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NO. 57115-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DESMOND MODICA,

Appellant.

---

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

The Honorable Christopher Washington

---

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

1. The trial court abused its discretion in finding Mr. Modica knowingly and unequivocally waived his right to the assistance of counsel and thereafter granting his motion for self-representation.

2. The trial court violated Mr. Modica's right to assistance of counsel by denying his motion for reappointment.

3. The trial court erroneously admitted recordings of telephone conversations made without court order or consent of either party.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A valid waiver of the constitutional right to counsel must be knowing and intelligent. At a minimum, a defendant must be informed of the seriousness of the charges, the maximum penalties he could be facing, and the risks of representing himself. Where a new charge had just been added to the information and the court failed to instruct the defendant on the seriousness and maximum penalties of that charge, did the defendant lack the knowledge necessary for a valid waiver? (Assignment of Error 1)

2. A valid waiver of the right to counsel must also be unequivocal. Where the defendant repeatedly stated that he felt

“forced” to represent himself and was essentially choosing between effective assistance of counsel or a speedy trial, was the purported waiver equivocal? (Assignment of Error 1)

3. A motion for reappointment should be granted absent reasons to deny. Where reappointment could have preserved the defendant’s rights and resulted in no prejudice to the State other than delay, did the trial court abuse its discretion in denying the request? (Assignment of Error 2)

4. The Washington Privacy Act (WPA) requires the consent of all parties to a telephone conversation in order for that conversation to be lawfully recorded. Where neither party consented to the recording of collect telephone calls made from jail, were the recordings illegally made? (Assignment of Error 3)

5. The two-party consent requirement of the WPA may be circumvented by court order. The Washington Administrative Code (WAC) also requires a court order for the recording of telephone calls by an inmate of a county facility. Where the State failed to obtain a court order for recording of collect telephone calls made from jail, were the recordings illegally made? (Assignment of Error 3)

6. RCW 9.73.095 exempts employees of the Department of Corrections from some of the WPA's provisions. King County jail is a county facility which is not run by employees of the state Department of Corrections. Where the telephone conversations occurred in a county facility, did they fall outside of the exceptions of RCW 9.73.095? (Assignment of Error 3)

### C. STATEMENT OF THE CASE.

1. Procedural Facts. On May 23, 2005, the State charged Desmond Modica with Assault in the Second Degree (Domestic Violence) and Resisting Arrest. CP 1-5. On June 22, 2005, the Honorable Michael J. Trickey denied Mr. Modica's motion to dismiss but granted his request for new counsel. CP 14, 15; 1RP 17. On July 8, 2005, the information was amended to add a charge of Assault in the Fourth Degree (Domestic Violence). CP 7. On July 12, 2005, Judge Trickey denied Mr. Modica's renewed motion to dismiss and granted his motion to represent himself. CP 11. On July 21, 2005, the date that trial was scheduled to begin, the information was again amended to add a charge of Tampering with a Witness (Domestic Violence). CP 12-13. On the same date, the court issued a material witness warrant for Mr. Modica's wife, Karen

Modica, and continued the trial to July 25, 2005. Append. A;<sup>1</sup> 4RP 27.<sup>2</sup>

On July 25, 2005, Ms. Modica had been apprehended and was being held in custody. 4RP 23. At this time the Honorable Christopher Washington again granted Mr. Modica's request to proceed pro se. 4RP 36. On July 26, 2005, a CrR 3.5 Hearing was held, at which the court ruled that Mr. Modica's statements to police would be admissible. 7RP 50-54.

On July 27, 2005, the parties conducted voir dire and selected a jury. 8RP 5. On July 28, 2005, Mr. Modica told the court he did not want to continue pro se and requested

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<sup>1</sup> The Motion and Certification for Order to Apprehend and Detain Material Witness has been supplementally designated and attached as Appendix A.

<sup>2</sup> The Verbatim Report of Proceedings("RP") consists of thirteen volumes of transcripts, which will be referred to as follows:

- 1RP Pre-Trial Motions, June 22, 2005
- 2RP Pre-Trial Motions, June 30, 2005
- 3RP Pre-Trial Motions, July 12, 2005
- 4RP Pre-Trial Motions, July 21, 2005
- 5RP Pre-Trial Motions, July 25, 2005 (Vol. I)
- 6RP Pre-Trial Motions, July 25, 2005 (Vol. II)
- 7RP Pre-Trial Motions, CrR 3.5 Hearing, July 26, 2005
- 8RP Pre-Trial Motions, Jury Trial, July 27, 2005
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- 16RP Sentencing Hearing, September 16, 2005

reappointment of counsel; the court denied his request. 9RP 6, 13-14.

Following a jury trial, Mr. Modica was convicted of all four charges. CP 54-60, 61-63. For Count One (Assault in the Second Degree), Judge Washington imposed seven months with credit for time served, alcohol treatment, domestic violence treatment, and a temporary no-contact order against Ms. Modica. CP 57, 60; 16RP 16-17. For Count Two (Resisting Arrest), he imposed 90 days with credit for time served. CP 61; 16RP 19-21. For Count Three (Assault in the Fourth Degree), he imposed 12 months with all 12 months suspended, plus two years probation. CP 61; 16RP 19-21. For Count Four (Tampering with a Witness), he imposed three months with credit for time served. CP 57; 16RP 19-21.

2. Testimony at Trial. Mr. Modica and his wife, Karen Modica, have been married for fifteen years and have nine children together. 9RP 65-66.

Ms. Modica appeared in court after being arrested on a material witness warrant and held in custody; she testified under an immunity agreement. 4RP 36; 7RP 10; 10RP 17-18. Ms. Modica testified that on the night of May 18, 2005 she and Mr. Modica were drinking beer in their van, which was parked in the driveway of their

home. 9RP 67. She was heavily intoxicated that night and at the time of her testimony could not remember much of what happened that evening. 9RP 67. Ms. Modica testified she wanted more beer but Mr. Modica wanted her to stop drinking, so she slapped and pushed him, and he pushed back. 9RP 68-70. In the course of the ensuing fight they kicked, hit and scratched each other, and Ms. Modica sustained injuries, including a broken nose, which she surmised came from falling into a table in the back of the van. 9RP 70-71, 100. Ms. Modica testified this was "not the first time" Mr. Modica had physically defended himself from Ms. Modica; in the past, Ms. Modica had threatened Mr. Modica with a knife and bit his finger, requiring stitches. 9RP 71-72, 100-01. At some point after this fight, Ms. Modica began to walk to a nearby gas station to call an ambulance. 9RP 72. The foregoing testimony was inconsistent with the statement Ms. Modica gave to the police, which placed the incident in a different location and alleged that Mr. Modica was the aggressor, punching Ms. Modica in the nose, pushing her down, and twisting her arm. 9RP 94-95. This statement was read into the record at trial. 9RP 94-95.

