 (competency requires ability “to consult with counsel, and to assist in preparing his defense).

A defendant's motion to act as pro se counsel may be granted only if the defendant is competent to stand trial and the motion is

voluntary, knowing, and intelligent. *Coley*, 180 Wn.2d at 560, *see also Rhome*, 172 Wn.2d at 663; *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); *State v. Hahn*, 106 Wn.2d 885, 895, 726 P.2d 25 (1986). A person is not eligible to exercise their right to self-representation until competency is firmly established. *Hahn*, 106 Wn.2d at 895. Permitting a defendant who lacks mental competency to conduct their own defense does not “affirm the [defendant’s] dignity” and undermines the requirement that proceedings not only be fair, but also “must appear fair to all who observe them.” *Edwards*, 554 U.S. at 177.

If the court doubts the defendant’s competency to proceed pro se, “the necessary course is to order a competency review.” *Madsen*, 168 Wn.2d at 505 (*referencing Fleming*, 142 Wn.2d at 863; RCW 10.77.060(1)(a)). Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. *Id.* at 510. “Once there is a reason to doubt a defendant’s competency, the court must follow the statute to determine his or her competency to stand trial.” *Fleming*, 142 Wn.2d at 863 (*quoting City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985)).

- i. *Federal due process authorizes a separate inquiry into a defendant's mental competency to appear pro se.*

The standard for a defendant's mental competence to stand trial is different from the standard to represent oneself at trial. *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th Cir. 2009), *cert denied*. 558 U.S. 910 (2009). A separate inquiry into a defendant's mental capacity to conduct trial proceedings is required even if the person is competent to stand trial. *Edwards*, 554 U.S. at 177-78; *see also Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (Sixth and Fourteenth Amendment right to proceed without counsel must be voluntarily and intelligently made).

*Edwards* cautions against a single standard for mental competency recognizing “[m]ental illness is not a unitary concept,” but “can vary over time” interfering with “an individual’s functioning at different times in different ways.” 554 U.S. at 176. According to the American Psychiatric Association, “disorganized thinking, deficits in sustaining attention and concentration, impaired executive abilities, anxiety, and other common symptoms of severe mental illness can impair the defendant’s ability to play the significantly expanded role

required for self-representation even if he can play the less role of represented defendant.” *Id.*

*ii. Washington’s right to self-representation is limited when competency is at issue.*

Washington has yet to craft a due process based rule requiring a more stringent waiver of counsel for a defendant whose competency is questioned, but the Supreme Court has acknowledged there “may be room within the universe of *Edwards*, *Kolocotronis*, and *Hahn*” to craft one. *Rhome*, 172 Wn.2d at 665-66.<sup>4</sup> In Washington, the right of an accused “to act as his own counsel may not properly be construed as an absolute right in all cases.” *State v. Kolocotronis*, 73 Wn.2d 92, 98, 436 P.2d 774 (1968) (defendant who was found competent for trial was permitted to participate in some aspects of the trial, but was unable to prevent standby counsel from presenting evidence or giving closing arguments). Thus,

if the court determines that [the defendant] does not have the requisite mental competency to intelligently waive the services of counsel nor adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, is disregarded if the court permits him to so act in a criminal case.

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<sup>4</sup> Since *Rhome* was a PRP and the court held *Rhome* would not be able to gain the benefit of the new rule, the court did not consider whether such a rule should be adopted. *Id.*

*Rhome*, 172 Wn.2d at 661 (quoting *Kolotronis*, 73 Wn.2d at 99). This limitation on the right to self-representation “reflects concern for a defendant’s right to a fair trial and due process of law.” *Id.* at 662, but see *State v. Hahn*, 106 Wn.2d 885, 893, 726 P.2d 25 (1986) (a defendant who is competent to stand trial may waive the assistance of counsel if the waiver is made knowingly and intelligently).

*iii. Washington’s constitution provides greater protection for a mentally ill person than do federal due process rights.*

Washington’s constitution is more protective of the due process fair trial rights of a mentally ill defendants attempting to waive their right to counsel. To determine whether the state constitution provides greater protection than the federal constitution, this Court looks to the criteria set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

- *Textual Language, Differences in Text, State Constitution and Common Law History.*

Art. I, § 3 provides “No person shall be deprived of life, liberty, or property, without due process of law.” Const. art. I, § 3. While nearly identical to the Fifth and Fourteenth Amendments of the United States Constitution, identically worded state and federal provisions should be interpreted independently unless there is historical

justification for assuming the framers intended an identical meaning. See, Justice Robert Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 71 U. Puget Sound L. Review 491, 515-16 (1984). In fact, much of the Washington Constitution's Declaration of Rights is copied from the constitutions of older states and not the federal constitution. *State v. Silva*, 107 Wn. App. 605, 672-73, 27 P.3d 663 (2001). The decision to use other state's constitutional language indicates "the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution." *Id.* at 673.

