

NO. 35281-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ABDULKAHLIF CALHOUN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 05-1-04400-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it granted defendant's motion to proceed pro se after the court engaged in an extensive colloquy that advised the defendant of the penalty for the crime, the seriousness of the charge, and the technical difficulties associated with trial?

2. Has the defendant met his heavy burden of demonstrating that RCW 9.94A.589(3) is unconstitutional beyond a reasonable doubt and violates equal protection where the statute has a rational basis for permitting a sentencing court to impose a consecutive sentence in when a defendant is convicted of successive crimes by different courts?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged by information on September 7, 2005, with one count of unlawful possession of a controlled substance (cocaine), in violation of RCW 69.50.4013(1). CP 1-2. Defendant was arraigned in Pierce County Superior Court on September 8, 2005. CP 1-2. At the arraignment hearing, both the prosecutor and Judge Buckner advised the defendant that he was charged with unlawful possession of a controlled

substance, cocaine. VRP held 9/8/05 at 3.¹ The record reflects that the defendant was also given a copy of the charging document at arraignment. Id. at 6. The information advised the defendant that the charge was a felony offense. Id. at 6; CP 1.

Defendant's trial date was initially scheduled for 10/27/05. CP 3. On September 22, 2005, attorney Barbara Corey substituted in as counsel of record and attorney Ann Stenberg withdrew as counsel. CP 4. On October 18, 2005, the court continued the trial date at the request of both parties pursuant to State v. Campbell.² CP 6. The order continuing the trial indicated that the reason for the continuance was that the "Parties agree that this case should trail defendant's multi-count robbery case with DPA Schacht." CP 6. On November 21, 2005, the trial was again continued at the request of the parties for the same reason. CP 8. On December 14, 2005, the defendant, through his attorney Ms. Corey, moved again to continue the trial date to January 5, 2006, on the grounds that this case was tracking behind defendant's other case, Pierce County Cause number 05-1-03396-9. CP 9. The court granted that motion. CP 9. The trial was continued again on January 5, 2006, for the same reasons. CP 10. On January 25, 2006, the court continued the trial date to March 6,

¹ Respondent has moved at the time of the filing of its brief to amend the verbatim report of proceedings (VRP) to include the transcript of the arraignment hearing in this case, held September 8, 2005. If the motion is denied respondent understands that the remedies of RAP 10.7 would be applicable.

² State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

2006, on the grounds that Ms. Corey withdrew as counsel the day before and the defendant had just obtained new counsel, attorney James Schoenberger. CP 12, 13; 5RP at 8-9.³ On March 6, 2006, the defendant brought a motion to continue the trial for the reason that the defendant had three matters set for trial on 3/6/06, one with two co-defendants likely to proceed at that time. CP 17. The court granted the motion to continue the trial to 4/17/06. CP 17. On April 17, 2006, the court granted defendant's request to continue the trial date to 5/15/06 for the stated reason that the defendant still wanted this case to be tried after his more serious case that involved co-defendants. CP 20.

On May 9, 2006, the defendant brought a motion to represent himself and proceed pro se with stand-by counsel. CP 2, 8RP at 4. The defendant advised that he no longer wished to have Mr. Schoenberger represent him. Id. The defendant stated that he wished to proceed on his right to self representation. Id. at 5. The defendant specifically stated to Judge Cuthbertson:

³ Respondent has adopted Appellant's references to the verbatim report of proceedings as characterized in footnote 1 of Appellant's opening brief. Those references are as follows:

October 18, 2005, as "1RP"
November 7, 2005, as "2RP"
December 14, 2005, as "3RP"
January 24, 2006, as "4RP"
January 25, 2006, as "5RP"
April 17, 2006, as "6RP"
February 16, 2006, as "7RP"
May 9, 2006, as "8RP"
August 1, 2, 3, 7, and 11, 2006 as "9RP"

Well, your Honor, at this time I request that you enter a judicial determination and rule on the fact that I intelligently, knowingly, and voluntarily waive Mr. Schoenberger as the assigned counsel and the assignment of a lawyer, in fact. 8RP at 4.

The prosecutor advised the court that she was requesting to continue the trial date due to witness scheduling difficulties and unavailability of Officer Halfhill. 8RP at 3, 6. The judge advised the defendant that the court would need to continue the trial date to allow standby counsel to “get up to speed on the case.” Id. at 5. The prosecutor then requested a new trial date of August 1, 2006. Id. at 6.

The court then engaged the defendant in the following colloquy:

Court: And I think we’ve established Mr. Calhoun, have we not, that you’ve never studied law. Is that right?

Defendant: Your Honor, I study law from 12 to 4 daily in my abode.

Court: You’ve never been to formal law school?

Defendant: I cannot affirm that.

Court: Have you ever represented yourself in a criminal proceeding?

Defendant: I’m representing myself here today.

Court: Do you know what your offender score is and how much time you could do if you’re convicted of the unlawful possession of a controlled substance, cocaine?

Defendant: Well, in fact, I have a compilation of the charges of juvenile – adult convictions where there are no

juvenile felony convictions whatsoever, and it states on the criminal history compilation that there are three charges, three points out of Portland, Oregon – two out of Portland, Oregon, and one out of Clark County, Vancouver, Washington, Clark County Superior Court Judge.

Court: So the question is: Do you understand that if you're found guilty of the unlawful possession of a controlled substance that you could be sentenced to incarceration in the Department of Corrections probably for a number of years and have significant fines on top of that?

Defendant: I understand your assessment, yes.

Prosecutor: Your Honor, just for Mr. Calhoun's information, currently his offender score stands at a 4 depending on the outcome of several pending cases. That could go up by the time this gets to trial, with a minimum of 6 to 18 months, If his range goes up two points to a six, he'll be looking at 12 plus to 24.

Court: So you're looking at up to two years in prison. Are you familiar with what we call the Rules of Evidence?

Defendant: I have a notice, the Rules of Evidence, yes. The book, I don't have a copy myself.

Court: I asked: Are you familiar with the Rules of Evidence.

Defendant: Correct.