Ms. Modica testified that on her way to the gas station, a woman she did not know pulled over to help her. 9RP 73. At the

time of her testimony Ms. Modica could not remember what she told this woman, the 911 operator, the police, the medics, or the doctor at the hospital. 9RP 73-74, 97, 99. Ms. Modica remembered only that she was very angry and intoxicated and “really didn’t care” what would happen to Mr. Modica. 9RP 92. “[M]y outlook was, you know, you fuck with me, excuse me, I’ll ‘F’ with you and I will make your life a living hell.” 9RP 92. Ms. Modica therefore concocted a false statement for the police because she was furious with Mr. Modica and wanted to “get him into trouble.” 9RP 93; 10RP 13.

Kerry Solandros testified she was on her way to work on the morning of May 19, 2005 when she noticed a woman “stumbling” alongside the road with a bloody face and shirt. 12RP 19, 21. Ms. Solandros pulled over to help the woman, who was Ms. Modica. 12RP 20. After speaking with Ms. Modica, she called 911 on her cell phone. 12RP 20-21. Ms. Modica then spoke to the 911 operator. 12RP 26. Ms. Solandros noted that although Ms. Modica did not appear confused, she did seem intoxicated; she smelled of alcohol and slurred her speech. 12RP 31. The story that Ms. Modica told Ms. Solandros was consistent with the version in her statement to the police; however, when Ms. Solandros thought

about it later, she felt that the timing of her story didn't make sense.  
12RP 32-33.

Deputy Neil Woodruff testified he responded to Ms. Solandros' 911 call. 10RP 30. He contacted Ms. Modica, determined that she had injuries and called a medic. 10RP 31. In the emergency room of Highline Hospital, Ms. Modica was treated by Dr. Robert Ripley. 9RP 43-44. Dr. David Omdal also performed a CT scan on Ms. Modica and determined she had a comminuted (or multiple) fracture of the nasal bone. 9RP 24, 28, 31.

After Ms. Modica was treated at the hospital, Mr. Woodruff offered her a ride home. 10RP 45. Ms. Modica told him that Mr. Modica was probably at home, and on the way there Deputy Woodruff decided to arrest him and called for back-up to assist. 10RP 46.

When Deputy Lee Crawley arrived at the house, Ms. Modica let both the deputies in. 10RP 48; 11RP 25. The officers asked Mr. Modica to come outside to "talk." 10RP 48; 11RP 26. Both officers testified when they tried to grab and handcuff him, Mr. Modica pulled away and fled. 10RP 48-49; 11RP 28. A fight and chase ensued, with Deputy Todd Morrell assisting. 10RP 48-57; 11RP 28-37; 12RP 58-61. Mr. Modica was ultimately subdued and

arrested. 12RP 61. (Both Crawley and Morrell testified to these events.)

Sergeant Thomas Manning testified regarding a new program for monitoring telephone calls in the King County Jail, which had begun on April 20, 2005. 12RP 85-86. Mr. Manning described the recorded warning played at the beginning of every phone call placed from the jail, and explained the process for tracking particular numbers and documenting recorded calls. 12RP 90-91, 104-06. Ten compact discs, containing recordings of Mr. Modica's telephone conversations with his grandmother Grace Stewart, were admitted into evidence. 12RP 98-99. Several of these recordings were played to the jury. 12RP 109; 13RP 8-17, 31-33, 52-53. The prosecutor alleged that these conversations revealed a scheme by which Ms. Modica and her nine children would leave their home and stay with Ms. Stewart in order to avoid Ms. Modica's obligation to testify in this trial. 14RP 25-30.

Ms. Modica testified she had been planning for weeks to move out of her home at the end of July; her landlady had told her at the end of May to move out by that time. 9RP 104-05. Overwhelmed with nine children, a full-time job, classes, and the stress of moving, Ms. Modica admitted she had failed to appear in

court or at meetings with the prosecutor. 9RP 81, 83-84, 87-90. However, she testified that neither Ms. Stewart nor anyone else ever asked Ms. Modica not to testify or discussed this trial with her. 9RP 86, 90-92. Ms. Modica frequently spoke to Ms. Stewart, but did not discuss Mr. Modica except for Ms. Stewart relaying updates on how he was doing. 9RP 86, 92.

Like Ms. Modica, Ms. Stewart testified under an immunity agreement with the State. 12RP 80. She testified Mr. Modica called her from jail almost every day. 12RP 76. She heard the recording which is played at the beginning of every collect call from jail and presumably knew the calls were recorded. 12RP 78. They rarely discussed his trial, and never in detail. 12RP 77. She did not remember any conversations about preventing Ms. Modica from coming to court or having Ms. Modica stay at her house. 12RP 80-82.

D. ARGUMENT

1. THE TRIAL COURT DEPRIVED MR. MODICA OF HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL.

a. A person accused of a crime has a fundamental constitutional right to the assistance of counsel. A person accused of a crime has a fundamental right under both the federal and Washington constitutions to have the assistance of counsel for his defense. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The assistance of counsel is also deemed fundamental and essential to a fair trial as a matter of due process of law under the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Article I, section 22 of the Washington Constitution declares a right to counsel similar to its federal counterpart: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Finally, the basic constitutional provision guaranteeing the right to counsel is implemented by CrR 3.1, which provides, "A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review." CrR 3.1(b)(2).

b. A criminal defendant may refuse the assistance of counsel and represent himself, but only if the request is knowing, intelligent and unequivocal. The constitutional guarantee of the assistance of counsel is unusual among constitutional rights in that it is also a guarantee of its opposite, the right to refuse the assistance of counsel. Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Silva, 107 Wn. App. 605, 617-18, 27 P.3d 663 (2001). A criminal defendant thus has a choice to make, but the options are not equally easy to elect. The right to assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at critical stages of a criminal prosecution, whether or not the defendant has requested it. Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Kirby v. Illinois, 406 U.S. 682, 689-90, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). To exercise the right to self-representation, on the other hand, a criminal defendant must negotiate several procedural obstacles and the trial court must find he has affirmatively waived the right to be represented by counsel. Faretta, 422 U.S. at 835; Johnson, 304 U.S. at 464; City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984)

(citing Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)).

The right of self-representation is conditioned on a valid waiver of the right to be represented by counsel. Chapman v. United States, 553 F.2d 886, 892 (5th Cir. 1977) (citing Faretta, 422 U.S. at 835; Johnson, 304 U.S. at 464-65). The record must show the defendant knowingly and intelligently waived the right to counsel, that "he knows what he is doing and his choice is made with eyes open." Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). But apart from the requirement that the defendant's decision be knowing and intelligent, is the requirement that the decision be unequivocal. State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995); State v. Fritz, 21 Wn. App. 354, 360-61, 585 P.2d 173 (1978). Thus, courts appreciate that a defendant who requests to represent himself may well understand the nature and consequences of self-representation, and yet the request may not reflect the defendant's true wishes.

