

57115-0

57115-0

79767-6

NO. 57115-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DESMOND MODICA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGES MICHAEL TRICKEY AND
CHRISTOPHER WASHINGTON

BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

RANDI J. AUSTELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

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

FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
2005 JUL 13 PM 4:42

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	5
1. BECAUSE MODICA'S <i>FARETTA</i> WAIVER WAS VALID, HE WAS NOT LATER ENTITLED TO COUNSEL AS A MATTER OF RIGHT.....	5
a. Facts Relevant To The Waiver Of Counsel Issue.	5
b. The Requirements For A Valid <u>Faretta</u> Waiver.....	10
c. Modica Knowingly And Unequivocally Waived His Right to Counsel.	11
d. The Trial Court Properly Denied Modica's Untimely Request For Reappointment Of Counsel.....	19
2. THE RECORDED TELEPHONE CONVERSATIONS ARE NOT CONSTITUTIONALLY PROTECTED OR UNLAWFUL BECAUSE MODICA CANNOT DEMONSTRATE: A) A LEGITIMATE EXPECTATION OF PRIVACY, AND B) THAT SOCIETY IS WILLING TO RECOGNIZE THAT EXPECTATION AS REASONABLE, AND C) THAT AT LEAST ONE PARTY TO THE COMMUNICATION DID <u>NOT</u> CONSENT TO ITS RECORDING.	22

a.	Facts Relevant To The Recording Issue.....	22
b.	Constitutional Claim	26
i.	Modica did not have a legitimate expectation of privacy.....	27
ii.	Any expectation of privacy Modica might have had is not one society is willing to recognize as reasonable.	31
a)	Jails may monitor and record inmate telephone calls for institutional security purposes.	32
b)	Many of Modica's calls violated a no-contact order.	33
iii.	Because one party consented to the recordings, they were constitutional.	35
c.	Statutory Claim	36
i.	Because all parties consented to the recordings, they do not violate the Privacy Act.	37
ii.	Modica's statements conveyed unlawful requests or demands.....	42
3.	THE RECORDINGS DID NOT VIOLATE WASHINGTON ADMINISTRATIVE CODE 289-24-200(4) BECAUSE THE LEGISLATURE REPEALED ITS ENABLING STATUTE, THEREBY RENDERING 289-24-200(4) INVALID.....	44
D.	<u>CONCLUSION</u>	49

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525,
45 L. Ed. 2d 562 (1975)..... 5, 9, 10, 12-15, 17, 49

Gilday v. Dubois, 124 F.3d 277
(1st Cir. 1997)..... 41

Katz v. United States, 389 U.S. 347,
88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)..... 27

Lanza v. New York, 370 U.S. 139,
82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962)..... 29

Lopez v. Thompson, 202 F.3d 1110
(9th Cir. 2000) 13

Silverman v. United States, 365 U.S. 505,
81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)..... 29

Smith v. Maryland, 442 U.S. 735,
99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)..... 28

United States v. Amen, 831 F.2d 373
(2nd Cir.1987), cert. denied
485 U.S. 1021 (1988)..... 32

United States v. Balough, 820 F.2d 1485
(9th Cir. 1987) 13

United States v. Dujanovic, 486 F.2d 182
(9th Cir. 1973) 13

United States v. Erskine, 355 F.3d 1161
(9th Cir. 2004) 13

United States v. Faulkner, 323 F. Supp 2d.
1111 (D. Kansas 2004)..... 39

<u>United States v. Friedman</u> , 300 F.3d 111, (2 nd Cir. 2002), <u>cert. denied</u> 538 U.S. 981 (2003).....	36
<u>United States v. Horr</u> , 963 F.2d 1124 (8 th Cir. 1992)	38
<u>United States v. Jacobsen</u> , 409 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).....	31
<u>United States v. Roy</u> , 349 F. Supp. 2d 60 (D. Mass. 2003).....	39-41
<u>United States v. Van Poyck</u> , 77 F.3d 285 (9 th Cir.)	28, 32, 39
<u>United States v. White</u> , 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971).....	35
<u>United States v. Willoughby</u> , 860 F.2d 15 (2 nd Cir. 1988), <u>cert. denied</u> 488 U.S. 1033 (1989)	32
<u>United States v. Workman</u> , 80 F.3d 688 (2 nd Cir.), <u>cert. denied</u> , 519 U.S. 938, and <u>cert. denied</u> 519 U.S. 955 (1996).....	39
<u>Wolff v. McDowall</u> , 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).....	31
 <u>Washington State:</u>	
<u>Batten v. Abrams</u> , 28 Wn. App. 737, 626 P.2d 984, <u>review denied</u> , 95 Wn.2d 1033 (1981).....	14
<u>Bellevue v. Acrey</u> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	7, 11

