

NO. 41926-2

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

STATE OF WASHINGTON, RESPONDENT

v.

KIYOSHI ALAN HIGASHI, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Buckner

No. 10-1-01901-6

BRIEF OF RESPONDENT

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

1. Did the defendant relinquish his constitutional right to represent himself when he failed to bring a motion until halfway through trial?
2. Has defendant failed to show the trial court abused its discretion in denying defendant's untimely request to represent himself when the court found that granting it would impair the effective administration of justice?

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2010, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, KIYOSHI HIGASHI ("defendant"), with murder in the first degree (felony murder), robbery in the first degree, and assault in the second degree. CP 1-3. Additionally, the State alleged firearm enhancements on all three counts. *Id.* The State later amended the information to adding another count of robbery in the first degree, and of assault in the second degree, as well as a burglary in the first degree, all with firearm enhancements, and to allege three aggravating factors on each of the crimes. CP 17-21. Three other co-defendants, Joshua Reese, Amanda Knight, and Clabon Berniard were also

charged in these crimes. CP 6-9. The case was assigned to the Honorable Roseanne Buckner; the court severed defendant's trial from those of his co-defendants. RP 11-12.

Defendant brought a motion seeking suppression of evidence seized by California law enforcement officers at the time of his arrest; the court denied the motion. CP 22-24. At this point, defendant raised a concern about his counsel, asked for substitute counsel and indicated he would rather represent himself than continue with current counsel. RP 15-16. This exchange occurred on February 11, 2011; trial was set to begin on February 17, 2011. RP 14. Defendant stated:

Can I say something? I don't want to work with [defense counsel]. I don't want him to be my attorney. If it was possible, I could get a new attorney. We could reset the trial date period. Because if I'm not granted a new attorney, I'm prepared to waive all rights to counsel, period, and just go pro se. I have a major conflict with [defense counsel], and the questions I have asked him, he has not answered me in a helpful manner. The motions, things I asked about, he just denied it and kind of laughed at it like it was pretty funny that I was thinking that. He told me I was panicking and that basically I'm just not going to be able to work with [him]. And I'm prepared to go pro se if I am denied a new lawyer.

RP 15-16. The court responded that his motion had not been scheduled for hearing that day and that the motion for substitute counsel would be addressed on the 17th, the next time the case was in court; the court directed defense counsel to alert the director of the local public defender

agency as to the pending motion and to see if he could meet with defendant. RP 16-18.

When the case was next in court, defense counsel indicated that a discussion with his client and the director of the public defender agency had resolved the defendant's concerns about his representation. RP 20-21. Defendant verified that he did not want new counsel, and did not want to represent himself at trial. RP 21. After the prosecution rested its case in chief, defendant brought a motion to represent himself. RP 495. After a lengthy discussion with defendant about his reasons for wanting to go pro se, the court denied the request, finding it untimely and likely to delay the trial. RP 510-514. Defendant renewed his request just before the time for the defense closing argument; the court summarily denied it. RP 605. Ultimately, the court entered an order setting forth its reasons for denying the defendant's requests. CP 110-116, (Appendix A).

After a hearing pursuant to CrR 3.5, the court found that defendant's custodial statements were made after a knowing, voluntary, and intelligent waiver of his rights, and would be admissible in the State's case. RP 23-109. The court entered findings of fact and conclusions of law on this ruling. CP 30-38.

On the eighth day of trial, the defendant refused to come to court. 4ARP 2-15. After holding a hearing on the defendant's behavior, including his threat to cause a mistrial if forced to come to court, and his

reasons¹ for not coming to court, the court found that defendant had voluntarily absented himself from the court proceedings. *Id.* Later that morning, the defendant sent a note that he was now willing to come to court. 4ARP 22. There was a discussion as to whether defendant presented a security risk; the court took a recess until the defendant could be present in court. RP 22-25.

After hearing the evidence at trial, the jury convicted defendant as charged. CP 92, 93, 94, 95, 96, 97. The jury found three aggravating factors on the murder, burglary and the two counts of burglary; it found one aggravating factor on one count of assault, and two aggravating factors on the other count of assault. CP 98, 99, 100, 101, 102, 103. The jury also returned special verdicts, finding defendant was armed with a firearm during the commission of all six felonies. CP 104, 105, 106, 107, 108, 109.

At the sentencing on March 11, 2011, the court imposed an exceptional sentence of 1,486 months. CP 117-132. This was achieved by imposing high end standard range sentence on each count, then using the aggravating circumstances found by the jury as a basis for running each of these sentences consecutive to the others, for a total of 1,174

¹ The court found it curious that defendant's family members, who had been a constant presence, were not present the morning that defendant decided not to come to court. RP 12-15.

months². CP 195-203. The 312 months of consecutive flat time for the firearm enhancements brought the total sentence to 1,486 months. CP 117-132. The court imposed a total of \$10,673.04 in legal financial obligations, including \$6,619.89 in restitution, and \$1,253.15 in extradition costs. *Id.* The court entered findings of fact and conclusions of law on its exceptional sentence. CP 195-203.

Defendant filed a timely notice of appeal from entry of this judgment. CP 178-194.