The defendant's true wishes are determinative, because the right to self-representation is fundamentally about freedom of choice. Faretta, 422 U.S. at 833-34. As the United States

Supreme Court explained, “it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.” Id. at 833. The right to self-representation is a personal right that must be honored out of respect for the individual. Id. at 834. Thus, although “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,” courts must nonetheless allow defendants to make that choice. Id.

Not every request to dispense with counsel truly reflects a desire to exercise the constitutional right to self-representation, however. The precise choice to be made is a choice between representation by counsel and representation by oneself. United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994). The choice must be explicit and reflect a true subjective desire for self-representation. Id.; State v. Chavis, 31 Wn.App. 784, 791, 644 P.2d 1202 (1982). In ruling on a defendant’s request to proceed pro se, therefore, the trial court must subject the defendant to a penetrating and comprehensive examination in an attempt to discern the defendant’s subjective reasons for making the request.

Chavis, 31 Wn. App. at 791. For example, a defendant may request to proceed without counsel out of a mistaken belief that no state-appointed lawyer would zealously represent him or that a pro se appearance is necessary for a fair trial. Id. In such cases, the defendant's request to defend himself truly reflects not a desire to dispense with counsel, but a desire to avoid what is perceived as a greater but unrelated evil. Id. In such cases, rather than grant the defendant's request, the court should attempt to mitigate his concerns. Id.; Chapman, 553 F.2d at 892.

Courts must question a defendant closely regarding his true reasons for requesting to proceed without counsel, because a decision to defend pro se often jeopardizes the defendant's chances of receiving an effective defense. Fritz, 21 Wn. App. at 360; Chapman, 553 F.2d at 892. The constitution grants defendants "a personal right to be a fool,"<sup>3</sup> but where the defendant's request does not truly reflect a choice of self-representation, the defendant's countervailing interest in receiving adequate representation and having his guilt or innocence fairly determined must win out. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); Chavis, 31 Wn. App. at 792.

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<sup>3</sup> Fritz, 21 Wn. App. at 359; see also Faretta, 422 U.S. at 834.

Thus, to protect the defendant's right to a fair and just proceeding, the law requires courts to indulge in every reasonable presumption against a defendant's waiver of his right to counsel. In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999) (citing Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)). Courts "should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense." Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982). Any doubt as to whether the defendant is truly making an autonomous choice to proceed without counsel must be resolved in favor of appointing counsel. Chavis, 31 Wn. App. at 792-93.

Finally, in determining the defendant's true subjective wishes, the trial court must look beyond the defendant's request to the record as a whole. The determination of whether the request is unequivocal depends upon the particular facts and circumstances surrounding the case. Johnson, 304 U.S. at 464.

i. Mr. Modica's waiver of his right to counsel was not knowledgeable. The "preferred method" for determining a waiver's validity is a colloquy on the record "detailing at a minimum the seriousness of the charge, the possible maximum penalty involved,

and the existence of technical, procedural rules governing the presentation of the accused's defense." Silva, 108 Wn.App. at 539. The first colloquy of Mr. Modica, conducted by Judge Trickey on July 12, 2005, was conducted before the State had added the tampering charge. 3RP 6-12. On July 21, 2005, Judge Washington also asked Mr. Modica a series of questions about his decision, but did not inform Mr. Modica of the seriousness or maximum penalty of any charges, including the new tampering charge. 5RP 2-11.<sup>4</sup>

In Silva, the defendant was never informed of the maximum penalties for the crimes with which he was charged. Id. at 540. Therefore, the appellate court found that he "could not make a knowledgeable waiver." Id. See also State v. Nordstrom, 89 Wn.App. 737, 950 P.2d 946 (1997) (defendant's decision to proceed pro se, without colloquy on the record, was not made knowingly because defendant was not fully informed of maximum penalties or the risks of self-representation); State v. Buelna, 83

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<sup>4</sup> Compounding the prejudice, the information had been amended only a four days earlier (spanning a weekend), on July 21, and Mr. Modica, who was still in custody, had had no opportunity to investigate the charge. CP 12-13. Moreover, the prosecutor had not yet provided Mr. Modica with copies of the recordings which formed the basis of this charge. 7RP 30. In fact, Mr. Modica was not able to listen to those recordings until July 29-30, days after the trial began, due to his status in administrative hold which was in turn caused by the block on telephone and mail privileges, imposed on the prosecution's motion. 4RP 23; 8RP 2-3; 9RP 3-6; 12RP 14-15.

Wn.App. 568, 922 P.2d 1371 (1996) (waiver was not knowing and intelligent where court failed to advise defendant of the seriousness and maximum penalties of the charges).

Moreover, Mr. Modica's answers to Judge Trickey's earlier colloquy consisted of simple, unexplained responses such as "Sure," "I do," and "I understand." 3RP 6-7. The existence of a "mere routine inquiry" on the record is insufficient to determine the validity of a waiver. Chavis, 31 Wn.App. at 789.

Since the question ultimately is the subjective understanding of the accused rather than the quality or content of the explanation provided, the court should question the accused in a manner designed to reveal understanding, rather than framing questions that call for a simple "yes" or "no" response. See United States ex rel. Miner v. Erickson, 428 F.2d 623, 636 (8th Cir. 1970). The judge must make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently. See United States ex rel. Martinez v. Thomas, 526 F.2d 750, 755 (2d Cir. 1975).

Chavis, at 790. Judge Trickey's routine colloquy, without follow-up questions to determine the extent of Mr. Modica's understanding, combined with Judge Washington's failure to inform Mr. Modica of the new risks he was facing and to inquire into his understanding of those dangers, resulted in an invalid waiver that cannot be deemed knowledgeable.

ii. Mr. Modica's request to represent himself was equivocal. Although Mr. Modica requested the trial court allow him to exercise his right to represent himself, an examination of the record as a whole reveals that Mr. Modica did not truly wish to proceed without counsel. His request was equivocal, and thus the trial court should have denied the motion. State v. Stenson, 132 Wn.2d 668, 739-40, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998); State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001); Luvene, supra, 127 Wn.2d 690.

The record shows that Mr. Modica's "choice" to proceed pro se was no choice at all. During the colloquy conducted by Judge Washington, Mr. Modica repeatedly explained that he was "forced" to represent himself because first, his appointed counsel, wanted a continuance and Mr. Modica strongly desired to assert his right to a speedy trial, and second, he believed his attorney had violated the RPC and his attempts to address that issue with the attorney's supervisors had been fruitless. 5RP 2-4. Therefore he "felt that [he] had no other choice" but to proceed pro se. 5RP 4. The following exchange between the court and Mr. Modica shows the impossible bind he was in:

THE DEFENDANT: [U]nder the Sixth Amendment, I am allowed – afforded a speedy trial. And I am afforded to have competent and knowledgeable and skillful representation. I am exercising that right...