Court: So you know what can come into trial and what doesn't get in and what can be admitted and what can't and order of questioning and what documents are admitted and what aren't?

Defendant: Yes. I have an understanding of that, and that's why I request standby counsel so they will make themselves readily available so that we may determine an affirmative defense in this matter.

Court: Are you familiar with the Rules of Criminal Procedure?

Defendant: Yes.

Court: And you realize that the Rules of Criminal Procedure govern the way in which a criminal trial is tried in this court?

Defendant: Yes.

Court: Even though you haven't demonstrated that in practice in the last week, you think you understand that?⁴

Defendant: Yes.

Court: Okay. And you understand that you're going to be held to the same standard of any other counsel in this court if you are assisted by standby counsel and try to represent yourself?

Defendant: Yes.

Court: In light of the penalties that you might suffer, if you're found guilty and in light of all the difficulties in representing yourself, is it still your desire to represent yourself and give up your right to be represented by a lawyer?

Defendant: I adamantly stand on my right to self-representation.

⁴ This colloquy before Judge Cuthbertson occurred on May 9, 2007. This portion of the colloquy clearly references the existence of other criminal proceedings involving the defendant. The orders continuing trial in this case demonstrate that the defendant had several criminal proceedings pending in the superior court, including a single case that included charges of robbery, assault in the second degree, and burglary, under Pierce County Superior Court Cause Number 05-1-03396-9. See Plaintiff's Exhibit 5 admitted at sentencing; 9RP at 229. The judgment and sentence order under 05-1-03396-6 indicates that the defendant was found guilty in that case on May 16, 2006, by a jury verdict. Id.

Court: Okay. Is this a voluntary decision on your part?

Defendant: Voluntarily, knowingly, and intelligently made.

Court: Okay. I'm going to enter a finding that the defendant has knowingly and voluntarily waived the right to counsel in the UPCS case and we'll appoint standby counsel, but it will necessitate a continuance through August of 2007. Thank you.

Defendant: I would also –

Court: If you'd draft an order.

Defendant: Judge –

Court: 2006, excuse me. It's my error.

8RP at 4-11. The court subsequently entered an order allowing attorney James Schenberger to withdraw as counsel in the case. CP 24. The court then continued the trial date to August 1, 2007. CP 23. The court set the case for a hearing on May 23, 2006, for the purpose of having the defendant return with a new standby attorney.

On August 1, 2006, the case was assigned to Judge Kathryn J. Nelson for trial. 9RP at 3. The defendant appeared for trial with standby counsel, attorney Bayley Miller. 9RP at 13-15.

On August 3, 2006, the defendant brought a pre-trial motion pursuant to CrR 3.6, to suppress statements, citing Miranda v. Arizona.⁵

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

9RP at 67. The State stipulated that it would not be introducing any statements of the defendant at trial. 9RP at 69.

On August 7, 2006, the jury returned a verdict of guilty as charged to crime of unlawful possession of a controlled substance, cocaine. 9RP at 216; CP 64. A sentencing hearing was scheduled for August 11, 2006. CP 30; 9RP at 220.

At the sentencing hearing the court admitted numerous exhibits consisting of certified judgments and decisional and statutory law governing the defendant's criminal history. 9RP at 228-237; Plaintiff's Exhibits 1-8, admitted 8/11/06. The court conducted a comparability analysis of the defendant's 2001 Oregon convictions for delivery of a controlled substance (cocaine), and unlawful possession of a controlled substance (cocaine). Id. at 237-38. The court found that the Oregon convictions were comparable to Washington felonies and included them in the defendant's criminal history for purposes of his offender score. Id. at 239. The court also admitted certified judgments of the defendant's Washington State felony convictions. Id. at 237. The court ruled that the defendant had an offender score of 9 points, resulting in a standard range sentence of 12 months and a day to 24 months in the Department of Corrections. CP 65-67-80.

At sentencing the State requested that the Court impose a sentence of 24 months, consecutive to the defendant's sentence received for the robbery, assault, and burglary convictions under Pierce County Superior

Court case number 05-1-03396-9. 9RP at 239. The defendant had been sentenced in the 05-1-03396-9 case on June 2, 2006. Plaintiff's Exhibit 5, dated 8/11/06. The State argued that the defendant committed the present crime in April 2005, two months after he had been ordered by the Pierce County Superior Court to comply with conditions of release in an unrelated felony drug charge under case, number 05-1-00412-8.⁶ 9RP at 239-40; Plaintiff's Exhibits 6-7 dated 8/11/06. The State also noted that the defendant already had an offender score of 9 points⁷, and that a concurrent sentence would result in the defendant receiving a free crime. 9RP at 240. Judge Nelson imposed a standard range sentence of 24 months, and ordered that it be served consecutively to the defendant's sentence under cause number 05-1-03396-9. *Id.* at 243; CP 68-80.

The defendant filed a timely notice of appeal. CP 93.

⁶ The sentencing court was aware that the proceedings in case number 05-1-00412-8, a charge of delivery of cocaine were still active at the time of trial in this matter. On August 1, 2006, the first day of trial in this case, 05-1-04400-6, Judge Nelson specifically continued the trial date for the 05-1-00412-8 case to August 13, 2006. VRP dated August 1, 2006, at 5.

⁷ Pursuant to RCW 9.94A.517, the Drug Offense Sentencing Grid, a level I drug offense carries the same standard range of 12+ to 24 months where the offender has a criminal history score from 6 to 9+ points. The crime of possession of a controlled substance involving a schedule II narcotic (Cocaine) is a level I drug offense pursuant to RCW 9.94A.518.

2. Facts

On April 18, 2005, Lakewood Police Officer Jeremy Vahle responded to the Golden Lion Motor Inn. 9RP at 123-25. A security officer at the Golden Lion Inn had reported a complaint of trespassers who refused to leave the property. Id. at 141. Officer Vahle determined that the defendant was a trespasser and arrested him at that same location. Id. at 126. The defendant was transported to the Pierce County Jail. Id. at 129. The defendant was then booked into the jail. Id. at 130.