2. Facts

Pierce County Sheriff's Deputy Jerry Johnson testified that on April 28, 2010, at approximately 9:18 pm, he was dispatched to 3610 106th Avenue E, Edgewood, in regards to a possible shooting. RP 126 -127. He was the first to arrive on the scene and he pulled into the driveway and called for backup assistance. RP 127. A woman, Charlene Sanders, came to the front door; when Deputy Johnson went into the house he saw two boys and a male lying on his back on the floor. RP 127-28. Ms. Sanders was hysterical and crying; she indicated that her husband had been shot. RP 128. She appeared to be in shock. RP 129. By this time, Deputy Rawlins arrived as back up and the deputies secured the house; they found no one else in the house. RP 129-133, 136-140. As Deputy Rawlins

² A standard range sentence would have had all sentences running concurrently for a total base sentence of 548 months, to which 240 months for firearm enhancements would be added bringing the total to 860 months confinement.

looked through the house for suspects, he noted that the master bedroom looked like it had been ransacked. RP 140. Deputy Rawlins checked the victim but could not detect any breath, as he was about to get CPR equipment from his car, the fire department arrived on the scene. RP 141-42. The medics indicated that Mr. Sanders was deceased. RP 143. Deputy Rawlins took steps to preserve the crime scene while waiting for detectives to arrive. RP 144. Deputy Johnson spoke with Ms. Sanders who indicated that a man and a woman had come to the house to look at a ring they had listed for sale and that, eventually, four people had come into her house and that one of them had taken the ring off her finger. RP 133-135.

Charlene Sanders testified that she lived at her home in Edgewood with her husband, Jim, and two sons, Jim Jr. and Chandler, RP 174 . Around 8:00 pm on April 28, 2009, Mrs. Sanders came home from work to learn that her husband had re-listed an old wedding ring on Craigslist, and that some girl was going to come by the house to look at it that night. RP 181-82. The entire family gathered to watch a movie in the playroom above the garage, but Mr. Sanders kept checking the window as it was difficult to hear someone at the front door in the playroom. RP 183-84. It had just gotten dark when he saw a car outside and went downstairs. RP 184. After a couple of minutes she was called downstairs to answer questions; she found her husband standing with a man and a woman at her kitchen island. RP 185. After answering their questions, the man asked

the woman if she wanted the ring; when the woman indicated that she did, the man pulled out a wad of cash from his pocket and asked “How about this?” RP 187. Then the man pulled out a skinny silver gun and asked “How about this?” RP 187-88. Both Mr and Mrs Sanders told the two to “just take it” but then more people came into her house and she and her husband had their hands tied behind their back with plastic zip ties. RP 188-89. They were both forced to lay face down on the floor; they continued to tell the intruders to just take everything. RP 189. Mrs Sanders could hear other people in her house and was worried about her kids; she knows that the intruders found them because her sons were brought downstairs to the kitchen. RP 193. There were a total of four intruders; three males and one female. RP 193. One of the males, whom she identified as Clabon Bernard, kept yelling “Where’s the safe?” and while holding a gun to the back of her head, threatened to kill them all. RP 196-97. Initially, both Mr and Mrs Sanders denied having a safe, Bernard continued his threats and kicked her in the head; when Bernard stuck the gun to the back of her head and began a countdown, she admitted there was a safe. RP 198-201.

Two of the males, whom she identified as being defendant and Reese, got her husband off the floor and took him toward the safe that was in the garage. RP 202-03. Mrs. Sanders saw that someone was hitting her son, Jimmy Jr., in the head. RP 205. After that, Mrs. Sanders heard two or three gunshots, which was followed by lots of commotion and people

moving about. RP 206-07. The next thing she recalls is Jimmy Jr. saying “They are gone” then going to lock the door. RP 206-07. Mrs. Sanders went looking for her husband and found him lying on the living room floor; his ear looked like it had been shot off and he was gasping for air. RP 207-08. She managed to get to the phone and call 911 while still tied up; both she and Jimmy spoke to the 911 operator and she indicates that she was still on the phone with the operator when the first officer arrived at the scene. RP 208-10. The jury heard a tape of the 911 call. RP 146-154. Mrs. Sanders was informed a short time later by a Sheriff’s chaplain that her husband was dead. RP 219-20.

Mrs. Sanders was interviewed by detectives later that night, and she gave them the best description she could of the intruders despite being in shock from her husband’s death. RP 220. Mrs. Sanders testified that in addition to the ring that had been listed on Craigslist, the intruders took her and her husband’s wedding rings off of their hands. RP 222. She is unclear what else was taken because she never went back to her house after that night to do an inventory. RP 222-23. She identified the defendant in court. RP 224.

Chandler Kittelman, who was eleven years old at the time of trial, testified that he was at home watching a movie with his family, when his mom and step-dad went downstairs to speak with some people who were thinking of buying a ring that his parents had listed on Craigslist. RP 230-31. He remained upstairs with his step-brother, until two African-

American masked males, each armed with a gun, came upstairs, pointed the guns at them, and ordered them to go downstairs. RP 232-33. They were ordered to the kitchen and told to lay on the floor with their hands behind their backs. RP 234-35. He heard an intruder demanding to know where the safe was and saw his mom get kicked in the head. RP 237. He then saw one of the intruders put a gun to his mom's head and begin to count down. RP 238. He then saw his dad break his zip ties and begin fighting with one of the intruders which took him into the living room; he then heard gunshots. RP 238-40. The intruders began running around saying things like "we got to go" and looking worried. RP 240. He saw a couple of them come down from upstairs with bags or pillow cases filled with things, before running out the door. RP 240-41. He testified that after they left that his brother locked the door and his mom got on the phone to 911. RP 241.