THE COURT: Which right do you feel you have prejudiced in exercising –

THE DEFENDANT: Exercising my rights to have a speedy trial, exercising my rights to proceed pro se, deeming I have a speedy trial.

THE COURT: Is it true, am I correct in understanding you that it is your desire to have a speedy trial, that's your primary concern in this case. It's a greater concern to you than it is to have competent counsel represent you; is that true?

THE DEFENDANT: No, it's not.

5RP 27-28. And the following day Mr. Modica informed the court that the reason he wished to proceed pro se was "the Sixth Amendment constitution rights and right to fair and speedy trial."

7RP 3. Mr. Modica was thus faced with a Hobson's choice between his right to effective assistance of counsel and his right to a speedy trial.

Mr. Modica finally stated that it was his decision to proceed pro se. 5RP 36. However, he continued to equivocate, wanting to know how long defense counsel would need to prepare for trial, and indicating that he would accept appointment of counsel if the

continuance were not too lengthy. 5RP 39. Defense counsel told the court he would ask for at least four weeks. 5RP 40. The fact that Ms. Modica was in custody pending her testimony was also a significant factor in Mr. Modica's decision. 5RP 47. There was lengthy discussion about the possibility of continuing the trial, taking Ms. Modica's deposition, and releasing her, but defense counsel indicated that it would probably be two days before he could take her deposition. 5RP 55. The court finally presented Mr. Modica with two options. The court could assign counsel, arrange for Ms. Modica's deposition in the next day or two, release her, and then continue the matter for at least thirty days (during which time Mr. Modica would remain in custody) so that counsel could prepare for the trial. On the other hand, Mr. Modica could proceed pro se, beginning the trial the next day. 5RP 59-60. Faced with the choice between assistance of counsel or a speedy trial, Mr. Modica decided to represent himself. 5RP 60; 7RP 3-4. The court granted the motion and appointed rotating SCRAP attorneys as stand-by counsel. 5RP 62-63.

Mr. Modica's decision was not a true choice, but was compelled by a desire to avoid a delay in the trial, combined with his belief in his current counsel's incompetence. He thus was not

exercising his constitutional right to choose self-representation.

See Faretta, 422 U.S. at 833-34; Chavis, 31 Wn. App. at 791.

The Washington Supreme Court has held that where a defendant requests to proceed without counsel out of a desire to avoid what he perceives to be a greater evil, but where the outcome to be avoided is unrelated to a dissatisfaction with counsel, the request is equivocal and should not be granted. See State v. Woods, 143 Wn.2d 561; State v. Luvene, 127 Wn.2d 690. In Luvene, the trial court granted the defense attorney's request for a continuance three weeks before the scheduled trial date, because the attorney needed more time to prepare. 127 Wn.2d at 698. Mr. Luvene, however, strongly opposed any continuance, stating he had been in jail for several months and did not want to wait any longer, that he was prepared to defend himself, and that he wanted to go to trial. Id. The trial court nonetheless granted the continuance. Id. On review, the Supreme Court held the trial court properly determined the request to proceed without counsel was equivocal. Id. at 699. In the context of the record as a whole, the defendant's statement could be seen only as an "expression of frustration by Mr. Luvene with the delay in going to trial and not as an unequivocal assertion of his right to self-representation." Id.

The Supreme Court reached a similar conclusion more recently in Woods, supra, 143 Wn.2d 561. There, when defense counsel requested a continuance of the trial date, the defendant stated he was prepared to proceed to trial without counsel on the original trial date. Id. at 587. As in Luvene, the Supreme Court concluded the request could not be viewed as an unequivocal statement of his desire to proceed to trial pro se. Id. Rather, “[h]is statement, like that which we examined in Luvene, merely revealed the defendant’s displeasure with his counsels’ request to continue the trial for a lengthy period of time.” Id.

Similarly, in State v. Stenson, the defendant’s motion to represent himself was found to be equivocal because it stemmed from disagreements over trial strategy between the defendant and his attorney. 132 Wn.2d at 739-40. The defendant told the trial court he did not want to represent himself but felt forced into it. Id. at 742. Therefore the court found that Stenson “really [did] not want to proceed without counsel” and properly denied his motion. Id. See also In re Detention of Turay, 139 Wash.2d 379 (defendant’s request to proceed pro se as an alternative to his counsel of choice was equivocal).

Here, the record is clear that Mr. Modica did not truly wish to represent himself. He told the trial court he did not want to represent himself, but that he felt "forced" to do so. 5RP 2. The request was equivocal and thus did not amount to a waiver of Mr. Modica's fundamental constitutional right to the assistance of counsel. Faretta, 422 U.S. at 835; Johnson, 304 U.S. at 464. The trial court should have denied the request to proceed pro se and granted a continuance. See State v. Campbell, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984) (trial court may grant continuance to allow defense counsel opportunity to prepare for trial, even over express objections of defendant).

c. The trial court violated Mr. Modica's right to counsel by denying his request for reappointment of counsel. A defendant has the right to counsel of his choice. Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). If the request is not timely, "the existence of that right depends on the facts with a measure of discretion in the trial court." State v. Chase, 59 Wn.App. 501, 506, 799 P.2d 272 (1990), citing State v. Fritz, 21 Wn.App. 354. In the case of a pro se defendant, "[o]nce an unequivocal waiver of counsel has been made...reappointment is wholly within the discretion of the trial court." DeWeese, 117 Wn.2d

at 376-77. However, as discussed above, Mr. Modica's waiver was equivocal. Moreover,

[b]ecause "[s]elf-representation is a grave undertaking, one not to be encouraged," the request for reappointment should be granted absent reasons to deny.

State v. Canedo-Astorga, 79 Wn.App. 518, 525, 903 P.2d 500 (1995), quoting DeWeese, at 379.

On July 28, 2005, Mr. Modica requested that counsel be reappointed and that the court grant a continuance to allow new counsel to prepare for the trial.

I do feel, at this time, Your Honor stated earlier about courtroom antics and I am not a trained lawyer. I don't think that I have the knowledge and skill to actually proceed forth and represent myself fairly in this case. I feel I'm a little bit over my head, a little bit. I would, at this time, humbly ask the Court to allow me to accept the State's opportunity for me to abide by counsel, SCRAP...

So, before we even get into it, I would ask you to allow SCRAP to represent me. I would abide by giving them the necessary time they need to look at the case and proceed forthwith.