<u>Cazzanigi v. General Electric Credit Corporation</u> , 132 Wn.2d 433, 938 P.2d 819 (1997).....	47
<u>H & H Partnership v. State</u> , 115 Wn. App. 164, 62 P.3d 510 (2003).....	48
<u>State v. Baird</u> , 83 Wn. App. 477, 922 P.2d 157 (1996).....	30
<u>State v. Baker</u> , 28 Wn. App. 423, 623 P.2d 1172 (1981).....	31
<u>State v. Bebb</u> , 108 Wn.2d 515, 740 P.2d 829 (1987).....	10
<u>State v. Berber</u> , 48 Wn. App. 583, 740 P.2d 863, <u>review denied</u> , 109 Wn.2d 1014 (1987).....	29
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	26
<u>State v. Bonilla</u> , 23 Wn. App. 869, 598 P.2d 783 (1979).....	37
<u>State v. Buelna</u> , 83 Wn. App. 568, 922 P.2d 1371 (1996).....	15
<u>State v. Campbell</u> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	29
<u>State v. Christensen</u> , 40 Wn. App. 290, 698 P.2d 1069 (1985).....	11, 30
<u>State v. Clark</u> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	25, 36
<u>State v. Corliss</u> , 123 Wn.2d 656, 870 P.2d 317 (1994).....	25, 27, 36
<u>State v. DeWeese</u> , 117 Wn.2d 369, 816 P.2d 1 (1991).....	10, 11, 16, 19, 20, 22

<u>State v. Faford</u> , 128 Wn.2d 476, 910 P.2d 447 (1996).....	30
<u>State v. Fritz</u> , 21 Wn. App. 354, 585 P.2d 173 (1978), <u>review denied</u> , 92 Wn.2d 1002 (1979).....	20
<u>State v. Grove</u> , 65 Wn.2d 525, 398 P.2d 170 (1965).....	28
<u>State v. Hahn</u> , 106 Wn.2d 885, 726 P.2d 25 (1986).....	10, 11, 15
<u>State v. Jacobs</u> , 101 Wn. App. 80, 2 P.3d 974 (2000).....	34, 35
<u>State v. Johnson</u> , 33 Wn. App. 15, 651 P.2d 247 (1982), <u>review denied</u> , 99 Wn.2d 1001 (1983).....	19
<u>State v. Jones</u> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	28
<u>State v. Luvene</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	18
<u>State v. Miles</u> , 5 Wn.2d 322, 105 P.2d 51 (1940).....	45
<u>State v. Nordstrom</u> , 89 Wn. App. 737, 950 P.2d 946 (1996).....	15
<u>State v. Rainford</u> , 86 Wn. App. 431, 936 P.2d 1210, <u>review denied</u> , 133 Wn.2d 1019 (1997).....	28, 29, 31
<u>State v. Rose</u> , 128 Wn.2d. 388, 909 P.2d 280 (1996).....	27, 31
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	27

<u>State v. Silva</u> , 108 Wn. App. 536, 31 P.3d 729 (2001).....	15
<u>State v. Sinclair</u> , 46 Wn. App. 433 730 P.2d 742 (1986).....	10
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	18
<u>State v. Townsend</u> , 147 Wn.2d 666 57 P.3d 255 (2002).....	38, 40
<u>State v. Williams</u> , 94 Wn.2d 531, 617 P.2d 1012 (1980).....	37, 42-44
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046, <u>cert. denied</u> 534 U.S. 964 (2001).....	10, 18
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	29
<u>Washington Water Power Co. v. Washington State Human Rights Comm'n</u> , 91 Wn.2d 62, 586 P.2d 1149 (1978).....	45
 <u>Other Jurisdictions:</u>	
<u>State v. Kenny</u> , 399 N.W.2d 821 (Neb. 1987)	27