Instead, there is no consistent answer on whether the state constitution provides greater protection than the federal constitution. As a result, the court will look to the specific context of the right at issue to determine whether to independently analyze due process under the state constitution. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011), see also *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) ("in interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's

interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause”).

- *Pre-existing State Law*

Washington most recently analyzed the mental competency to proceed pro se in *Rhome*, where it examined the case law prior to *Edwards*. The court reviewed its 1968 opinion *Kolocotronis*, stating that “in considering whether a defendant whose competency is in question is capable of making a knowing and intelligent waiver, a trial court considers the background, experience and conduct of the accused, which may include a history of mental illness.” *Rhome*, 172 Wn.2d at 663 (citing *Kolocotronis*, 73 Wn.2d at 99; *Hahn*, 106 Wn.2d at 900).

*Kolocotronis* emphasizes that when a defendant attempts to proceed pro se they must have “the requisite mental competency to intelligently waive the services of counsel [and] adequate mental competency to act as his own counsel” in order not to abridge the rights to a fair trial and due process of law. *Kolocotronis*, 73 Wn.2d at 99. Thus, Washington has long held that due process requires not only an inquiry into whether a person has the mental competency to proceed to trial but the additional mental competency to intelligently waive the right to counsel.

- *Structural Differences*

Given the different structures of the federal and state constitutions, this factor always favors an independent state interpretation. *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994). “Our consideration of this factor is always the same; that is that the United States Constitution is a grant of limited power to the federal government, while the state constitution imposes limitations on the otherwise plenary power of the state.” *State v. Foster*, 135 Wn.2d 441, 458–59, 957 P.2d 712 (1998) (citing *Russell*, 125 Wn.2d at 61; *Gunwall*, 106 Wn.2d at 66).

- *Matters of particular state or local concern*

Whether a subject matter is of particular state or local concern addresses the question of whether “there appears to be a need for national uniformity.” *Gunwall*, 106 Wn.2d at 62. *Edwards* makes clear there is no need for national uniformity and invites states to conduct an independent analysis of whether a higher standard of competency should apply in their state. *Edwards*, 554 U.S. at 178.

The manner in which an accused’s state constitutional right of self-representation is effectively exercised is plainly a state and local concern. Washington has historically required a greater degree of

competency than merely being competent to stand for trial. *See, e.g. Kolocotronis*, 73 Wn.2d at 99. Additionally, Washington courts have recognized “the manner in which an accused’s state constitutional right of self-representation is plainly of state interest and local concern.”

*Silva*, 107 Wn. App. at 621.

- *Washington provides more protection to mentally incompetent persons seeking to represent themselves than does the federal constitution.*

For a waiver of counsel to be intelligently made in Washington, the court must determine that the accused has the mental competency to make the waiver valid. There is no need for national uniformity on this issue and because this has been a long held principle in this state, this Court should find that the Washington Constitution provides greater protection when a person is seeking to waive counsel than does the federal constitution.

- iv. *The due process right to counsel and waiver of counsel is violated when the waiver is not voluntary, intelligent and knowing.*

Before a trial court may permit a person to represent themselves in a criminal proceeding, the court must find the waiver of counsel is knowing, voluntary and intelligent. *Faretta*, 442 U.S. at 853; *Iowa v.*

*Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004); *see also*, *State v. De Weese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991).

The determination of whether there has been an intelligent waiver must depend, in each case, “upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). The court “should indulge in every presumption against a valid waiver” of the right to counsel. *Silva*, 107 Wn. App. at 529; *see also Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

“When the accused demands his constitutional right to act as his own counsel, the trial court is faced with the necessity of making a factual determination of the competency of the accused to ... intelligently waive the services of counsel. *Kolocotronis*, 73 Wn.2d at 101. Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. *Madsen*, 168 Wn.2d at 511. Without a meaningful inquiry into Mr. Speaks mental competency, this Court cannot be satisfied the waiver was knowing, intelligent and voluntary.

- b. The trial court failed to conduct a meaningful inquiry into whether Mr. Speaks was mentally competent to represent himself.