9RP 6-7. Mr. Modica's request was not timely; however it was a direct result of the court's error in granting his motion to represent himself, as discussed above. Mr. Modica's explanation of his

change of heart shows that his earlier waiver was not, in fact, knowing, intelligent, or unequivocal. As Mr. Modica told the court,

I was doing my best, I felt, at the time, to understand the system, but I lack that. I think that led to my misunderstanding of the pro se process of the court proceedings and I just – I feel that I am really out of my league.

9RP 9.

The lateness of a request for reappointment on the eve of trial or midstream can constitute a reason to deny. Canedo-Astorga, 79 Wn.App. at 525.<sup>5</sup> However, in this case Mr. Randolph proposed a solution which would have preserved Mr. Modica's rights, allowed Ms. Modica's prompt release, and resulted in no prejudice to the State. Mr. Randolph reasonably suggested that the court declare a mistrial but put Ms. Modica on the stand so that her testimony as the State's witness could be preserved that day and Mr. Modica, through Mr. Randolph, would be able to cross-examine

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<sup>5</sup> In Canedo-Astorga, the trial court initially denied defendant Canedo's motion to represent himself, but then granted it. 79 Wn.App. at 502-03. On the second day of trial, the defendant moved for reappointment, which the court denied. Id. at 523. Division Two found that this was not abuse of discretion. Id. at 526-27. That case was complicated by the presence of multiple defendants and issues of severance; in fact co-defendant Naranjo argued against Canedo's pro se motion. Id. at 522. That case can further be distinguished by the fact that Canedo did not, on appeal, contest the validity of his waiver, as Mr. Modica does here. Id. at 526. Finally, although the opinion does not indicate precisely how far the trial had progressed when Canedo moved for reappointment, the phrases "halfway through the trial," "midtrial," and "midst of a jury trial" suggest that it was further along than in Mr. Modica's case. Id. at 523, 524, 526. Here, the only action taken was the selection and swearing in of the jury. The opening statements had not even been made.

her. This way Ms. Modica could be released from custody and there would be no prejudice to the State, only delay. 9RP 13. The court denied the request. 9RP 13-14.

In determining whether the trial court has abused its discretion in denying a continuance for defendant to obtain new counsel, this Court should consider whether the trial court had granted previous continuances at defendant's request, whether the defendant had some legitimate cause for his request, whether available counsel is prepared to go to trial, and whether denial of the motion is likely to result in material prejudice to the defendant. State v. Price, 126 Wn.App. 617, 109 P.3d 27 (2005); State v. Roth, 75 Wn.App. 808, 881 P.2d 268 (1994).

Considering the factors outlined above, there had been no previous continuances on the defendant's motion. Mr. Modica certainly had a legitimate reason for his request, since his realization that he was "out of [his] league" was consistent with what the court had itself been saying. Available counsel was ready to go to trial, with a reasonable continuance to prepare; stand-by counsel joined in Mr. Modica's motion. 9RP 13. Previous stand-by counsel had told the court SCRAP could represent Mr. Modica with a thirty day continuance. 5RP 40. There can be no doubt that

denial of the request resulted in material prejudice to Mr. Modica, since the court itself had impressed upon Mr. Modica the disadvantage he would face proceeding pro se. 4RP 8-9, 11-12.

d. The convictions must be reversed. The record shows that Mr. Modica was not fully informed of the charges facing him and did not truly want to represent himself. Because his waiver was neither knowing nor unequivocal, the trial court erred in finding that it was constitutionally sufficient. Given the opportunity to fix its error when Mr. Modica requested reappointment of counsel, the court again erred by denying his request.

The Supreme Court has held “no conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel.” State v. Cory, 62 Wn.2d 371, 376, 382 P.2d 1019 (1963). When a pro se defendant’s waiver of the right to counsel is not knowing, intelligent, and unequivocal, reversal is the proper remedy. Silva, 108 Wn.App. 536; Chavis, 31 Wn.App. 784; Nordstrom, 89 Wn.App. 737; Buelna, 83 Wn.App. 658.

2. THE RECORDINGS OF MR. MODICA’S TELEPHONE CONVERSATIONS WERE ILLEGALLY OBTAINED AND THEREFORE INADMISSABLE.

a. The Government's recordings of Mr. Modica's telephone conversations with his grandmother violated the Washington Constitution and the Revised Code of Washington. Article I, Section 7 of our State's Constitution recognizes an individual's right to privacy with no express limitations: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Almost 100 years ago, our Legislature enacted a privacy statute to criminalize the interception of private telephone conversations:

Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor.

Rem. Comp. Stat. 1922 §2656 (1909). In so doing, our State again distinguished itself from nearly every other by deliberately providing greater privacy protections.<sup>6</sup>

While the code provisions have changed, the interception of private telephone calls remains illegal to this day. RCW

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<sup>6</sup> Only the constitutions of nine other states have provisions that, like Washington, explicitly provide for the protection of privacy. See ALASKA CONST. Art. I, §22; ARIZ. CONST. Art. II, §8; CAL. CONST. Art. I, §1; FLA. CONST. Art. I, §23; HAW. CONST. Art. I, §6; ILL. CONST. Art. 1, §6; LA. CONST. Art. 1, §5; MONT. CONST. Art. II, §10; S.C. CONST. Art. I, §10. Of these, only four other states also require the permission of all parties to a telephone conversation before it can be legally recorded. These are California, Florida, Illinois, and Montana.

9.73.030(1) prohibits all interceptions, except those made with the consent of all parties to the conversation:

- (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the State of Washington, its agencies, and political subdivisions to intercept, or record any:
  - a. Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the conversation.
  - b. Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

This proscription remains the cornerstone of the Washington Privacy Act ("WPA"), codified in RCW 9.73.010-9.73.140.

The purpose of the WPA, as recognized by the Washington Supreme Court is to

safeguard the private conversations of citizens from dissemination in any way. The statute reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement.

State v. Fiermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990);  
see also Johnson v. Hawe, 388 F.3d 676 (9th Cir. 2004) (holding  
the WPA “deliberately places the court system between the police  
and private citizen to protect against this type of [electronic  
eavesdropping]”). Through the WPA, Washington “has recognized  
a strong policy of protecting the privacy of its citizens and the  
introduction of evidence obtained in violation of the statutes is  
prohibited.” State v. Baird, 83 Wn. App. 477, 483, 922 P.2d 157  
(1996).

i. The conversations between Mr. Modica and Ms. Stewart were private. Whether a communication is private is a question of fact depending on the reasonable, subjective expectations of the parties. State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996); Kadorian by Peach v. Bellingham Police Dept., 119 Wn.2d 178, 829 P.2d 1061 (1992). The critical question is: “was the information conveyed in the disputed conversations intended to remain confidential between the parties?” Faford, at 484.