James Sanders, Jr ("Jimmy") testified that he was 14 years old at the time of trial and that he had lived primarily with his dad, step-mom and step-brother - until his dad was murdered. RP 243-45. He testified that on the day his father was killed, he had been watching a movie with his family upstairs at his home. RP 245. A couple of times his dad took a phone call from some people that were coming out to look at a ring his dad had for sale; eventually these people showed up at the house and his father went downstairs, followed by his step mom a short while later. RP 245-46. The next thing that happened was that two African American

males, armed with guns, entered the room and told the boys to go downstairs. RP 246. The intruders had bandannas masking their faces; one was taller and thinner than the other; one had a silver semi-automatic - the other carried a black revolver. RP 246-47. The boys moved toward the staircase; the intruders told them not to run or they would be shot. RP 248. The boys were directed to the kitchen and told to lay face down on the floor, with their hands behind their backs. RP 248. Jimmy saw a total of four intruders - three men and one woman. RP 249. Jimmy testified that one of the male intruders was trying to get his step-mom to tell him where the safe was by kicking her in the head and by holding his gun to the back of her head and counting down as if she would be shot if she didn't answer in time. RP 250. Jimmy heard his dad indicate that he knew where the safe was and saw him get up. RP 250-51. The tall, skinny intruder took his dad out of the room, but his dad broke free and began to fight with the guy, who responded by shooting his father. RP 251. After watching his father fall to the ground, Jimmy testified that he jumped up and jumped on the back of the shooter. RP 252. The shooter got Jimmy off his back and began pistol -whipping him. RP 252. Jimmy didn't see any of the intruders take anything, but testified that the house had been ransacked and that things were missing, such as his cell phone, iPod, and Playstation. RP 253-54. After the intruders left, he locked the door and then spoke with a 911 operator; police and fire department personnel arrived on the scene in a few minutes. RP 255.

Jimmy was taken to the hospital that night to have the injuries to his head treated. RP 219, 256. He still has a scar from his injuries. RP 252.

Detective Donlin was sent to the hospital to interview Jimmy that night and to document his injuries. RP 292-296.

Detective Jimenez arrived at the sander's house around 11:00 that night, took a tour of the crime scene and instructed the investigators to document certain items of evidence such as the caller ID information on the phone. RP 308 – 12. Later he spoke with Mrs. Sanders, and got her statement as to what happened and a description of the four intruders. RP 313-14. Law enforcement investigators arrived and documented the crime scene with video, photographs, sketches, and measurements, then collected evidence. RP 260- 276. Included in the evidence collected at the scene were several shell casings found near where the victim's body was found. RP 276-80.

Dr Thomas Clark, a forensic pathologist employed by Pierce County, testified that he reviewed the records and photographs pertaining to the autopsy of Jim Sanders body which had been performed by Dr, Sigmund Mitchell. RP 358- 67. The autopsy revealed three gunshot wounds. One bullet entered the front left leg just below the knee; this was not a lethal injury. RP 375, 389. The second bullet entered the front of the right leg, traveled through the soft tissue of the upper leg and lodged in

the right buttock; this injury could have been survived. RP 378, 389. The third bullet entered on the right upper back and passed through the chest cavity in a downward direction causing damage to the upper right lobe of the lung, the aorta, another large blood vessel, and the heart itself; this was a fatal injury. RP 382-83; 388-89. The autopsy also revealed evidence of multiple blows to the head, but is unlikely they would have caused his death. RP 387, 390. The cause of the victim's death was multiple gunshot wounds, and the manner of death was classified as a homicide. RP 390.

Detective Jimenez testified that he attended the autopsy on April 29, 2010, where it was revealed that the victim had three bullet wounds to his body. RP 313-15, 326-27. The autopsy also showed that there were three or four linear abrasions/bruises to the scalp. RP 327-28. After the autopsy, Detective Jimenez went back to the crime scene to see if he could locate the object that had caused these injuries. RP 329-330. He found a door casing that had blood spatter and hair on it near the entryway to the living room. RP 330. The shape of the molding appeared to match the wounds he had seen during the autopsy. RP 331-32.

Detective Jimenez testified that Crimestoppers put out a bulletin offering a reward for information regarding the murder of Jim Sanders. RP 337. On May 3, 2010, Detective Jimenez received information via fax from the Daly City Police department that three people - defendant, Joshua

Reese and Amanda Knight – were in custody in the San Mateo Jail and that they appeared to match the descriptions of the suspects in the Sanders homicide. RP 338-39. These people had not been identified as possible suspects yet by Pierce County law enforcement; Detective Jimenez created a photo montage, containing defendant's photograph as photo No 6, to show to Mrs. Sanders to see if she recognized him as one of the intruders. Upon showing Mrs Sanders the montage, she pointed to photo No 6 and, while continuing to focus on it, stated "There is something about the eyes that discerned [sic] me. It could be No. 6. It is just something about the eyes. Yes, it could be No. 6." RP 340-41. Mrs. Sanders was also shown a photo montage containing Amanda Knight's photograph and she identified her picture as being one of the intruders in the home invasion and murder of her husband. RP 224, 297-301.

Detective Jimenez traveled to California to interview defendant and Joshua Reese; Amanda Knight had been released from custody by the time he arrived. RP 341-343. While there he took custody of a black revolver that had been taken into property when the three were arrested in California. RP 343. He testified that California law enforcement officers assisted his investigation by checking pawn shop records to see if any of the three had pawned any items that might have been taken from the Sanders residence. Sean Begley, of the Daly City Police department,

located pawn records showing that Amanda Knight had pawned a man's wedding ring at a San Francisco pawn shop which was consistent with one taken from Jim Sanders. RP 343-46, 399-400, 467-68. He retrieved the ring and turned it over to Detective Jimenez, as well as a photograph of Amanda Knight pawning the ring, taken from the store security camera. RP 469-70. Officer Begley also used information Detective Jimenez learned from an interview of defendant to locate another pawn shop in San Francisco where defendant had pawned the other two rings on April 30th; the officer recovered the two rings and sent them to Detective Jimenez. RP 399-402, 471-74. Detective Jimenez showed the rings to Mrs Sanders who identified them as the stolen rings. RP 223-24.