Because of questions regarding Mr. Speaks competency, this Court cannot be confident Mr. Speaks knowingly, intelligently and voluntarily waived his right to counsel. When Mr. Speaks began to address the court regarding his decision to proceed to trial without a lawyer, clear evidence indicated he might not be capable of waiving his right to counsel. Defense counsel informed the court “*because of potential mental health concerns,*” Mr. Speaks ability to waive his constitutional rights was suspect. 5/27/14 RP 20 (emphasis added).

Defense counsel’s concerns did not arise in a vacuum. When asked about his legal training, Mr. Speaks informed the court he had attended the Navy Seal Academy, Marine Academy, and the Air Force Academy. 5/27/14 RP 14. He had worked in “the academies all the way up to criminal justice, to paralegal status.” *Id.* He also told the court he had “served on the Perry Mason and also Telly Savalas and Kojak trials.” *Id.*

When the court again queried Mr. Speaks regarding his qualifications to represent himself the following colloquy occurred:

THE COURT: You said that you studied criminal justice?

DEFENDANT: I did paralegal work under somebody else's badge number and jurisdiction.

THE COURT: A lawyer?

DEFENDANT: Yes.

THE COURT: Was it in this state?

DEFENDANT: Fort Sumter.

THE COURT: In the State of Washington?

DEFENDANT: I said in Fort Sumter. You never heard of Fort Sumter?

THE COURT: No. Where is that?

DEFENDANT: It's between the junction line and the Dixon line. So it begins at the junction and ends before you get to the end of the junction.

THE COURT: When was this?

DEFENDANT: My academy, I studied my academy all the way back from the '80s, 14 all the way up until I was 29 to 30. So all that took place in one academy.

5/27/14 RP 21-22.

Mr. Speaks then told the court,

My main ground of field was an investigator, a tracker of all documents, and recognize a seal of approval of any mark five, six or seven signature. My background history became well known until I was awarded my own German Shepherd. It became more base ground and more spread on to other measures.

5/27/14 RP 22-23.

Likewise, when asked about his understanding of the rules of evidence, Mr. Speaks made a baseball analogy, similar to the Abbott and Costello joke about “Who’s on First?”<sup>5</sup> *Id.* at 14. When the court made further inquiries into Mr. Speaks’ understanding of court rules, Mr. Speaks fell off track instead requesting a public defender be appointed to represent him. *Id.* at 31-32.

DEFENDANT: Like I said, you said that I have a right to an attorney. That's the constitutional right. That's what you said.

THE COURT: You can waive that, which is what you're doing.

DEFENDANT: I choose not to waive it.

THE COURT: Then here's the --

DEFENDANT: I choose to have a public defender.

THE COURT: Let's deal with that. If you are not waiving it, then Mr. Peaquin will stay on the case. That's the end of it.

DEFENDANT: No. I will waive it, then.

*Id.*

Mr. Speaks made other requests to be represented by someone other than his current counsel. Because of his “academy” training, he

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<sup>5</sup> THE COURT: The other thing is, do you know all the rules of evidence?  
DEFENDANT: I know the ground bases. I know how to get to second and third and who’s on fourth, if I have to get to the home plate. 5/27/14 RP 14.

A full copy of the Abbot and Costello script can be found on Pennsylvania State University’s Integrative Arts web site:  
[http://www.psu.edu/dept/inart10\\_110/inart10/whos.html](http://www.psu.edu/dept/inart10_110/inart10/whos.html) (last viewed 7/20/2015).

asked the court to have an “internal affairs deputy” appointed to represent him. 5/28/14 RP 27. The court merely confirmed Mr. Speaks had gotten this understanding about the right to representation from his training at the academy. *Id.*

Finally, when the court inquired into whether Mr. Speaks should have standby counsel, Mr. Speaks appears to have declined. 5/27/14 RP 49. At one point after the court asked him about having standby counsel, Mr. Speaks stated,

I'm very October-ish in that Pearl Harbor, in that decision. Like I said, I will enter a plea of guilty on something that a torpedo had thrown at me and what I will be looking. When I say October and Pearl Harbor, that's what I intend to do, impeccable and follow the standard. Like I said, we can take it as far as however they want to go with it. But my decision is still the same, is to go straightforward.

*Id.*

The court again asked Mr. Speaks whether he wanted standby counsel. Mr. Speaks was again unable to understand or answer the question.

THE COURT: Would you like to have standby counsel?

DEFENDANT: Right.

THE COURT: What is your decision?