In Faford, the Court rejected the State’s argument that because technological developments allow easy interception of cordless telephone calls, users of cordless telephones do not have a reasonable expectation of privacy. Id. at 485. It is absurd to

argue that because something is technologically feasible it is legal, even if the users of that technology are aware of the risks. The Supreme Court has warned:

We recognize as technology races ahead with ever increasing speed, our subjective expectations of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent. We believe our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.

State v. Young, 123 Wn.2d 173, 184, 867 P.2d 593 (1994).

It is equally absurd to argue that telephone calls from jail can never be private simply because the parties are aware that the call may be monitored. The unconscious altering of expectations warned of in Young cannot justify illegal government action, and the existence of a recorded warning cannot substitute for a subjective, case-by-case inquiry.

The test remains a subjective one. Mr. Modica's conversations with one other party, his grandmother, carried a reasonable expectation that those conversations would be private.

ii. The government did not obtain two-party consent pursuant to RCW 9.73.030. There is not a single case or statute that says that a mere statement that the recording is occurring, by a non-party, is sufficient to establish consent to record telephone conversations. At most, such a statement provides notice, not

consent. Putting someone on notice that their call would be recorded is not the same as obtaining consent. Telling someone that you are going to illegally record his telephone calls, does not cure the illegality. Our Legislature made that clear by specifying what constitutes consent.

Two party "consent" is defined in the WPA itself and it exists only:

. . . whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.030(3). There were two parties to the conversations: Mr. Modica and Ms. Stewart. Neither of them announced to the other that the call would be recorded. Neither consented.

In fact, our Supreme Court has specifically held that someone doing the same thing that the government did here was not a "party." The Court in State v. Faford, held that a neighbor who listened to (and recorded) telephone conversations between two others was not a "party" to those conversations. 128 Wn.2d at 487-88. The Faford Court further held that "the plain language of [RCW 9.73.030] requires one intended party to the conversation to consent to interception." Id.; see also Baird, 83 Wn. App. 477 (defendant illegally recorded a telephone conversation between his wife and another man, and so the tape was inadmissible); State v.

Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004) (mother illegally intercepted telephone conversation between her daughter and her boyfriend). The Court then reversed Faford's conviction, holding in part:

Despite [the neighbor's] allegations that Defendant's conveyed threats to his family and property, the plain language of the statute requires one intended party to the conversation to consent to interception for the threat exception to apply. Because none of the parties to Defendant's cordless telephone conversations consented to interception, the threat exception does not apply.

128 Wn.2d at 487-88.

WPA cases permit the government to listen to a telephone call when someone calls a government agency or actor, or when a government actor makes the call him or herself, thereby making the government a party to the call.<sup>7</sup> Other WPA cases permit the

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<sup>7</sup> See State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) (use of recorded computerized messages appropriate because defendant's sent the messages to a federal agent – the agent was a "party"); State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996) (defendant spoke to undercover agent who was the consenting "party" to the conversation); State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (defendant spoke to police and so the person recording the conversation was also a "party"); State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) (recordings admitted where defendant was talking to government agent, and so government agent was a "party"); State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981) (defendant spoke to police and so the person recording the conversation was also a "party"); State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980) (defendant spoke to undercover agent who consented to the recording and so the person consenting was also an intended "party"); State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980) (defendant spoke to police and so the person recording the conversation was also a "party"); State v. Higgins, 125 Wn. App. 666, 105 P.3d 1029 (2005) (defendant conversing with police officer and so the person recording was also a "party"); State v. Mazzante, 86 Wn. App. 425, 936 P.2d 1206 (1997) (defendant spoke to police officers and

government to listen to telephone calls when one of the intended recipients takes an affirmative step to consent, such as tipping the receiver so that a government agent can hear it.<sup>8</sup> Again, in that case an intended party to the call has consented. No WPA case permits the government to interject itself into private telephone conversations in the manner done so here.

In Faford, our Supreme Court chastised the State for defending the neighbor's actions:

[The neighbor] did not accidentally or unintentionally pick up a single cordless telephone conversation on his radio or cordless telephone, but undertook 24-hour, intentional, targeted monitoring of Defendants' telephone calls with a scanner purchased for that purpose. This type of intentional, persistent eavesdropping on another's private affairs personifies the very activity the privacy act seeks to discourage.

125 Wn.2d at 487-88. This case is no different, except that here the government was not just defending the intentional, persistent eavesdropping on another's private affairs – it was doing it. The jail administration undertook 24-hour, intentional, targeted monitoring of Mr. Modica's telephone calls. This "personifies the very activity

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so the person recording the conversation was also a "party"); State v. Gelvin, 43 Wn. App. 691, 719 P.2d 580 (1986) (defendant spoke to police and so the person recording the conversation was also a "party").

<sup>8</sup> State v. Corliss, 123 Wn.2d 656, 870 P.2d 317 (1994) (defendant talked to a party who consented to have the call intercepted by tipping the receiver so that an officer could hear the conversation).

the privacy act seeks to discourage.” Id. The recordings were illegal.

iii. The State did not seek or obtain Court authorization to record Mr. Modica’s calls. RCW 9.73.040 permits the interception of private communications by the government if court authorization has been obtained.<sup>9</sup> RCW 9.73.090 permits the interception of private communications if court authorization *and* one-party consent has been obtained.<sup>10</sup> Neither court authorization

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<sup>9</sup> RCW 9.73.040 provides:

(1) An ex parte order for the interception of any communication or conversation listed in RCW 9.73.030 may be issued by any superior court judge in the state upon verified application of either the state attorney general or any county prosecuting attorney setting forth fully facts and circumstances upon which the application is based and stating that:

- a. There are reasonable grounds to believe that national security is endangered, that a human life is in danger, that arson is about to be committed, or that a riot is about to be committed, and
- b. There are reasonable grounds to believe that evidence will be obtained essential to the protection of national security, the preservation of human life, or the prevention of arson or a riot; and
- c. There are no other means readily available for obtaining such information.

<sup>10</sup> RCW 9.73.090(3) makes it lawful for a law enforcement officer to record “an oral conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the . . . recording . . . : PROVIDED, That prior to the . . . recording the officer shall obtain written or telephonic authorization for a judge. . . who shall approve the . . . recording . . . if there is probably cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony . . . .”

nor the consent of one party was obtained in this case. Neither of these statutes legitimizes the recordings made here.

iv. The government did not record calls made under emergency circumstances and with one-party consent. RCW 9.73.030(2) contains other exceptions to the blanket prohibition on recording private communications in the absence of all-party consent:

Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded *with the consent of one party to the conversation.*

(Emphasis added.) These limited exceptions are not met unless the government has also obtained “the consent of one party to the conversation.” RCW 9.73.030(2). Again, here there were two parties to the conversations and neither consented.