At the jail, the defendant entered a small room with Officer Halfhill where inmates are required to change into jail clothes as part of the booking process. Id. at 131. After that process was completed, Officer Vahle observed Officer Halfhill exit the changing room with a plastic baggy that contained a substance which appeared to be “rock” cocaine. Id. at 131-32.

Officer Halfhill also testified at trial. He stated that during the booking process at the Pierce County Jail a strip search is conducted to make sure that contraband such as drugs do not enter the jail. Id. at 152-53. Officer Halfhill participated in the procedure of patting down the defendant and strip searching him. Id. at 155-56. During that process Officer Halfill had the defendant undress. Id. at 156. After the defendant was undressed, Officer Halfill observed a cellophane baggy containing a white substance crunched up in the defendant’s anus. Id. at 158. Officer

Halfhill recovered the cellophane baggy and its contents and then turned it over to Officer Vahle. Id. at 159-60.

John Dunn also testified at trial. He stated that he was an analyst at the Washington State Patrol Crime Lab. Id. at 174. Dunn, a forensic scientist, tested the substance found in the cellophane baggy and determined that it was in fact cocaine. Id. at 175, 182.

C. ARGUMENT.

1. DEFENDANT HAS NOT DEMONSTRATED THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED HIS ADAMANT DEMAND TO PROCEED PRO SE MONTHS BEFORE THE DATE OF TRIAL AND AFTER A THOROUGH COLLOQUY; TO THE CONTRARY, A DENIAL OF THE REQUEST WOULD HAVE BEEN ABUSE OF DISCRETION.

A trial court's determination to grant or deny a defendant's waiver of right to counsel is reviewed for abuse of discretion. State v. Hahn, 106 Wn.2d 885, 900, 726 P.2d 25 (1986); State v. Kolocotronis, 73 Wn.2d 92, 102, 436 P.2d 774 (1968); In re Detention of J.S., 138 Wn. App.882, 891, 159 P.3d 435 (2007); State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001); State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995); State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), review denied, 108 Wn.2d 1006 (1987) (whether valid waiver of right to counsel has been made is within the sound discretion of trial court). A trial court abuses its

discretion if its “decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002).

On appeal the defendant carries the burden of proving that he did not competently and intelligently waive his right to counsel. Hahn, 106 Wn.2d at 900-01; In re Wilken v. Squier, 50 Wn.2d 58, 61, 309 P.2d 746 (1957); State v. Jessing, 44 Wn.2d 458, 461, 268 P.2d 639 (1954).

Every defendant has a constitutional right to represent himself or herself without counsel’s assistance. State v. Honton, 85 Wn. App. 415, 419, 932 P.2d 1276, review denied, 133 Wn.2d 1011, 946 P.2d 401 (1997). The United States Supreme Court has long recognized a constitutional right of criminal defendants to waive assistance of counsel and to represent themselves at trial. In Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the rule was announced that a court cannot force a defendant to accept counsel if the defendant wants to conduct his or her own defense, as the Sixth Amendment grants defendants the right to make a personal defense with or without the assistance of an attorney. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). The rationale for this rule is respect for an individual’s autonomy:

It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by

counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350-351, 90 S. Ct. 1057, 1064, 25 L. Ed. 2d 353 (1970) (Brennan, J., concurring). Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "Even if the defendant [is] likely to lose the case anyway, he has the right--as he suffers whatever consequences there may be--to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case."

Breedlove, 79 Wn. App. at 110-11 (quoting United States v. Dougherty, 154 U.S. App. D.C. 76, 473 F.2d 1113, 1128 (D.C. Cir. 1972)). Nor is a trial court required to advise a defendant of every possible legal technicality that he or she may encounter. See, State v. Imus, 37 Wn. App. 170, 177-78, 679 P.2d 376, review denied, 101 Wn.2d 1016 (1984) (trial court was not required to tell the defendant about possible lesser offenses, possible defenses, or mitigating factors during colloquy on request to proceed pro se).

“The erroneous denial of a defendant’s motion to proceed pro se requires reversal without any showing of prejudice.” Breedlove, 79 Wn. App. at 110- 11 (quoting State v. Estabrook, 68 Wn. App. 309, 317, 842 P.2d 1001, review denied, 121 Wn.2d 1024, 854 P.2d 1084 (1993) (citing Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir. 1990), cert. denied, 501 U.S. 1255, 111 S. Ct. 2900, 115 L. Ed. 2d 1064 (1991)). The right to self-representation is either respected or denied; its deprivation cannot be harmless. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied, 148 Wn.2d 1022, 66 P.3d 638 (2003).

The appellate courts have repeatedly held that trial court have a limited amount of discretion when a defendant demands his or her constitutional right to proceed pro se. That discretion lies along a continuum, corresponding to the timeliness of the request:

- (a) if made well before the trial . . . and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial . . . is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial . . . , the right to proceed pro se rests largely in the informed discretion of the trial court.

Vermillion, 112 Wn. App. at 855 (quoting State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)). “Where a court is put on notice that the defendant wishes to assert his right to self-

representation but it nevertheless delays ruling on the motion, the timeliness of the request must be measured from the date of the initial request.” Breedlove, 79 Wn. App. at 109. Where the record demonstrates that a motion to proceed pro se is made well in advance of trial, and there is no evidence that it is made for an improper motive or the purpose of delay, a trial court must view such a request as a right as a matter of law. See, Vermillion, 112 Wn. App. at 855-57.

A defendant’s request to proceed pro se must be unequivocal. State v. Barker, 75 Wn. App. 236, 238, 881 P.2d 1051 (1994). The waiver of the right to counsel must be knowingly, voluntarily and intelligently made. Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984); State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996).