DEFENDANT: My decision is just October and Pearl Harbor.

*Id.* Following this non-responsive answer, the court allowed counsel to withdraw and did not appoint standby counsel. *Id.* at 51. The court then found Mr. Speaks decision to proceed pro se knowing, intelligent, and voluntary. *Id.* at 52.

c. Mr. Speaks is entitled to a new trial after his competency to proceed is determined.

By the conclusion of Mr. Speaks colloquy on the right to proceed pro se, it was manifestly apparent there were serious questions regarding his mental competency. Despite the non-responsive answers and statements unrelated to the questions posed by the court, the court made a finding Mr. Speaks' waiver was knowing, voluntary and intelligently made.

For a waiver of counsel to be valid, however, the defendant must have the mental competency to waive the right to counsel.

The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

*Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). The particular facts of this case required, at a minimum, a hearing regarding Mr. Speaks mental competency to waive counsel. After holding the hearing, the court could have then made a meaningful

finding of competency to waive his right to counsel. The failure to inquire into whether Mr. Speaks was competent to waive his right to counsel violated his due process rights.

**3. Mr. Speaks' constitutional right to self-representation was violated when he was denied the opportunity to investigate his case and serve subpoenas.**

- a. The right of self-representation for pre-trial detainees includes the right to reasonable access to state provided resources.

The Washington Constitution affords a pre-trial detainee who has exercised his constitutional right to represent himself, the right to reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense. *Silva*, 107 Wn. App. at 621, *see also* Const. art. I, § 22. In order to ensure a meaningful pro se defense, “the State must allow the defendant reasonable access to legal materials, paper, writing materials and the like.” *State v. Bebb*, 108 Wn.2d 505, 524, 740 P.2d 829 (1997).

The scope of the right to meaningful access to materials needed for self-representation is governed by the circumstances of individual cases. *Silva*, 107 Wn. App. at 624. In order to ensure meaningful access, a trial court has the authority to appoint standby counsel over the defendant's objection. *State v. McDonald*, 143 Wn.2d 506, 511, 22

P.3d 791 (2001) (*citing McKaskle v. Wiggins*, 465 U.S. 168, 177-78, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)). The right to self-representation may also include the right to an investigator. *Silva*, 107 Wn. App at 624.

- b. The failure to provide subpoena services and other basic necessities of trial preparation denied Mr. Speaks a meaningful opportunity to proceed pro se.

Mr. Speaks made his request to proceed pro se after the trial had commenced. 5/22/14 RP 200. Mr. Speaks was in custody during the course of his trial.

Mr. Speaks wanted to subpoena several witnesses to testify at trial. The court asked the State to prepare subpoenas for the firefighters who were called to the scene and for persons who worked at a homeless shelter Mr. Speaks was familiar with. 6/2/14 RP 5. The State prepared the subpoenas, and the court signed them. 6/2/14 RP 7. These subpoenas were never executed and none of the witnesses Mr. Speaks requested to appear at his trial received notice or appeared for trial. *Id.*

In order to allow him to listen to recorded discovery, the prosecutor informed the court she would prepare an order allowing Mr.

Speaks to review interviews conducted by his former attorney.<sup>6</sup> 5/27/14  
56. The court emphasized the importance of this order, stating “I don’t  
want to wait on the process.” *Id.*

When the court reconvened, the State informed the court “it may  
take several days” for the discovery to become available to Mr. Speaks.  
5/28/14 RP 6. The court informed the State that providing discovery to  
Mr. Speaks “has priority right now.” 5/28/14 RP 9. The prosecutor  
demurred on the issue, telling the court “I cannot do anything about the  
jail procedures.” *Id.* When the court asked the State to prepare  
transcripts of the interviews so Mr. Speaks could review them, the  
prosecutor informed the court it would take their word processing unit  
“three to four days to get the transcripts done.” 5/28/14 RP 10. The  
State then proposed to take an “extensive recess” or dismiss the jury  
and empanel another one when the prosecutor returned from her  
vacation.<sup>7</sup> 5/28/14 RP 11. As an accommodation, the court then offered  
to make the courtroom available to Mr. Speaks to review the  
transcripts. 5/28/14 RP 13.

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<sup>6</sup> Unlike other discovery in this case, there were three to four interviews with  
State’s witnesses which were only recorded and not otherwise preserved. 5/28/14 RP 11.  
These interviews had a total run time of 115 minutes of audio. 5/28/14 RP 12.