Even if one-party consent were obtained, the four exceptions still do not apply. They all cover circumstances where it is known, prior to the monitoring beginning, that a call involves an emergency circumstance. The exceptions do not permit a government agency to record every telephone call without consent and then listen to the

calls to see if an emergency or factual basis can be found to justify the invasion of privacy that has already occurred. Otherwise, the government would be able to record everyone's telephone calls simply by announcing at the beginning of the call that the recording is going to happen. If that were the case the privacy right contemplated in our Constitution and the Washington Privacy Act would cease to exist. These exceptions do not authorize the recordings made here.

v. Mr. Modica was not an "offender" housed in a "state correctional facility" monitored by the Department of Corrections when his calls were recorded. RCW 9.73.095 exempts employees of the Department of Corrections from some of the WPA's provisions:

(1) RCW 9.73.030 through 9.73.080 and 9.73.260 shall not apply to employees of the department of corrections in the following instances: Intercepting, recording or divulging any telephone calls from an offender or resident of a state correctional facility; or intercepting, recording, or divulging any monitored nontelephonic conversations in offender living units, cells, rooms, dormitories, and common spaces where offenders may be present. For the purposes of this section, "state correctional facility" means a facility that is under the control and authority of the department of corrections, and used for the incarceration, treatment or rehabilitation of convicted felons.

RCW 9.73.095(1). Importantly, even DOC employees must still comply with RCW 9.73.090(1)(b). That section applies here and was not followed.

Moreover employees of the Department of Corrections do not run the King County Jail. Authorized employees did not record Mr. Modica's conversations. This exception applies to "an offender or resident of a state correctional facility," but Mr. Modica was not an offender; he was being held in a county jail awaiting trial. Finally the King County Jail does not meet the definition of "state correctional facility" included in the statute itself. RCW 9.73.095(1).

Legislative action demonstrates that this exception does not apply to the King County Jail and also that no other exception applies to the King County Jail. Just this year, a Bill Request<sup>11</sup> was sent to the Code Reviser's Office for the Washington State Legislature. This description of this Bill Request was: "Regulating the interception of offender conversations by county-operated correctional facilities." The Bill would have added "employees of a county-operated correction facility" to the list of people authorized to record pursuant to RCW 9.73.095, but was never even introduced and has not become law.

b. The Government's recordings of Mr. Modica's telephone conversations with his grandmother violated the Washington

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<sup>11</sup> A copy of the Bill Request is attached as Appendix B.

Administrative Code. In conjunction with the WPA, the Washington Administrative Code (“WAC”) governs telephone usage in the King County Jail. The WAC specifically bans the recording of telephone calls made by an inmate in a county jail unless a Court order has been obtained. WAC 289-24-100(4).

“Jail,” in the WAC, is defined as:

any holding, detention, special detention, or correctional facility as defined in this section, or any farm, camp, or work release facility established and operated in conjunction with a jail.

RCW 70.48.020(5); WAC 289-02-020(10). The terms “holding facility,” “detention facility,” and “correctional facility” are also defined by statute and by the WAC.<sup>12</sup> Mr. Modica was held in a jail.

WAC 289-24-100 governs “telephone usage” in “holding facilities.” WAC 289-24-200 governs “telephone usage” in “detention and correctional facilities.” Both provisions contain the same admonishment:

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<sup>12</sup> The term “holding facility” is defined in both the RCW’s and the WAC’s as “a facility operated by a governing unit primarily designed, staffed, and used for the temporary housing of adult persons charged with a criminal offense prior to trial or sentencing and for the temporary housing of persons during or after trial and/or sentencing, but in no instance shall the housing exceed thirty days.” RCW 70.48.020(1); WAC 289-02-020(9). The term “detention facility” is defined in both provisions as “a facility operated by a governing unit primarily designed, staffed and used for the temporary housing of adult persons charged with a criminal offense prior to trial or sentencing and for the housing of adult persons for purposes of punishment and correction after sentencing or persons serving terms not to exceed ninety days.” RCW 70.48.020(2); WAC 289-02-020(6). The term “correctional facility” is defined as: a facility operated by a governing unit primarily designed, staffed and used for housing of adult persons serving terms not exceeding one year for the purposes of punishment, correction, and rehabilitation following conviction of a criminal offense.

(4) Location of telephone facilities shall insure reasonable privacy, and telephone conversations shall not be monitored, tape recorded, or spot-checked except by court order.

There was no court order authorizing the recording of Mr. Modica's telephone calls.

The above WACs were drafted by the State Jail Commission, which was created by statute in 1977 for the purpose of recommending standards for the operation of adult correctional facilities. RCW 70.48.030. In 1986-87, the Legislature dissolved the Commission and transferred its responsibilities to the Department of Corrections (for state facilities) and local governments (for local facilities). RCW 70.48.070, 72.09 new ch., 70.48.071. The Legislature explicitly stated that this act in no way impacted the validity of the existing WACs. RCW 70.48 new ch. 20 (1987). The WACs on telephone usage are still valid and clearly prohibit recording without court order.

c. The tampering conviction should be reversed and the charge dismissed. In addition to strict limitations on the ability to intercept private communications, the WPA strictly penalizes violators. RCW 9.73.080(1) provides that any person who violates RCW 9.73.030 is guilty of a gross misdemeanor. Moreover, any "information" obtained in violation of the WPA

shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state,

except with the permission of the person whose right have been violated in an action brought for damages. . . or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

RCW 9.73.050. Washington courts have held fast to the suppression rule, even in cases where the decision to do so had dire consequences. In Fjermestad, the Washington Supreme Court suppressed conversations recorded in violation of Washington's Privacy Act, even though its decision applied recordings made "during a 7-month investigation . . . aimed at arresting drug dealers." 114 Wn.2d 828. In doing so, the Court responded thusly to the State's protestations:

This decision does not hamstring the goals of law enforcement, but only preserves the integrity of the police and the privacy of individuals.

Id. at 836. The government illegally recorded Mr. Modica's telephone conversations, and the trial court erred in admitting that evidence at trial.

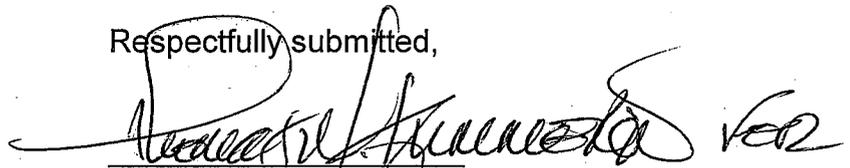
The trial court's improper admission of illegally obtained evidence was not harmless if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). These recordings were the *only* evidence offered by the prosecution to support the tampering charge. The conviction must therefore be reversed and the charge dismissed with prejudice.