In determining whether a defendant’s waiver is valid, the trial court should preferably conduct a colloquy on the record reflecting that the defendant is at least minimally aware of the task involved. State v. DeWeese, 117 Wn.2d 369, 377-78, 816 P.2d 1 (1991). In the absence of a colloquy, the record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense. Id. at 378. A defendant need not demonstrate technical knowledge of the law and the rules of evidence. Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Generally, a defendant in a criminal case who is sui juris and mentally competent has the right to conduct his defense in person, without assistance of counsel. Faretta, 45 L. Ed. 2d at 569. A lack of legal technical knowledge generally will not serve as a basis for denying assertion of the right to self-representation. State v. Chavis, 31 Wn. App. 784, 790, 644 P.2d 1202 (1982) (citing People v. Freeman, 76 Cal. App. 3d 302, 142 Cal. Rptr. 806, 809 (1977) and Faretta, at 422 U.S. 835-36).

In State v. Vermillion, the Court of Appeals reversed the defendant's robbery conviction on the grounds of an erroneous denial of a motion to proceed pro se. Vermillion, 112 Wn. App. at 858. Division One emphasized in Vermillion that the trial court's role in assessing a motion to proceed pro se is actually quite narrow, and it must not consider whether the defendant will be able to skillfully present his or her case at trial:

No showing of technical knowledge is required. Faretta, 422 U.S. at 835. If a person is competent to stand trial, that person is competent to represent himself. Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). The purpose of asking the defendant about his experience, if any, in representing himself and his familiarity, if any, with the rules of evidence and other aspects of courtroom procedure is not to determine whether he has sufficient technical skill to represent himself. Rather, the purpose is to determine whether he fully understands the risks he faces by waiving the right to be represented by counsel, such as the risk that lack of familiarity with evidentiary rules could result in admission of prosecution evidence that could have been excluded by a proper objection, or exclusion of defense evidence that the

defendant would like to present but cannot for some reason based on evidentiary rules of which he has no knowledge. See State v. Hahn, 106 Wn. App. 885, 889-90, 726 P.2d 25 and n.3 (1986). A defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, but the record should establish that “he knows what he is doing and his choice is made with eyes open.” 106 Wn. App. at 889, quoting Faretta, 422 U.S. at 835. “It is the responsibility of the trial court to determine a defendant’s competency intelligently to waive the services of counsel and act as his own counsel, . . . [but] any consideration of a defendant’s ability to ‘exercise the skill and judgment necessary to secure himself a fair trial’ was rendered inappropriate by Faretta.” Hahn, 106 Wn.2d at 890 n.2, citing Fritz, 21 Wn. App. at 360 (other citations omitted).

Vermillion, 112 Wn. App. at 857-858 (2002)

The absence of a colloquy is not fatal to a valid waiver as long as the record reflects at least minimal awareness of the task involved.

DeWeese, 117 Wn.2d at 378. Whether the criminal defendant’s waiver of the constitutional right to be represented by counsel at trial is valid depends on the facts and circumstances of each case, and there is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant. Id.

The record in this case does not differ in any meaningful degree from the record in State v Vermillion, supra, with the exception that defendant Vermillion made his request on more than one occasion and at a point in time closer to his actual trial date than did Mr. Calhoun. As in the case of Vermillion, Mr. Calhoun’s request to proceed pro se was adamant

and unequivocal. Calhoun made his request months in advance of the trial date, and therefore had an absolute right to proceed pro se under Fritz.

Contrary to appellant's argument, the trial court is not required to expressly advise the defendant that he will not be assisted by the court. Where the record demonstrates, as in this case, that the defendant understood he would be held to the same standard as a lawyer, that is sufficient to grant a motion to proceed pro se. See, Vermillion, 112 Wn. App. at 856. Indeed, as a matter of law under Vermillion, where the defendant acknowledges that he understands he or she will be held to the same standard as an attorney the court must grant the motion to proceed pro se where the colloquy otherwise addresses the basic requirements. Id. Additionally, the trial court is not required in the colloquy to advise the defendant that his or her decision is for keeps and the lack of such an advisement does not permit the trial court to deny a motion to proceed pro se. Vermillion, at 855-57.

Furthermore, the record in this case contains evidence in addition to the colloquy that demonstrates that the defendant was aware of the technical difficulties and magnitude of self-representation. The defendant had previously been to trial before on the same charge of unlawful possession of a controlled substance, cocaine. The record at sentencing demonstrated that the defendant had been convicted by a jury trial in 2001 in Multnomah County, Oregon on a multiple count indictment that included charges of 1) delivery of a controlled substance (cocaine), 2)

possession of a controlled substance (cocaine), and 3) escape in the third degree. See, Plaintiff's Exhibit No. 4, admitted August 11, 2006.

Defendant was convicted at trial on all three charges. Id. Consequently, the defendant had previously experienced the technical difficulties of trial on the very same charge of possession of cocaine that he faced in this case.⁸ A reviewing court can consider this prior jury trial experience in assessing the defendant's understanding of the technical difficulties associated with self-representation in criminal proceedings. See, State v. Silva, 108 Wn. App 536, 541, 31 P.3d 729 (2001).

Furthermore, the record indicates that at the defendant was also apparently aware of the risks attendant with self-representation based the posture of his other current criminal proceedings. As indicated by all of the defendant's motions to continue the date of trial in this case, defendant consistently wanted his robbery/assault/burglary case to commence trial prior to going to trial on the drug possession charge at issue in this appeal. That clearly occurred as a matter of record. The colloquy in this case occurred on May 9, 2006. During his colloquy with the defendant, Judge Cuthbertson referenced the fact that the defendant had not demonstrated his understanding of the rules of criminal procedure "in the last week."

⁸ The sentencing court conducted a comparability analysis of defendant's 2001 Oregon conviction for unlawful possession of a controlled substance (cocaine), and determined that the conviction, also classified in Oregon as a class "C" felony (ORS 475.992(4)), was comparable to the same offense in Washington. See, Plaintiff's Exhibit 8, admitted 8/11/06; VRP date 8/11/06 at 239.

The judgment and sentence for the robbery, assault, and burglary charges indicates that the defendant was convicted by a jury verdict on May 16, 2006. See, Exhibit 5, admitted 8/11/06.