<sup>7</sup> The prosecutor had extensive unavailability due to her vacation schedule,  
making her unavailable from June 6-11, June 18-20 and from July 10-18. 5.28.14 RP 9.

- c. To make the right to proceed pro se meaningful, Mr. Speaks is entitled to a new trial where he should be provided with investigative and subpoena services.

Mr. Speaks right to proceed pro se was not meaningful. While the court made accommodations to allow Mr. Speaks to listen to the taped interviews, it was after he had already become frustrated with the process. Given the obvious questions regarding his mental competency, the court and prosecutor should have done more to allow him to listen to the interviews privately, without the presence of the prosecuting attorney.

More importantly, Mr. Speaks was denied a meaningful opportunity to present a defense. Although the court assisted Mr. Speaks in securing subpoenas for witnesses he believed would establish his defense, no attempt was made to have the sheriff to serve the subpoenas or secure an investigator or subpoena service to make this request meaningful. The right to meaningful self-representation is not satisfied by providing an appearance of due process, but only when due process is actually executed. The mere act of creating subpoenas which no one ever intended to have served does not satisfy due process. Mr. Speaks was denied the right to meaningful self-representation. He is entitled to a new trial.

**4. It was an abuse of discretion to allow Mr. Speaks to proceed pro se once trial had commenced.**

- a. The right to self-representation is not absolute and may be limited in the interest of due process.

The right to proceed pro se is neither absolute nor self-executing. *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). Both the United States and Washington Supreme Courts have held that trial courts are required to indulge in “‘every reasonable presumption’ against a defendant's waiver of his or her right to counsel.” *Madsen*, 168 Wn.2d at 504 (citing *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer*, 430 U.S. at 404).

The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05. The request must be timely made in order to minimize possible disruptions and maintain continuity in the handling of the case. *State v. Fritz*, 21 Wn. App. 354, 360-61, 585 P.2d 173 (1978). To be timely, the demand for self-representation should be made in a reasonable time before trial.

*Id.*

- b. Mr. Speaks should not have been allowed to proceed to trial pro se.

Mr. Speaks made his request to proceed pro se after the trial had commenced and a jury had been selected. 5/22/14 RP 200. Because he was in custody, he had no meaningful way to review taped interviews of witnesses or otherwise prepare his defense for trial. 6/2/14 RP 7. The concerns raised by defense counsel regarding his mental competency made the validity of this waiver even more questionable. 5/27/14 RP 20. Rather than continue on course for a timely conclusion of the trial, court recessed for periods of time to resolve the waiver of counsel issue and to allow Mr. Speaks to potentially view discovery. Because of vacation schedules, the court was then put into a position where it had to ensure the trial was completed quickly, with the possibility that proceedings were possibly hurried along to accommodate the unavailability of counsel. *See*, 5/28/14 RP 11.

c. Mr. Speaks is entitled to a new trial.

It was not reasonable under the circumstances to allow Mr. Speaks to proceed without counsel, and the court abused its discretion by allowing Mr. Speaks to proceed pro se. Serious questions existed regarding Mr. Speaks mental competency and his request to dismiss his lawyer after trial had commenced was not timely made. Mr. Speaks was put into a place where he was forced to represent himself without

resources to serve subpoenas or otherwise prepare his defense with little time to even review the record.

Under the circumstances presented to the trial court, the court should have found Mr. Speaks' waiver of counsel was not timely made. Instead, the court should have insisted counsel remain to assist Mr. Speaks in his trial. The court abused its discretion in allowing Mr. Speaks to proceed pro se and he is entitled to a new trial.

#### F. CONCLUSION

Mr. Speaks' constitutional right to due process was denied when the court below failed to make a meaningful inquiry into his competency to stand trial. Because the court never established Mr. Speaks' competency to proceed, it further failed to determine whether his waiver of the right counsel was knowing, voluntary and intelligent. These concerns should have precluded the court from allowing Mr. Speaks to proceed pro se. When, however, the court allowed Mr. Speaks to proceed without an attorney, the failure to provide him with basic services to defend himself made the representation not meaningful.

The denial of Mr. Speaks due process rights entitles him to a new trial.

DATED this 7<sup>th</sup> day of August 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72157-7-I
v.	)	
	)	
FELIX SPEAKS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	( )	U.S. MAIL
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KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] FELIX SPEAKS	(X)	U.S. MAIL
C/O COMPASS CENTER	( )	HAND DELIVERY
77 S WASHINGTON	( )	_____
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF AUGUST, 2015.

X \_\_\_\_\_ 

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