James Jackson Matter, a manager at Cartunz Motor Sports, testified that he knows the defendant because he is a customer. 4ARP 18. He testified that on April 29, 2010, defendant contacted him about a weapon he wanted to sell. 4ARP 18-19. Mr. Matter also identified a photograph taken from his store's security video showing the defendant and the two people he was with that day. 4ARP 21. Defendant came into Cartunz with a woman, identified as Amanda Knight, and another guy. 4ARP 18-19; RP 409-12. Mr. Matter went to defendant's car, a mid-nineties white Chevy Impala or Caprice, to look at the gun. 4ARP 19. Amanda Knight handed him the gun, it was a stainless steel AMC .380

semiautomatic. 4ARP 20; RP 410. It was the same gun admitted as Exhibit 22. 4ARP 20-21. He decided to purchase the gun, which came with a magazine filled with Hornady ammunition and a holster, for \$150 cash. RP 409-12. The three also asked Mr. Matter if he wanted to buy another pistol, a .22 revolver, or a Playstation; Mr. Matter did not, but a co-worker bought the Playstation. RP 412-13. Mr. Matter took the gun home, took it apart and cleaned it. RP 413. Several weeks after this purchase, law enforcement officers came to his Cartunz store with a search warrant for a gun and a Playstation. RP 414. Mr. Matter showed them the gun he had purchased from defendant and it was taken into evidence. RP 414-16. This gun was submitted to the Washington State Patrol Crime lab where a firearm examiner test fired it to obtain comparison bullets and determined that it was the same gun that had fired the bullets recovered from the victim's body. RP 422-38. He also compared the shell casing from his test fires to the shell casings recovered at the crime scene and concluded that they were fired from the same gun. RP 438-40.

Two items taken from the Sanders' home, a wallet belonging to Mrs. Sanders and a cell phone belonging to Jimmy, were recovered from the home of Jenna Ford. RP 382-394. Jenna's sister found the items, recognized the name in the wallet and called 911; police responded to take the items into evidence. *Id.* At trial, Jimmy identified this cell phone as the one that had been taken that night. RP 254. Mrs. Sanders identified her wallet. RP 226.

Jenna Ford testified that on April 28, 2010, the defendant, her then boyfriend, left her home with Amanda Knight between noon and 1:00pm, after having spent the previous night there. RP 447-50. She next saw him at her home about 10:30 to 11:00 that night, when he told her that he thought he might have killed somebody. RP 450. Defendant told her that he, Amanda, Reese and XYG (YG) had gone to a home that had an ad on Craigslist to set up the family, and he had shot someone. RP 450-51. She testified that they then went inside to listen to the news and learned that Mr. Sanders had been pronounced dead at the scene. RP 451. She testified that defendant then called Amanda and Reese and that both came over to her house. RP 451-52. Ms Ford told the three what to get rid of, including anything taken from the house; she watched them pack up several items and then suggested they throw them into a dumpster down the street. RP 453. Defendant came into her house after that and emptied his pockets; she saw him with two guns, a wallet and a cell phone. RP 454. The next day he left with Amanda Knight, taking the guns with him; on the 30th she learned that he had left the state; on May 1st she called Crimestoppers and gave the names of Kyoshi Higashi, Amanda Knight, Reese and XYG as the people involved in the crime. RP 457-58. Ms Ford pleaded guilty to three counts of rendering criminal assistance for her actions. RP 460.

On the plane ride back from California, defendant posed a hypothetical question to a detective that was assigned to bring him back to Pierce County; defendant asked what would happen if four people went into a house to steal some stuff and someone died. RP 302. Detective Jimenez interviewed defendant and after advisement of his rights, defendant admitted his involvement in the home invasion robbery of the Sanders residence when Mr. Sanders was killed. RP 396-98; EX 156.

Defendant testified at trial. RP 516-542. Defendant acknowledged that he was one of the intruders into the Sanders home and that he tied someone up, but denied being the shooter and denied beating anyone RP 517-19. He suggested that the victim's family was not being honest about what happened because they were mad and they were not being Christian because they had not turned the other cheek to his actions. RP 518-19. He stated that he was 'sorry for what was done.' RP 520. On cross-examination, defendant was extremely evasive and argumentative in his answers. RP 521-42. He acknowledged that Amanda drove him out to the Sanders' residence and that he and Amanda were the first two to make contact with the Sanders. RP 522-25. He acknowledged that Amanda was wearing a bluetooth and that the four of them had arranged a code word to be said to signal those waiting outside. RP 525-26. He acknowledged that at some point he pulled out a weapon inside the Sanders' residence. RP 527. He acknowledged that he gave a gun to Reese that night and that was

the one that was in the car when he was arrested in California. RP 528-29. Defendant could not recall who had the .380 that night and testified that he did not know who had shot Mr. Sanders, although he had an idea. RP 529-31. When asked who had struck Jimmy in the head, he replied “It was Willie foo foo.” RP 533.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT’S UNTIMELY MID-TRIAL REQUESTS TO REPRESENT HIMSELF.

The United States Supreme Court recognizes a constitutional right of a criminal defendant to waive assistance of counsel and to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The Washington Constitution similarly provides that the accused in criminal prosecutions shall have the right to appear and defend in person. Const. art. 1, § 22 (amend. 10); *State v. Barker*, 75 Wn. App. 236, 881 P.2d 1051, 1053 (1994). The trial court must be careful when a criminal defendant unequivocally requests the right to represent himself; the unjustified denial of this right requires reversal. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); *State v. Breedlove*, 79 Wn. App. 101, 111, 900 P.2d 586 (1995).

Although the constitutional right to self-representation is fundamental, it is neither absolute nor self-executing. *Faretta v. California*, 422 U.S. at 819; *State v. Madsen*, 168 Wn.2d at 504; *State v. Woods*, 143 Wn.2d 561, 585–86, 23 P.3d 1046 (2001). A “request to proceed pro se must be *both* timely made and stated unequivocally.” *State v. Stenson*, 132 Wn.2d 668, 742, 940 P.2d 1239 (1997) (emphasis in original); *State v. Luvene*, 127 Wn.2d 690, 698, 903 P.2d 960 (1995).