Constitutional Provisions

Federal:

18 U.S.C. § 2510..... 40
18 U.S.C. § 2511..... 40, 41

Washington State:

Const. art. 1, § 7..... 25, 35, 36

Statutes

Washington State:

Laws 1987, ch. 462, § 17 46
Laws 1987, ch. 462, § 23 44, 46
Laws 1987, ch. 462, §§ 22-23 48
RCW 9.73.010-.140 25
RCW 9.73.030..... 24-26, 37, 38, 41, 44
RCW 9.73.095..... 33, 48
RCW 9A.20.021 14
RCW 9A.72.120 14, 43
RCW 26.50..... 34
RCW 70.48.010..... 44, 46
RCW 70.48.020..... 46
RCW 70.48.050..... 2, 44-47

RCW 70.48.070.....	46, 48
RCW 70.48.071.....	44-46, 48
RCW 70.48.080.....	48

Rules and Regulations

Washington State:

RAP 2.4.....	26
--------------	----

Other Authorities

Washington Privacy Act	25, 26, 36, 37, 40-44, 49
Federal Wiretap Act	40
Final Legislative Report, 50 th Legislature, Regular and First Special Sessions (1987).....	46, 47
SHB 738.....	46, 47
WAC 289-24-200	44, 45, 48
WAC 289-30-020	48

A. ISSUES PRESENTED

1. This Court reviews the validity of Modica's waiver of his right to counsel based on what he understood at the time of the waiver. On July 12, 2005, when Modica knowingly and unequivocally opted to forego counsel, he understood the seriousness of the charges against him, the possible maximum penalty, and that presenting a defense requires the observance of technical rules. Did the court below properly allow Modica to represent himself?

2. A defendant who validly waives his right to counsel is not later entitled to assistance of counsel as a matter of right; rather, it is wholly within the trial court's discretion. After Modica repeatedly refused the trial court's advice to permit reappointment of counsel, and after the jury was sworn, he requested reappointment of counsel. Did the trial court exercise proper discretion when it denied his concededly untimely request?

3. There is no constitutional or statutory violation when a *non-private* conversation is recorded, or when one party to a *private* conversation consents to the recording. The Privacy Act applies only where *private* communications or conversations are intercepted or recorded. Here, none of the recorded conversations

were private because all parties knew that the calls were recorded and subject to monitoring, and each consented to the recordings.

Are the recordings admissible under either a constitutional or a statutory analysis?

4. Effective January 1, 1988, the Legislature repealed RCW 70.48.050, the sole authority for Title 289 of the Washington Administrative Code. The repeal of the enabling statute rendered Title 289 invalid. In determining the lawfulness of the recorded telephone conversations, should this Court decline to apply an invalid regulation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 21, 2005, in a second amended information the State charged the defendant, Desmond Modica, with assault in the second degree (DV), resisting arrest, assault in the fourth degree (DV), and tampering with a witness. CP 12-13. The jury convicted Modica as charged. CP 50-53. Judge Washington sentenced Modica to standard range sentences. CP 54-63. Modica timely appealed. CP 64.

2. SUBSTANTIVE FACTS

Desmond and Karen Modica have been together 16 years.

9RP 66.¹ Between them they have nine children, ranging in age from 10 months to 14 years. 9RP 65. During her testimony, Ms. Modica made it very clear that she was not willingly appearing in court. 9RP 79-85. Not unexpectedly, her trial testimony differed significantly from her original statement to the police.

Ms. Modica's initial statement to the police was admitted at trial as substantive evidence, 10RP 8-10, and read into the record:

My husband, Desmond Modica, and I have been married for 15 years. We have 9 children together and live at 3214 South 186th Street. On May 18, 2005, around 11:00 p.m. Desmond and I were driving south on Highway 5 from downtown Seattle. We got into . . . we got into an argument because he thought I was flirting. I told him I wasn't, but he didn't believe me. He punched me in my nose causing pain and bleeding. We continued driving until we ran out of gas. We started to argue again. He pushed me down. He pushed me down in the back of the van. He twisted my right arm causing pain. We went to get gas and when he returned we drove home. I sat in the van because I didn't want the children to see me. After a few hours, I decided to call 9-1-1. I started to walk to a phone when a stranger picked me up and dialed 9-1-1 for me.