The record therefore indicates that Judge Cuthbertson clearly knew that the defendant was aware of trial procedure from the proceedings that were ongoing in his court with the defendant's robbery trial. The present record, however, does not establish precisely what aspects of the robbery trial had taken place. Under Silva, supra, this is clearly relevant and on this record necessary material to appellant's claim of error. As previously stated, on appeal the defendant carries the burden of proving that he did not competently and intelligently waive his right to counsel. Hahn, 106 Wn.2d at 900-01; In re Wilken v. Squier, 50 Wn.2d 58, 61, 309 P.2d 746 (1957); State v. Jessing, 44 Wn.2d 458, 461, 268 P.2d 639 (1954). Because defendant carries the burden, and the record in this case clearly demonstrates that the defendant had knowledge of the technicalities of criminal procedure in a different proceeding that had already taken place

before the same Judge, it is incumbent upon the defendant to provide this court with the complete record to justify his request for relief.⁹

Appellant's failure to provide this court with the complete record detailing all of the proceedings that had occurred with the defendant before Judge Cuthbertson should bar his claim that the court abused its discretion in granting the motion. An appellate court cannot review an assignment of error absent an adequate record that would permit review. State v. Wade, 138 Wn.2d 460, 465, 979 P.2d 850 (1999). When facing an inadequate record, an appellate court may order supplementation of the record under RAP 9.10 or refuse to address the issue. Id.

The unusual circumstance of conducting a pro se colloquy during the middle of a concurrent criminal trial presided over by the same judge places the record in the case within the framework of State v. Silva, 108 Wn. App 536, 31 P.3d 729 (2001). In Silva, the defendant also claimed that the court did not adequately explain the technical difficulties of self-representation, but the Court of Appeals rejected that assertion where the record demonstrated his recent participation in a concurrent criminal trial:

“In this case, Silva’s recitation and qualitative description

⁹ The judgment and sentence for the defendant’s convictions for robbery, two counts of assault in the second degree and burglary in the first degree were entered under Pierce County Superior Court case number 05-1-03396-9. Those convictions are already before Division Two on direct appeal under COA No. 34943-8-II. Division Two is already in possession of the verbatim report of trial proceedings under that case number. The State is not opposed to any motion by appellant to expand the record in this case to include review of proceedings that had already taken place before Judge Cuthbertson as of the date of the defendant’s motion to proceed pro se, May 9, 2006. The State is already in possession of those transcripts.

of the charges against him indicate that he understood their nature and gravity. Moreover, the record reflects ample evidence that Silva was aware of the risks attendant with self-representation. He had just completed a criminal trial with counsel during which he saw firsthand the complexity of the process by witnessing jury selection, presentation of evidence, including cross-examination, evidentiary objections and argument. In addition, by the time of trial in this case, Silva had twice represented himself in other trials in both King County and Oregon.”

Silva, 108 Wn. App at 541.

Defendant also mistakenly analogizes the record in this case to that of State v. Nordstrom, 89 Wn. App. 737, 950 P.2d 946 (1997). In Nordstrom, the court reviewed defendant’s claim that the trial court had erroneously allowed him to proceed pro se. The Court of Appeals observed that there was no colloquy on the record regarding the court ordering the defendant to proceed pro se. Nordstrom, 89 Wn. App. at 742. The Court of Appeals began its opinion by writing, “Thus, the question before us is whether this is one of those ‘rare cases’ where the record shows the required awareness of the risks of self-representation.” Nordstrom, 89 Wn. App. at 742. The trial court in Nordstrom did not advise the defendant about the rules of evidence, or the rules of criminal procedure. In addition to its failure to discuss the existence of those rules, the court failed to advise the defendant that those rules have a relationship to what evidence can be admitted and order of questioning at trial, and that the rules govern the way in which a criminal trial is tried. Nordstrom, 89 Wn. App. at 743.

By contrast, Judge Cuthbertson conducted a colloquy in this case. Judge Cuthbertson specifically discussed the existence of the rules of evidence and criminal procedure and the technicalities of admitting evidence with the defendant. Judge Cuthbertson connected the existence of those rules to the dangers of proceeding pro se by explicitly stating to the defendant that these rules “govern the way in which a criminal trial is tried in this court.” Furthermore, Judge Cuthbertson advised the defendant that he would be held to the same standard as any other counsel if he proceeded pro se, the same colloquy approved in Vermillion, supra. The defendant acknowledged at each stage of the colloquy that he understood these burdens and still wished to proceed pro se.

Given Mr. Calhoun’s adamant and unequivocal request for self-representation, which he presented well in advance of the trial date, he would have successfully appealed a decision that denied him self-representation based upon this record. See, DeWeese, 117 Wn.2d at 377 (noting that a request for self-representation presents a “heads I win, tails you lose” proposition for the trial court, because of the risk of violating either the right to counsel or the right to self-representation) (quoting State v. Imus, 37 Wn. App. 170, 179, 679 P.2d 376, review denied, 101 Wn.2d 1016 (1984)); Vermillion, 112 Wn. App. at 857 (reversing trial court’s denial of self-representation, noting: “If a person is competent to stand trial, that person is competent to represent himself.”).

The trial court made the correct decision in this case and did not abuse its discretion in granting the defendant's "adamant" request to represent himself. In light of State v. Vermillion, *supra*, a decision by Judge Cuthbertson to deny the defendant's right of self representation would have been an abuse of discretion entitling the defendant to a new trial. The defendant has failed to carry his burden of demonstrating that he did not competently and intelligently waive his right to counsel.

2. DEFENDANT'S EQUAL PROTECTION CHALLENGE TO RCW 9.94A.589(3) MUST FAIL BECAUSE IT IS PREMISED UPON THE THEORY THAT COURTS MUST NOT HAVE ANY DISCRETION IN SENTENCING, AN ARGUMENT THAT IF SUCCESSFUL WOULD INVALIDATE THE ENTIRE SENTENCING REFORM ACT.