If the motion to proceed pro se is not made in a timely fashion, then the “right is relinquished and the matter of the defendant’s representation is left to the discretion of the trial judge.” *Stenson*, 132 Wn.2d at 737 (citing *DeWeese*, 117 Wn.2d at 377, and *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987)). In *Stenson*, the Supreme Court discussed the issue of timeliness noting that federal courts have held that a motion to proceed pro se is timely as a matter of law if it is made before the jury is sworn, even if made on the first day of trial, “unless it is shown to be a tactic to secure delay.” *Stenson*, 132 Wn.2d at 737-38. The Court went on to note that many states have declined to follow this federal rule and held that a motion made on the day of trial is per se *untimely* and that California courts have held that “in order to invoke an unconditional right of self-representation, the defendant must assert the right within a reasonable time prior to the commencement of trial.” *Stenson*, 132 at

738-39 (citing *People v. Mogul*, 812 P.2d 705, 708–09 (Colo.App.1991), *People v. Burton*, 48 Cal.3d 843, 771 P.2d 1270, 1275, 258 Cal.Rptr. 184 (1989), and *People v. Horton*, 11 Cal.4th 1068, 12 Cal.4th 783A, 906 P.2d 478, 47 Cal.Rptr.2d 516 (1995), *cert. denied*, 519 U.S. 815, 117 S. Ct. 63, 136 L.Ed.2d 25 (1996)). The Washington Supreme Court noted that the trial court’s conclusion that Stenson’s motion to proceed pro se was untimely, was supported by the record as it was made after 21 days of jury selection, albeit prior to the jury being sworn, and granting the motion would have delayed the trial, and seriously hindered the administration of justice. *Stenson*, 132 Wn.2d at 739, n 16. Ultimately, the Court declined to decide which rule would be followed as it also found that Stenson’s request was not unequivocal and could affirm the trial court on that basis. *Id.* at 739. The Court of Appeals has set forth the following standard for timeliness:

The cases which have considered the timeliness of a proper demand for self-representation have generally held: (a) if made well before the trial or hearing and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial or hearing 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 or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)(citing *People v. Windham*, 19 Cal.3d 121, 137 Cal.Rptr. 8, 560 P.2d 1187, 1191 (1977),

and *Chapman v. United States*, 553 F.2d 886, 893-95 (5th Cir 1977)). A defendant does not have an absolute right to dismiss counsel and conduct his own defense after trial has begun because of need “to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury”. *United States v. Dunlap*, 577 F.2d 867, 868 (4th Cir.1978) (finding no abuse of discretion in denying a motion to proceed pro se made just before the defense closing); *see also, United States v. Smith*, 780 F.2d 810 (9th Cir. 1986)(motion to proceed pro se made halfway through trial was properly denied as being untimely). While the court has considerable discretion to grant or deny an untimely motion, the trial court is directed to balance the legitimate interests of the defendant in self-representation against the potential disruption of the trial already in progress. *United States v. Noah*, 130 F.3d 490, 498 (1st Cir. 1997).

When a request is unequivocal and timely, the court must then determine if the defendant's request is voluntary, knowing, and intelligent—usually by a colloquy. *Faretta*, 422 U.S. at 835; *State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open.”

Adams v. United States ex rel. McCann, 317 U.S., 63 S. Ct. 236, 143 A.L.R. 435, 87 L. Ed. 268 (1942).

In interpreting *Faretta*, our State Supreme court held that a colloquy between the defendant and the court must at a minimum consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist which will bind defendant in the presentation of his case. *Bellevue v. Acrey*, 103 Wn.2d 203, 233, 691 P.2d 957 (1984).

A criminal defendant's right to counsel under the Sixth Amendment does not encompass a right to name the advocate of his choice. *Wheat v. United States*, 486 U.S. 153, 159, n. 3, 108 S. Ct. 1692, 100 L. Ed. 2d. 140 (1988). When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the trial court may require the defendant to: 1) either continue with current appointed counsel; or, 2) to represent himself. *State v. Sinclair*, 46 Wn. App. 433,437-38, 730 P.2d 742 (1986), *review denied*, 108 Wn.2d 1006 (1987). If a defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right. *State v. Staten*, 60 Wn. App. 163, 802 P.2d 1384 (1991). The pro se defendant does not have an absolute right to standby counsel and there is no right to "hybrid representation," such as a pro se defendant serving as co-counsel with his attorney.

DeWeese, 117 Wn.2d at 379, quoting *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). Once a trial court obtains a valid *Faretta* waiver of counsel, the trial court is not obliged to appoint, or reappoint, counsel on the demand of the defendant; this decision is left to the trial court's discretion. *State v. Deweese*, 117 Wn.2d at 379.

Both the United States Supreme Court and the Washington Supreme Court have held that courts are required to indulge in “‘every reasonable presumption’ against a defendant's waiver of his or her right to counsel.” *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1977)). Even if a request is unequivocal, timely, voluntary, knowing, and intelligent, a court may defer ruling on the motion if the court is reasonably unprepared to immediately respond to the request. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). A trial court's denial of a request for self-representation is reviewed for abuse of discretion. *Madsen*, 168 Wn.2d at 504.

- a. The Findings Supporting The Court's Conclusion That Defendant's Motions To Proceed Pro Se Were Untimely Are Unchallenged And Therefore Verities On Appeal.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal.

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Id.* Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Defendant raised the issue of self representation three times during the course of the trial. The court found that the first was timely, but that it was also withdrawn. CP 110-116 (FOF 2, 3, COL 1). The court found the second and third motions were untimely. CP 110-116 (FOF 3, 4, 5, 14; COL 2,3). All of the factual findings that go to the timeliness of the motions, FOF 2, 3, 4, 5, 14, are unchallenged on appeal. *See* Appellant's Opening Brief at p. 1 (assignment of error 2). These findings pertaining to timeliness- as well as all other unchallenged findings - are verities on appeal.

b. The Defendant Relinquished His Right To Represent Himself By Failing To Bring A Timely Motion; The Trial Court Did Not Abuse Its Discretion By Denying The Untimely Motions.