9RP 94-95.

¹ The State adopts the appellant's designation of the verbatim report of proceedings.

At trial Ms. Modica minimized the incident. 9RP 67-71. Although it was clear she suffered multiple fractures to her nasal bone, 9RP 28-31, Ms. Modica blamed herself for these injuries, saying that she struck the table with her face, probably on her nose. 9RP 70-71. However, the jury heard testimony from Kerry Solandros—the Good Samaritan who stopped and called 911 after she saw Ms. Modica walking down the street distraught, crying, and bloody—that was consistent with Ms. Modica's initial statement to the police. 12RP 15-28.

After Ms. Modica received medical treatment, Deputy Woodruff drove her home. 10RP 44. He called for back-up officers to assist him in arresting Modica. 10RP 46. When the officers tried to arrest Modica, he violently struggled, kicking and punching at the officers, as he broke free of their grasp. 10RP 49-57; 11RP 28-35; 12RP 57-61. He was finally subdued and arrested. 10RP 57.

While incarcerated at the King County Jail, Modica repeatedly called his grandmother, Grace Stewart,² and asked her to assist him with his "plan." 12RP 73-75; Ex. 28-35. These calls were recorded. The plan was for Stewart and other family

² Ms. Stewart testified under the State's grant of immunity. 12RP 80.

members to make sure that Ms. Modica did not appear in court. Ex. 18-19, 21-22, 25-26. Modica was quite certain that if his wife stayed away from court, the case would be over. Ex. 25, track 4, ~04:40. Because, as Modica explained to Stewart, the State could not compel her attendance through the issuance of a warrant: "They can't. By law, they can't...." Ex. 18, track 2, ~02:47-03:36.

C. ARGUMENT

1. BECAUSE MODICA'S *FARETTA*³ WAIVER WAS VALID, HE WAS NOT LATER ENTITLED TO COUNSEL AS A MATTER OF RIGHT.
 - a. Facts Relevant To The Waiver Of Counsel Issue.

On July 7, 2005, the State filed an amended information. CP 1, 2, 7. The allegations were: assault in the second degree (DV), a class B felony (count I), resisting arrest, a misdemeanor (count II), and assault in the fourth degree (DV), a gross misdemeanor (count III).

On July 8, 2005, at the omnibus hearing, Modica requested pro se status. But because of time constraints, Judge Trickey set the matter over until July 12 to insure a full hearing on Modica's

³ Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975).

request. 3RP 3. On July 12, Modica asserted his right to proceed pro se. 3RP 3. He expressed frustration that his counsel sought an additional six weeks to prepare for trial. 3RP 3. Judge Trickey suggested that the better course of action would be to allow his counsel a continuance to prepare for trial. 3RP 3-5. Modica refused to agree to a continuance and continued to insist on self-representation. 3RP 3-4. Judge Trickey explained that he needed to make sure Modica's decision to proceed pro se was "unequivocal, which means it's done with the understanding of the consequences and the seriousness of the offense, and not simply because you're unhappy." 3RP 5. He then engaged in a lengthy colloquy with Modica.⁴

He read the charging document aloud, reviewing the elements and classification of each of the crimes charged, and the maximum penalties associated with each offense.⁵ 3RP 6-8. He cautioned Modica that if he got into trouble at trial, the court would be unable to advise him of motions or arguments that he should have made or objections that he should have raised. 3RP 8. He

⁴ Judge Trickey's colloquy with Mr. Modica is attached as appendix A.

⁵ Judge Trickey also explained that a sentencing court could run counts II and III consecutive to the felony charge. 3RP 7-8.

stressed the technical nature of the rules of evidence and criminal procedure. He warned Modica that he would be on his own in terms of "calling witnesses, preparing jury instructions, arguing to the jury, doing opening statements and closing arguments," and he repeatedly emphasized the importance of counsel. 3RP 8-12.

For instance, Judge Trickey advised Modica:

There's a lot to this, and I want to state for the record, unequivocally, **it's my counsel to you that you should not represent yourself. That you are at a disadvantage**, however strongly you feel about your case, because you are not an experienced and licensed attorney who does this everyday . . . I know of a lot of folks who represent themselves. They think, well, I only have my case to worry about so I'm going to do a lot better job than an attorney who has more cases. But the fact of the matter is, it's the experience factor and the training factor, which I assume you don't have. Do you have any training in the law?