The right to equal protection of laws is guaranteed by the Fourteenth Amendment of the United States Constitution and by the privileges and immunities clause of Article I, Section 12 of the Washington Constitution. Both require that persons similarly situated be similarly treated for any legitimate purpose of the law. State v. Shawn P., 122 Wn.2d 553, 559 60, 859 P.2d 1220 (1993). Constitutional challenges are reviewed de novo. Fausato v. Washington Interscholastic Activities Ass'n., 93 Wn. App. 762, 767, 970 P.2d 774 (1999). A statute is presumed constitutional; the party attacking that statute has the burden of

proving it is unconstitutional beyond a reasonable doubt. Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

Appellant asserts that the consecutive sentencing authority of RCW 9.94A.589(3)¹⁰ exercised by the court below is unconstitutional per se and violates both his state and federal rights to equal protection. (Appellant's brief at 23-24). Appellant fails to provide this court with any argument based upon the Washington State Constitution, this court should therefore review his claim only under the Fourteenth Amendment. See, State v. Blilie, 132 Wn.2d 484, 493, 939 P.2d 691 (1997) (Court reviewed equal protection claim solely on the Fourteenth Amendment where defendant failed to differentiate between the equal protection clause of the Fourteenth Amendment and WASH. CONST. art. I, § 12); In re Boot, 130 Wn.2d 553, 572, 925 P.2d 964 (1996).

When neither a suspect class, semi-suspect class, nor fundamental right is at issue in an equal protection challenge, the rational relationship test applies. Boot, 130 Wn.2d at 573; State v. Manussier, 129 Wn.2d 652,

¹⁰ RCW 9.94A.589(3) reads as follows:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

This statute was previously codified under RCW 9.94A.400(3) prior to 2002. The text of the statute did not change as a result of the recodification.

673, 921 P.2d 473 (1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1563, 137 L. Ed. 2d 709, 520 U.S. 1201 (1997). When physical liberty is the sole interest involved in a statutory classification, the rational relationship test applies. Manussier, 129 Wn.2d at 673. ““The rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause. Under this test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives.”” Boot, 130 Wn.2d at 573 (quoting Shawn P., 122 Wn.2d at 561). The challenger must also do more than challenge the wisdom of the legislative classification; he must “show conclusively that the classification is purely arbitrary.” Shawn P., 122 Wn.2d at 561.

RCW 9.94A.589(3) serves a rational and legitimate purpose and “applies when (1) a person who is ‘not under sentence of a felony’ (2) commits a felony and (3) before sentencing (4) is sentenced for a different felony.” State v. Shilling, 77 Wn. App. 166, 175, 889 P.2d 948 (1995) (upholding a sentencing court’s discretion to impose a consecutive sentence) (quoting former RCW 9.94A.400(3), recodified as RCW 9.94A.589(3) (2002)). Under these circumstances, “[a] sentencing court has total discretion in deciding whether a current sentence will run concurrently with, or consecutively to, a felony sentence previously imposed.” State v. Klump, 80 Wn. App. 391, 396, 909 P.2d 317 (1996); Shilling, 77 Wn. App. at 175-76; In re Pers. Restraint of Long, 117 Wn.2d 292, 302, 815 P.2d 257 (1991). An express order requiring that the

sentences be served consecutively overcomes the presumption that all sentences will be served concurrently. State v. Jones, 137 Wn. App. 119, 124-125, 151 P.3d 1056 (2007) (citing RCW 9.94A.589(3), and Shilling, 77 Wn. App. at 176).

Consecutive sentences imposed under RCW 9.94A.589(3) are one of two prescribed punishments. Jones, at 126. Under the plain language of the statute, the trial judge need not specify the reasons for imposing consecutive sentences. State v. Kern, 55 Wn. App. 803, 780 P.2d 916 (1989) (citing former RCW 9.94A.400(3)), review denied, 114 Wn.2d 1003 (1990).

The appellate courts have repeatedly upheld the discretion granted sentencing courts to impose consecutive sentences under RCW 9.94A.589(3). See, State v. Champion, 134 Wn. App. 483, 140 P.3d 633 (2006); State v. Smith, 74 Wn. App. 844, 875 P.2d 1249 (1994), review denied, 125 Wn.2d 1017, 890 P.2d 19 (1995); State v. Linderman, 54 Wn. App. 137, 772 P.2d 1025, review denied, 113 Wn.2d 1004, 777 P.2d 1051 (1989); State v. Kern, 55 Wn. App. at 806.

The statute is applicable where a defendant “*has been charged in multiple informations or has committed a series of crimes across court jurisdictions and where the defendant will be sentenced by more than one judge.*” Comments to 9.94A.589(3) of the Sentencing Guidelines Commission (emphasis added). “The purpose of this subsection is to allow the judge some flexibility within the guidelines in order to minimize

the incidental factors of geographical boundaries and jurisdictions.” Id. The legislature may well have intended that courts have the authority to treat offenders who have committed a series of separate and distinct crimes more harshly. See, State v. Veazie, 123 Wn. App. 392, 403, 98 P.3d 100 (2004) (wherein court rejected equal protection challenge to sentencing statute that permitted juvenile sentencing court discretion to impose multiple consecutive terms of confinement for probation violation rather than concurrent terms). As the Supreme Court recognized, the statute allows the sentencing judge “flexibility to be lenient or stern in sentencing.” In re Long, 117 Wn.2d at 302; State v. Grayson, 130 Wn. App. 782, 786, 125 P.3d 169 (2005). Therefore, it unquestionably serves a rational basis.

Where trial courts have discretion to establish sentence duration, they necessarily have discretion to impose disparate sentences upon defendants. See, State v. Handley, 115 Wn. 2d 275, 287, 796 P.2d 1266 (1990) (statute vesting trial judge with discretion to establish length of sentence does not violate equal protection when codefendants sentenced to different sentences). As a general rule, statutes that authorize varying punishments for the same criminal act do not violate constitutional equal protection provisions. See, State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987). “There is no requirement that two persons convicted of the same offense receive identical sentences.” Williams v. Illinois, 399 U.S. 235, 243, 90 S. Ct.