In the case now before the Court, defendant made his first request for new counsel, or in the alternative to represent himself, one week before the trial date. RP 15-16; CP 110-116, FOF 2. While this request was timely, the trial court was not prepared to handle the motion on that day, and set it over for approximately one week for the first day of trial. RP 16-18. The court could properly set the motion over until it was prepared to handle it under *Madsen*. When the case was back on the record on the trial date, defendant affirmatively withdrew his motion for substitute counsel and his motion to represent himself. RP 20-21; CP 110-116, FOF 3. Thus, the trial court was never required to rule on this timely motion by the defendant to represent himself.

The next time defendant made a motion to represent himself, it occurred mid-trial, after the State has rested its case in chief. RP 495; CP 110-116, FOF 3, 4, 5. The State can find no case, and defendant has cited none, that has held that a mid-trial request to proceed pro se is timely. Rather, under *Stenson* and *Fritz*, and other cases cited above, such a motion is untimely and defendant is deemed to have relinquished his constitutional right to represent himself; the question of self-representation

is left to the discretion of the trial judge. The record before this Court does not show an abuse of discretion in denying the motion.

The decision of the trial court below was not done summarily, but only after exploring the issue with the defendant to assess his reasons for wanting to represent himself, whether allowing him to proceed pro se would accomplish his goals, and whether it would cause a delay in the trial. When the court inquired of defendant his reason for wanting to proceed pro se at that point in time, defendant indicated that his counsel did not seem willing to ask the questions he wanted asked during his own direct examination – although he acknowledged that this issue had probably been resolved with a compromise- and that he wanted to call other witnesses in the defense case, but his attorney did not. RP 496. The court raised questions about the timeliness of the motion and whether his desire to call witnesses would result in delays. RP 498. When the court asked which witnesses he wanted to call to the stand, defendant indicated that he wanted to recall all of the State’s witnesses, including the victim’s wife and sons, because he did not agree with his attorney’s decision not to cross-examine them. RP 498-99. Defendant stated that he did not have any new witnesses that he wanted to call to the stand. RP 499. The court indicated that defendant could not recall witnesses just to cross examine them as he had to proceed pro se accepting the status of the case as tried by his attorney up to that point; the court asked defendant if he wanted to proceed with self-representation, understanding that he would not be

allowed to recall witnesses to engage in cross- examination. RP 500.

When given that information, the following exchange occurred:

DEFENDANT: Well, okay. Scratch those witnesses there. I'll bring up other witnesses. My lawyer has his own witness list. It's not my fault he didn't present one. I'll present my own.

COURT: That's what I was asking you. Who are these other witnesses that you wish to call?

DEFENDANT: I will have to come up with a list, but I'll give you a list.

COURT: That's something that has to be done now, otherwise you are delaying the trial. And that's why your request is not timely.

RP 500-501. The court continued to inquire about which witnesses defendant wanted to have testify in the defense case; defendant could not initially identify any by name, but assured the court that he could come up with a list if given ten minutes. RP 501-503. The court then began to explore whether defendant's waiver could be considered knowing and voluntary. RP 503-510. The court also asked several questions trying to discern how ready defendant was to proceed with the trial if he were to be granted the right to represent himself. The court discerned that defendant: 1) did not have a list of questions ready for his own examination; 2) had not subpoenaed any of the witnesses he wished to call and none of those witnesses were currently in court; 3) did not know how to get his

witnesses to court except by trying to get someone else to call them or to try to call them himself from the jail. RP 510-514.

The court also knew that defendant was capable of disrupting court proceedings, *see* CP 110-116, (unchallenged FOF 17), that he had recently threatened to cause a mistrial, *see* CP 110-116, (unchallenged FOF 18), and that his recent behavior had caused the court to lose a half day of court time, *see* CP 110-116, (unchallenged FOF 18,19). The fact that defendant's reasons for wanting to represent himself kept changing – first he wanted only to recall witnesses but present no new witnesses, then when he found out that he could not recall witnesses to be cross-examined, he wanted to call other new witnesses, but could not identify who those witnesses would be - is suggestive that defendant's true desire was to try to drag out the proceedings for as long as possible. Ultimately, the court denied the motion finding that it was untimely and that the trial would have to recess in order for defendant to get his witnesses to court. RP 514. Further, the court's conclusion that granting his motion "would have caused significant delay in these proceedings and disrupted the orderly administration of justice", *see* CP 110-116 (COL 2), is supported by the findings and the record. Such a ruling does not show an abuse of discretion. The court considered defendant's reasons for wanting to go pro se, the likelihood his objectives would be accomplished if the motion were granted, the impact on the administration of justice if his motion were granted; and the likely delay that would be caused by granting his

motion, before it denied the untimely motion. Defendant relinquished his absolute constitutional right to proceed pro se when he withdrew his timely motion and proceeded to trial with the assistance of counsel. Defendant has not cited to any case where the denial of an untimely motion to proceed pro se made under similar circumstances was found to be an abuse of discretion. This ruling should be upheld.

Finally, defendant renewed his untimely motion to go pro se after the prosecution gave its closing argument; the court summarily denied to motion. RP 605. While delay of the trial to obtain witnesses would no longer be a concern at this point, all of the other reasons were still applicable. Additionally, by this time the court had observed defendant's behavior during his own testimony. *See* CP 110-116, (unchallenged FOF 20, 21). Defendant had shown himself to be argumentative and incapable of following the court's directions. *Id.* A court does not abuse its discretion by refusing to give a platform to a defendant who has shown himself to be contemptuous of the court and unable to follow court orders. The court was concerned that defendant might do something to cause a mistrial and properly denied the untimely request. CP 110-116 (FOF 22).