3RP 8-9 (emphasis added). Modica responded that he had a layperson's legal training and studied the law "a little bit."⁶ 3RP 9.

⁶ His legal schooling consisted of what he studied for purposes of the pro se motions that he previously filed in this matter. 3RP 9. Additionally, Modica had prior experience with the criminal justice system: he had prior convictions for DV violation of a no contact order, DV harassment, and assault in the fourth degree DV. CP 5. Although a defendant's prior experience with the criminal justice system is insufficient to establish an understanding of the risks of self-representation, a "defendant's background is certainly relevant to his ability to make a sensible, intelligent decision regarding self-representation." Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

Judge Trickey re-emphasized the dangers and disadvantages of self-representation:

Okay. Well, I'm going to try this one more time. I really encourage you not to do this. You may have a momentary dissatisfaction with these attorneys, but they're trained and experienced and I would urge you not to do this. **I just think that individuals who represent themselves without formal training and experience are at a significant disadvantage, particularly when you're facing serious charges as you face in this case.**

3RP 11-12 (emphasis added). Despite the court's advice, Modica maintained that he wanted to represent himself. 3RP 12. Judge Trickey granted Modica's waiver of his right to counsel. CP 11.

On July 19, 2005, the deputy prosecutor discovered that Modica's wife (and the victim of both alleged assaults), Karen, intended to absent herself (at Modica's insistence) from the proceedings. CP 73-74; Ex. 18-19, 21-22, 25-26; 4RP 5-20. On July 21, the State filed a second amended information, adding count IV, tampering with a witness. CP 12-13. The court authorized a temporary telephone and mail block. CP 68.

On July 25, the presiding court agreed to temporarily detain Karen, whom the police had arrested on a material witness warrant the preceding weekend. The State promised to call her as its first witness. 5RP 3-9. Immediately after that hearing, the parties

appeared before the Honorable Judge Christopher Washington for trial. Judge Washington confirmed that Modica wished to proceed pro se. See generally 6RP; 7RP 2-3. The court provided Modica with its copy of the rules of evidence to assist him in understanding the admissibility of evidence. 7RP 50.

On July 29, after the jury was empanelled, Modica moved the court for reappointment of counsel. 9RP 6. After fully reviewing the circumstances, Judge Washington denied his request. 9RP 14-21.

Modica claims two infirmities in his trial. Br. of App. at 25. First, Modica asserts that his Faretta waiver was invalid because the court did not advise him about the seriousness of the tampering with a witness charge. He also claims the waiver was equivocal because he faced a "Hobson's choice between his right to effective assistance of counsel and his right to a speedy trial." Br. of App. at 20.

Modica's argument is fatally flawed because it focuses on proceedings that occurred after he opted for self-representation. To decide whether Modica's waiver was valid, this Court must focus its inquiry on Modica's knowledge and understanding on July 12, 2005, the time of the waiver. The record before and including July

12 establishes that Modica unequivocally opted to forego counsel "with eyes open." Consequently, this Court should reject Modica's argument and affirm his conviction for tampering with a witness.

b. The Requirements For A Valid Faretta Waiver.

Criminal defendants have a constitutional right to waive the assistance of counsel and represent themselves. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L.Ed.2d 562 (1975); State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). A request to proceed pro se must be timely and unequivocal. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046, cert. denied 534 U.S. 964 (2001). A request must be unequivocal in the context of the record as a whole. Id. The waiver of counsel must be knowing and intelligent. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). On appeal, the defendant has the burden of proving an invalid waiver. State v. Hahn, 106 Wn.2d 885, 901, 726 P.2d 25 (1986).

"Whether a valid waiver of the right to counsel has been made is within the sound discretion of the trial court." State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986). In determining the validity of the waiver, a colloquy on the record is the preferred means of assuring that the defendant is at least

minimally aware of the task involved. DeWeese, at 377-78. The colloquy should inform 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, 211, 691 P.2d 957 (1984). Whether the defendant's waiver is valid depends upon the facts and circumstances of each case.

DeWeese, at 378.

- c. Modica Knowingly And Unequivocally Waived His Right to Counsel.