2018, 26 L. Ed. 2d 586 (1970), supra. See also, Jansen v. Morris, 87 Wn.2d 258, 261-62, 551 P.2d 743 (1976) (*statute vesting trial judge with authority to order sentences to run concurrently or consecutively, thus permitting variation in punishment, does not violate equal protection*); State v. Oksoktaruk, 70 Wn. App. 768, 777, 856 P.2d 1099 (1993) (court rejected equal protection challenge to statute that allowed judge to impose an exceptional sentence in its discretion where defendants committing same crime had same offender score).

In short, sentencing disparities between similar crimes do not implicate equal protection. See, State v. Boggs, 57 Wn.2d 484, 358 P.2d 124 (1961) (wherein court held that discretion lodged in the trial judge to set the maximum sentence at anywhere from a fine of one thousand dollars, to 1 year in the county jail, or to life imprisonment does not violate equal protection); State v. Barton, 75 Wn.2d 947, 950, 454 P.2d 381 (1969) (court rejected equal protection challenge to a 20 year sentence imposed under a statute that authorized a sentence of 1 year in county jail or up to statutory maximum of 20 years in state penitentiary). Offenders may in some instances benefit from a court's exercise of discretion, but offenders do not have a right to a particular result that lies within the courts' discretion. State v. Rousseau, 78 Wn. App. 774, 777, 898 P.2d 870 (1995), (footnote omitted) review denied, 128 Wn.2d 1011, 910 P.2d 482 (1996).

In support of his position that the sentence imposed in this case constituted a violation of equal protection, defendant mistakenly relies on State v. Whitehead, 51 Wn. App. 841, 845 n.4, 755 P.2d 852 (1988). In Whitehead, the defendant was charged with six counts of burglary and four counts of possessing stolen property in a single information. Whitehead, 51 Wn. App. 842, and 845, n.4. The trial court granted Whitehead's motion to sever the charges, thus creating the two separate proceedings at issue. Whitehead went to trial on some of the charges that had been severed from the single information and was later convicted. In a second separate proceeding Whitehead entered guilty pleas to other severed charges and received an exceptional consecutive sentence after the court entered exceptional sentence findings. Whitehead raised an equal protection argument on appeal regarding his sentence. Division Two noted that "all offenses were 'current,' as evidenced by the prosecutor's decision to charge them all in one information." Whitehead, 51 Wn. App. at 845, n.4. In dicta, the court stated that the defendant's "equal protection argument would have force if the statute was interpreted as allowing consecutive non-exceptional sentences under [former] .400(3) for current offences imposed in separate proceedings." (Emphasis added).

The Whitehead decision addressed circumstances that are factually distinguishable from the defendant's situation. In contrast to Whitehead, defendant Calhoun was not sentenced for an other *current* offense. The drug offense was committed on a date separate from the dates of the

robbery, assault, and burglary offenses. The drug offense at was charged in a separate information, and filed under a separate cause number. The convictions were not, as a matter of law, “other current offenses” as that term is defined by RCW 9.94A.525(1) and RCW 9.94A.589. Defendant Calhoun was sentenced on the robbery, burglary, and assault convictions by a different judge prior to the trial date in the possession of cocaine charge. Consequently, the robbery, burglary, and assault convictions each constituted a “prior conviction” under RCW 9.94A.525(1).

Defendant is challenging the per se constitutionality of RCW 9.94A.589(3) on the grounds that persons with exactly the same criminal history who commit the same crime “may be treated differently, despite the fact that their circumstances are exactly the same. (Appellant’s brief at 26). Defendant premises his equal protection challenge by contrasting himself with a hypothetical non-existent other person.

The State does not deem this type of hypothetical “class” as sufficient to raise an equal protection challenge. By contrast, it is well settled that the appellate courts will entertain an equal protection challenge where co-defendants are treated differently at sentencing. In State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990), the Supreme Court emphasized that “no equal protection claim will stand unless the complaining person can first establish that he or she is similarly situated with other persons. Handley, at 289-90. In other words, only after the defendant establishes membership in a class will a court engage in equal

protection scrutiny. Id. at 290. The Supreme Court held that strict requirements were required to raise an equal protection challenge in the context of co-defendant sentencing:

Applying equal protection principles to the context of sentencing codefendants, two rules are derived: (1) if a defendant can establish that he or she is similarly situated with another defendant by virtue of near identical participation in the same set of criminal circumstances, then the defendant will have established a class of which he or she is a member. Only after membership in such a class is established will equal protection scrutiny be invoked. Then, only if there is no rational basis for the differentiation among the various class members will a reviewing court find an equal protection violation. (2) If a defendant is a member of a suspect class and can establish that he or she received disparate treatment because of that membership, i.e., that there was intentional or purposeful discrimination, then we will invoke equal protection scrutiny. To the extent that the Court of Appeals in this case held that only the second of these two rules was valid, that holding is reversed. There is no evidence in the record of intentional or purposeful discrimination. Therefore, we consider whether defendant's equal protection challenge can be sustained under the first rule. To determine whether the codefendants in this case were similarly situated, or members of the same class, it is helpful to compare the positions of the codefendants in the earlier Court of Appeals cases which invoked equal protection scrutiny. In each of the earlier cases the codefendants were at the scene of the offenses together and were charged with many, if not all, of the same crimes. *State v. Clinton*, 48 Wn. App. 671, 741 P.2d 52 (1987) (codefendants together at three crime scenes, each charged with three counts of first degree rape and three counts of first degree burglary); *State v. Portnoy*, 43 Wn. App. 455, 718 P.2d 805 (codefendants together at robbery scene, each codefendant charged with three of the same crimes, one defendant charged with one additional crime), review denied, 106 Wn.2d 1013 (1986); *State v. Turner*, 31 Wn. App. 843, 644 P.2d 1224 (codefendants

together at scene of crime), review denied, 97 Wn.2d 1029 (1982); State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975) (all three codefendants together at scene of crime, all charged and convicted of same crimes), review denied, 86 Wn.2d 1011 (1976); State v. Hurst, 5 Wn. App. 146, 486 P.2d 1136 (1971) (codefendants charged and convicted of same three crimes). These few cases illustrate that it is the exception rather than the rule which creates an equal protection class of codefendants.