It is not necessary to decide whether defendant's requests were equivocal or unequivocal as there is ample support in the unchallenged findings of fact to show that the trial court did not abuse its discretion in denying defendant's two untimely requests to go pro se. The trial court's rulings should be affirmed.

D. CONCLUSION.

For the foregoing reasons this Court should affirm the judgment and sentence entered below.

DATED: December 16, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



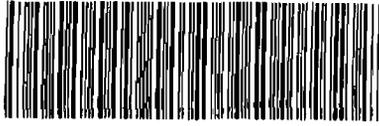
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

12.16.11 
Date Signature

APPENDIX “A”



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

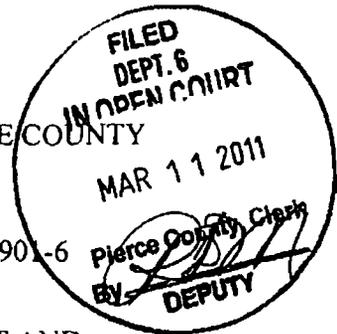
CAUSE NO. 10-1-01901-6

vs.

KIYOSHI ALAN HIGASHI,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
PRO SE REQUEST



This matter having come on for trial before the Honorable Rosanne Buckner, Judge of the above entitled court, the court having reviewed the case file, having presided over the pre-trial motions and the trial which commenced on February 17th, 2011, having heard the testimony of witnesses, having reviewed the exhibits, having reviewed the memoranda, having heard the arguments of counsel and the request of the defendant to proceed *pro se*, having conducted a colloquy with the defendant and being in all things duly advised, having issued an oral ruling, now enters the following written findings of fact and conclusions of law:

FACTS

1. On May 3, 2010, the defendant was charged in Pierce County Superior Court by information with multiple counts including Murder. On May 10, 2010, the defendant appeared in Pierce County superior Court and he was arraigned and entered a plea of not guilty On May 12,

ORIGINAL

1 2010, the defendant's attorney, Michael Jordan, filed a notice of appearance indicating that he
2 was representing the defendant. This case was set for trial on June 24, 2010. This case was
3 assigned to Department 10 and set for trial was continued until December 10, 2010. This case
4 was re-assigned to Department 6 and the trial date was continued to January 10, 2011. This case
5 was severed from the other co-defendants and trial was set for February 17, 2011.

6 2 On February 11, 2011, the defendant made his first request to proceed *pro se*. The
7 request came immediately after the court denied the defendant's motion to suppress evidence.
8 The defendant told the court he did not want to "work with" Mr. Jordan anymore. The defendant
9 told the court that he wanted to bring a certain motion and Mr. Jordan refused. The defendant
10 told the court he wanted new counsel, and if he could not have a new attorney, he would rather
11 represent himself than have Mr. Jordan as counsel. The court agreed to hear the defendant's
12 request on February 17, 2011.

13
14 3. On February 17, 2011, the trial commenced and the defendant reported that he
15 had resolved his conflict with Mr. Jordan. The defendant stated unequivocally that he wanted to
16 be represented by counsel.

17 4. The trial proceeded with Mr. Jordan representing the defendant. Mr. Jordan was
18 prepared for trial, he was familiar with the discovery, he had interviewed witnesses, researched
19 legal issues and filed appropriate motions. Mr. Jordan is a capable and experienced trial attorney.
20 Mr. Jordan prevailed on a motion *in limine* to prevent the State from presenting testimony
21 regarding other robberies committed by the defendant and to prevent the state from introducing
22 the statements the defendant made to doctors at Western State Hospital.

23
24 5. On March 7, 2011, the defendant made his second request to proceed *pro se*. The
25 request came immediately after the State rested its case and the court took a recess for the

1 defendant to consult with his attorney regarding whether he would testify or not. The defendant
2 told the court that he was dissatisfied with his attorney. The defendant complained that his
3 attorney advised him against testifying and his attorney did not want to conduct direct
4 examination of him. The court informed the defendant that the decision to testify or not was his
5 decision alone and not his attorney's decision.

6 6. The defendant told the court that he wanted to represent himself so he could call
7 witnesses in the defense case. The defendant wanted to recall the witnesses that had already
8 testified. The defendant acknowledged it was his attorney's tactical decision to not cross examine
9 some witnesses. The defendant did not make any proffer of new testimony that he would elicit
10 from any of the witnesses. He acknowledged that he did not have a witness list ready. The
11 defendant proposed to call the witnesses on the State's list that the State did not call.

12 7. The defendant began reading names from the State's witness list and the court
13 determined that none of the named witnesses besides the defendant were present. The defendant
14 had not issued subpoenas and he had not taken any steps to secure the witnesses' attendance. The
15 defendant could not tell the court how he was going to contact witnesses, and he suggested he
16 could telephone witnesses but had not done so

17 8. The defendant could not provide a list of questions he wished to ask himself. The
18 defendant's attorney agreed to ask questions that would permit the defendant to adequately elicit
19 the testimony the defendant wished to have the jury hear.

20 9. The defendant's request to proceed *pro se* was somewhat equivocal as it was based
21 primarily on his desire to testify as he wished and to answer the questions he wished to be asked.
22 He desire to testify as he wished was accommodated by his attorney and this court.
23
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1 10. The defendant's request to call witnesses, whose names he did not initially know
2 and whose attendance he had not secured, would have caused significant delay and disrupted the
3 orderly administration of justice. The jury had already been waiting approximately two hours.