E. CONCLUSION

For the reasons stated, this Court should hold Mr. Modica's waiver of his constitutional right to assistance of counsel was neither knowing nor unequivocal and his request for reappointment was improperly denied, and consequently reverse all four convictions. In addition, this Court should hold that the recordings of Mr. Modica's telephone calls were illegally obtained and should never have been admitted at trial, and therefore reverse the tampering conviction.

DATED this 18<sup>th</sup> day of May, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Donnan", with a large, stylized initial "D" and a flourish extending to the right.

DAVID L. DONNAN (WSBA 19271)  
Washington Appellate Project (91052)  
Attorneys for Appellant

# **APPENDIX A**

FILED  
05 JUL 21 PM 2:37  
KING COUNTY  
SUPERIOR COURT CLERK  
KENT, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 05-1-07759-6 KNT

vs.

DESMOND EARL MODICA,

Defendant,

MOTION AND CERTIFICATION FOR  
ORDER TO APPREHEND AND  
DETAIN MATERIAL WITNESS

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court upon the motion of the State of Washington, plaintiff, for an Order to Apprehend and Detain Material Witness in the above entitled cause, and the court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that

1. Pursuant to CrR 4.10 any law enforcement officer shall apprehend and detain:

Karen Modica

Birth Date: 12-28-69

Race: I Sex: Female Hgt:5'8" Wgt:135 Hair:Blk

Eyes: Bro

2. Upon apprehension, the material witness shall be held in the King County Department of Adult Detention, and be brought before this Court as soon as possible for determination of testimony materiality, and deposition thereof, and bail.

3. This material witness warrant will expire at the completion of the trial for above captioned case.

MOTION AND CERTIFICATION FOR ORDER TO  
APPREHEND AND DETAIN MATERIAL WITNESS - 7

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

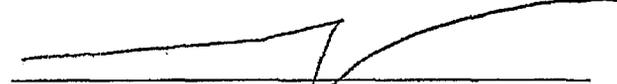
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CERTIFIED COPY TO WARRANTS

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DONE IN OPEN COURT this 21<sup>st</sup> day of July, 2005.

  
JUDGE M. TRICKEY

Presented by:  
  
Deputy Prosecuting Attorney  
Jim Ferrell WSBA#24314

MOTION AND CERTIFICATION FOR ORDER TO  
APPREHEND AND DETAIN MATERIAL WITNESS - 8

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

# **APPENDIX B**

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**BILL REQUEST - CODE REVISER'S OFFICE**

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BILL REQ. #: H-3394.1/06

ATTY/TYPIST: KB:seg

BRIEF DESCRIPTION: Regulating the interception of offender conversations by county-operated correctional facilities.

AN ACT Relating to intercepting offender conversations; and amending RCW 9.73.095.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

1. Sec. RCW 9.73.095 and 2004 c 13 s 2 are each amended to read as follows:

(1) RCW 9.73.030 through 9.73.080 and 9.73.260 shall not apply to employees of the department of corrections or to employees of a county-operated correctional facility in the following instances: Intercepting, recording, or divulging any telephone calls from an offender or resident of a state correctional facility; or intercepting, recording, or divulging any monitored nontelephonic conversations in offender living units, cells, rooms, dormitories, and common spaces where offenders may be present. For the purposes of this section((7)): (a) "State correctional facility" means a facility that is under the control and authority of the department of corrections, and used for the incarceration, treatment, or rehabilitation of convicted felons; and (b) "county-operated correctional facility" means a facility that is under the control and authority of a county and used for the detention and incarceration of

felons. It does not include a facility used solely for the detention or incarceration of misdemeanor offenders.

(2) (a) All personal calls made by offenders shall be made using a calling system approved by the secretary of corrections or the county operating the correctional facility which is at least as secure as the system it replaces. In approving one or more calling systems, the secretary of corrections or the county shall consider the safety of the public, the ability to reduce telephone fraud, and the ability of offender families to select a low-cost option.

(b) The calls shall be "operator announcement" type calls. The operator shall notify the receiver of the call that the call is coming from a prison or jail offender, and that it will be recorded and may be monitored.

(3) The department of corrections or the county operating the correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, or divulging any telephone calls from an offender or resident of a state or county correctional facility as provided for by this section. The department or county shall also adhere to the following procedures and restrictions when intercepting, recording, or divulging any monitored nontelephonic conversations in offender living units, cells, rooms, dormitories, and common spaces where offenders may be present:

(a) Unless otherwise provided for in this section, after intercepting or recording any conversation, only the superintendent or person in charge of the county-operated correctional facility and his or her designee shall have access to that recording.

(b) The contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.

(c) All conversations that are recorded under this section, unless being used in the ongoing investigation or prosecution of a crime, or as is necessary to assure the orderly operation of the correctional facility, shall be destroyed one year after the intercepting and recording.

(4) So as to safeguard the sanctity of the attorney-client privilege, the department of corrections or county operating the correctional facility shall not intercept, record, or divulge any conversation between an offender or resident and an attorney. The

department or county shall develop policies and procedures to implement this section. The ((department's)) policies and procedures implemented under this section shall also recognize the privileged nature of confessions made by an offender to a member of the clergy or a priest in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs as provided in RCW 5.60.060(3).

(5) The department or county shall notify in writing all offenders, residents, and personnel of state or county correctional facilities that their nontelephonic conversations may be intercepted, recorded, or divulged in accordance with the provisions of this section.

(6) The department or county operating the correctional facility shall notify all visitors to state or county correctional facilities who may enter offender living units, cells, rooms, dormitories, or common spaces where offenders may be present, that their conversations may intercepted, recorded, or divulged in accordance with the provisions of this section. The notice required under this subsection shall be accomplished through a means no less conspicuous than a general posting in a location likely to be seen by visitors entering the facility.

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

STATE OF WASHINGTON, )  
 )  
 Respondent, ) NO. 57115-0-1  
 )  
 v. )  
 )  
 DESMOND MODICA, )  
 )  
 Appellant. )

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2006 MAY 18 PM 4:35

**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 18<sup>TH</sup> DAY OF MAY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTOR'S OFFICE	<input checked="" type="checkbox"/> U.S. MAIL
APPELLATE UNIT	<input type="checkbox"/> HAND DELIVERY
KING COUNTY COURTHOUSE	<input type="checkbox"/> _____
516 THIRD AVENUE, W-554	
SEATTLE, WA 98104	
<input checked="" type="checkbox"/> DESMOND MODICA	<input checked="" type="checkbox"/> U.S. MAIL
228 - 31 <sup>ST</sup> AVENUE NE	<input type="checkbox"/> HAND DELIVERY
SEATTLE, WA 98102	<input type="checkbox"/> _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF MAY, 2006.

x \_\_\_\_\_ *gml*

Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711