Handley, 115 Wn.2d at 290-291.

Defendant has presented no authority for considering this type of challenge, a hypothetical equal protection violation based solely upon the classification of a hypothetical defendant with the same criminal history who hypothetically received a different sentence. The Supreme Court made it clear in Handley that it is the “exception rather than the rule which creates an equal protection class of codefendants,” which is to say that such a comparison in fact will be quite rare. Defendant has failed to substantiate that he is similarly situated with another actual defendant by virtue of near identical participation in the same set of criminal circumstances.

Such challenges have been rejected by other appellate courts. A similar hypothetical challenge was rejected by the 7th Circuit Court of Appeals in Holman v. Page:

As in United States v. Marshall, 908 F.2d 1312, Holman’s due process and equal protection attack on the entire Illinois sentencing scheme is not about his own sentence. Rather, he objects to the possibility that others might receive sentences too long or too short. “But these are only

possibilities, which have nothing to do with [Holman's] sentence[.]” Id. at 1320. Holman’s sentence of natural life imprisonment for murder is eminently rational. Illinois has the highest interest in meting out severe punishment for such brutality, both to deter others of similar moral depravity from committing like crimes and to prevent repeat offenses. It has materially advanced that interest by incarcerating Holman for the rest of his life. Some rational connection between the sentence and the offense is all the Constitution enjoins under the Due Process and Equal Protection Clauses. Id.; Chapman v. United States, 500 U.S. 453, 465, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991); see Jones v. United States, 463 U.S. 354, 362 n.10, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983) (an argument based on equal protection essentially duplicates an argument based on due process); French v. Heyne, 547 F.2d 994, 997 (7th Cir. 1976) (“In the absence of fundamental rights or a suspect classification, equal protection requires only that a classification which results in unequal treatment bear some rational relationship to a legitimate state purpose.”)

Having received a constitutional sentence, Holman is not “entitled to assert third parties’ rights to better sentencing practices” and thereby improve his own lot. Marshall, 908 F.2d at 1320. Illinois’ sentencing scheme might indeed permit another defendant guilty of the same crime to receive a lesser sentence. Yet that is no reason for altering Holman’s punishment or declaring the law unconstitutional. Judicial discretion naturally leads to discrepancies in sentencing.... But even wide sentencing discretion in the abstract is not a violation of due process or equal protection.

Holman v. Page, 95 F.3d 481, 485-86 (7th Cir. 1996).

Appellant is inviting this court to expand the principles of equal protection to a point where every defendant with “the same” criminal history must receive precisely the same sentence despite statutory authority supporting the exercise of discretion. The consequences of

appellant's position are tremendous. If defendant can challenge a 24 month consecutive sentence by comparing himself to a hypothetical defendant who might receive a concurrent sentence, then any convicted person could challenge his or her standard range sentence on the same grounds. If this court were to grant the defendant's equal protection claim it would permit any defendant who received a high end standard range sentence to make the same challenge.

Consider the example of a defendant with an offender score of six points convicted of assault of a child in the second degree, a level 7 offense under the SRA.¹¹ The standard range sentence for that defendant would be 77-102 months, a span of 25 months.¹² A defendant who received a high end of the range sentence of 102 months would be able to argue under appellant's theory that his right to equal protection was violated because some other hypothetical defendant might be sentenced to 77 months, a 25 month reduction. Defendant's hypothetical equal protection challenge would be available to any defendant who received any sentence greater than the low end of the standard range.

Defendant finds an equal protection challenge where "the result is that some people – like Mr. Calhoun – will spend more time in custody than others who have exactly the same record and commit essentially the same crime." (Appellant's brief at 27-28). Defendant's reasoning would

¹¹ RCW 9.94A.515 (Table 2 – Crimes Included Within Each Seriousness Level).

invalidate the entire sentencing grid with the SRA, a grid that vests sentencing courts with considerable discretion in the length of term to impose under a standard range sentence. Defendant's reasoning would also invalidate other discretionary sentencing options such as the First Time Offender Waiver (RCW 9.94A.650)¹³, the Drug Offender Sentencing alternative (RCW 9.94A.660), and the Special Sex Offender Sentencing Alternative (RCW 9.94A.670).¹⁴

In short, defendant's argument would be a basis to invalidate all discretionary sentencing schemes, and such discretion does not offend equal protection under the Fourteenth Amendment. The mere possibility of a disparate sentence alone does not implicate equal protection. State v. Handley, 115 Wn.2d at 288.

Defendant has failed to carry his heavy burden of proving that RCW 9.94A.589(3) is unconstitutional beyond a reasonable doubt. The statute has a rational basis to permit consecutive sentences in cases where a defendant is convicted of separate felony crimes charged in multiple

¹² RCW 9.94A.510 (Table 1 – Sentencing Grid).

¹³ Pursuant to RCW 9.94A.650, defendants with no felony history can either receive a standard range sentence, or be granted a First Time Offender Option that allows the court to impose a sentence of 0-90 days.

¹⁴ Pursuant to RCW 9.94A.670, the Special Sex Offender Sentencing Alternative, the court has discretion to disregard a standard range sentence and impose a sentence that suspends all but one year of a sentence that can be as great as eleven years. Not only does the statute give discretion to grant or deny this sentencing option, it allows the court, when imposing the option, to order the offender to serve anywhere from zero confinement up to 12 months of confinement.

informations. The trial court properly exercised its discretion to impose a consecutive sentence.

D. CONCLUSION.

The trial court properly granted the defendant's motion to proceed pro se and had it ruled otherwise based upon the record it would have been an abuse of discretion mandating a new trial. Finally, the sentencing court acted well within its authority to impose a consecutive sentence under RCW 9.94A.589(3) and the discretion authorized under the statute does not meet the standards required to show a violation of equal protection.

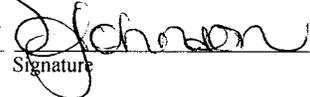
DATED: October 31, 2007

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Deputy Prosecuting Attorney
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/31/07 
Date Signature