4 11. During the inquiry into the defendant's request to represent himself, the court
5 determined that the defendant had never studied law, he had no legal training and had never
6 represented himself before in a criminal case. The defendant is not familiar with the rules of
7 evidence or criminal procedures. The defendant asked the court if he testified whether the State
8 could call rebuttal witnesses. The court declined to give him legal advice on that issue.

9 12. During the colloquy with the defendant, the court noted the defendant was
10 smiling and asked the defendant if the situation was funny. The defendant stated it was funny in
11 a way. The court denied the defendant's request to act *pro se* and he grinned and laughed out
12 loud.

13 13. During direct examination of the defendant, the defense attorney asked the
14 defendant, "If you were writing questions for me to ask you right now is there a question you
15 would want me to ask you?" Mr. Jordan then asked the defendant his desired question and the
16 defendant was allowed to answer without objection. Mr. Jordan then asked the defendant, "Is
17 there any other question you would like me to ask you?" The defendant testified, "No Sir I
18 think I summed it up myself."

19 14. On March 8, 2011, the defendant requested to proceed *pro se* a third time. The
20 request was made just after a recess as his attorney was about to begin closing argument and the
21 jury was being brought into the courtroom.
22

23 15. The court denied the defendant's third request without further inquiry or comment,
24 which would have caused further delay of the proceedings.
25

1 16. The defendant's repeated requests were designed to delay the proceedings or
2 obstruct justice or perhaps cause an error that would result in a mistrial.

3 17. The defendant has previously engaged in disruptive courtroom behavior
4 including failing to follow directions of the court security staff. During an earlier court
5 appearance in this case, the defendant was physically removed from the court room after he
6 refused to follow directions of the security staff; the defendant then used his body weight to try
7 to knock a court officer off his feet. The defendant also engaged in kicking and hitting the
8 officers who removed him. He threatened to spit on the officers. The event resulted in an officer
9 being injured. The defendant recently made statements to the effect that he has "nothing to lose."
10 He has historically and recently demonstrated that he does not follow directions while in
11 custody. The defendant has demonstrated historically and recently verbally and physically
12 aggressive behavior, including several fights while in custody. The defendant recently inflicted
13 significant injury, a fractured jaw, on fellow inmate.
14

15 18. The defendant delayed these proceedings again on March 3, 2011 when the court
16 was notified by court security staff that the defendant refused to appear in court. Corrections
17 Officer Tim Kavanaugh testified that he had been the security escort for the defendant
18 throughout the trial and he believed he had a good rapport with the defendant. Officer
19 Kavanaugh testified that the defendant was refusing to dress for or attend court and the defendant
20 told Kavanaugh he would have to be physically forced to go to court. The defendant also told
21 Officer Kavanaugh that if the defendant was forced to appear in court he would cause a mistrial.
22

23 19. The court found that the defendant had voluntarily absented himself from the
24 proceedings and the State called witness James Matter to testify. Within minutes, the court
25 security staff notified the court that when the defendant learned that court would proceed without

1 him, he demanded to be present. The court recessed to allow the defendant time to shower, dress
2 and prepare for court. The defendant's actions caused a delay of nearly half a day of court time.

3 20. During the defendant's testimony on cross examination, the defendant was
4 argumentative. The defendant also refused to answer when asked to identify the person who beat
5 the child at the Sanders residence. The court ordered the defendant to answer the question and
6 the defendant testified that the Sanders child was beaten by "Willy Foo Foo" . . . "He bopped the
7 rabbit on the head while they was running in the forest."

8 21 The defendant's refusal to follow the court's order to answer a question further
9 demonstrates his inability or unwillingness to follow instructions as to courtroom behavior. The
10 defendant's refusal to follow this court's order and answer this question demonstrates contempt
11 of this court.

12 22. The defendant's repeated attempts to delay the proceedings, his repeated disruptive
13 behavior both in and out of the courtroom, his demonstrated inability or unwillingness to follow
14 instructions on courtroom behavior, his refusal to comply with a court order, cause the court
15 believe his third request to proceed *pro se* was designed for the purpose of delay or disruption.

16 22. Further, the court has significant concerns that the defendant would intentionally
17 or recklessly engage in behavior so disruptive or so prejudicial that the court would be required
18 to declare a mistrial.

19 23. The defendant has made prior requests to represent himself and then changed his
20 mind, indicating that his requests are equivocal.
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CONCLUSIONS OF LAW RE: PRO SE REQUEST

1
2 1. The defendant's first request to proceed *pro se* was timely because it was made
3 prior to the trial. The defendant; however, changed his mind and he decided he wanted to
4 proceed to trial with the assistance of his attorney, Mr. Jordan

5 2. The defendant's second request to proceed *pro se* was not timely and it was
6 equivocal. It was made well into the trial and the State had rested and based primarily on the
7 defendant's desire to testify as he wished. The defendant did not appear to be serious in making
8 his request as he grinned and laughed when the request was denied. Allowing the defendant to
9 proceed *pro se* would have caused significant delay in these proceedings and disrupted the
10 orderly administration of justice. The concerns about the orderly administration of justice
11 outweighed the defendant's right to represent himself.

12 3. The defendant's third request to proceed *pro se* was not timely. The court finds
13 the request was designed to obstruct, delay, or gain opportunity for causing a mistrial. The need
14 for the orderly administration of justice outweighed the defendant's right to represent himself.

15 DONE IN OPEN COURT THIS 11 DAY OF March, 2010.

16
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18 
Judge Rosanne Buckner

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20 
Mary B. Robnett
21 Deputy Prosecuting Attorney
22 WSB# 21129

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24 
Karen Watson
25 Deputy Prosecuting Attorney
WSB# 24254

26 Approved as to form:
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29 Michael Jordan
30 Attorney for the Defendant
31 WSB# 16906

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Transmittal Letter

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Case Name: State v. Higashi

Court of Appeals Case Number: 41926-2

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

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