Contrary to Modica's assertion that Judge Trickey engaged in a "routine colloquy,"⁷ the record reflects that he conducted an assiduous inquiry that communicated fully to Modica the dangers and disadvantages of self-representation.⁸ See generally 3RP 6-11. In addition to the portions of the colloquy detailed above, Judge Trickey explained that, if convicted, Modica would lose his rights to bear arms and vote. 3RP 6-7. He reviewed Modica's federal and

⁷ Br. of App. at 18.

⁸ Our Supreme Court approved of the trial court's colloquies in State v. Hahn, 106 Wn.2d 885, 896 n.9 and State v. Christensen, 40 Wn. App. 290, 295 n.2, 698 P.2d 1069 (1985). The colloquies are examples of the depth of exploration required before a trial court can assess the validity of a defendant's waiver; no particular checklist is required. DeWeese, 117 Wn.2d 369, 378. The colloquy in the instant case covered the key points approved of in Hahn and Christensen. See appendix A.

state rights against compelled testimony. 3RP 10-11. He cautioned Modica that if he testified he would be subject to cross-examination, but that he also bore the responsibility of making the decision whether to testify. 3RP 10-11. Finally, Judge Trickey confirmed that Modica had not received any threats or promises in exchange for waiving his right to counsel. 3RP 11. Yet, despite the court's repeated counsel against self-representation, and despite Modica's realization of his peril,⁹ he maintained that he wanted to represent himself. 3RP 12. At the time that he waived his right to counsel, Modica "kn[ew] what he [wa]s doing," and his decision was "made with eyes open." See Faretta, 422 U.S. at 835.

Yet, Modica urges this Court to find an invalid waiver based on his professed lack of knowledge and equivocation at various stages in the proceedings after the waiver. Specifically, he claims that the court did not sufficiently describe the consequences of conviction for witness tampering. But, Modica's argument is fatally flawed because it lacks the proper temporal focus. The question is not what Modica understood at various stages in the proceedings—after the information was amended, or after trial began—but rather

⁹ "I understand I'm a 2 to 1 underdog." 3RP 12.

what Modica understood at the July 12 hearing at which he waived his right to counsel.¹⁰

Here, the State amended the information and added the tampering with a witness charge on July 21, after it learned of Modica's attempts to keep his wife from testifying, and **nine days after** Modica knowingly and unequivocally waived his right to counsel. CP 11-13; 3RP 12; 4RP 3-6. Thus, with the proper temporal focus, July 12, and with Modica's state of mind **at that time**, the record establishes a valid Faretta waiver.

Even if this Court reviews the post-July 12 record to determine Modica's understanding of the seriousness and maximum penalty of the tampering with a witness charge, his claim fails. On July 21, the State served Modica in open court with the second amended information. 4RP 26-27. Although Modica

¹⁰ Lopez v. Thompson, 202 F.3d 1110, 1119 (9th Cir. 2000) (en banc) ("waiver analysis must be pragmatic and directed to **the particular stage** of the proceedings in question.") (emphasis added; internal quotation marks omitted); United States v. Balough, 820 F.2d 1485, 1489 (9th Cir. 1987) (en banc) (the operative inquiry is whether the evidence "show[ed] that Balough understood the dangers and disadvantages of self-representation **at the time** he sought to waive his right to counsel.") (emphasis added); United States v. Dujanovic, 486 F.2d 182, 186 (9th Cir. 1973) (noting that the "keystone determination" in the waiver inquiry is the "state of mind of the accused or information at hand upon which he **at that time** intelligently waived his constitutional right to counsel.") (emphasis added); United States v. Erskine, 355 F.3d 1161, 1169 (9th Cir. 2004) (rejecting the government's argument that Erskine's waiver was valid because, before sentencing, Erskine knew that he faced a penalty greater than what was (continued)

waived formal reading of the amended information, 4RP 27, the State noted that the crime was a felony. 4RP 5. Further, the charging document (CP 13) provided the statutory cite for tampering with a witness, RCW 9A.72.120, and the statute specifies that the crime is a class C felony. As a pro se litigant—and one held to the same standard as a practicing attorney¹¹—Modica should have determined that the maximum penalty for a class C felony is five years confinement and a ten thousand dollar fine. RCW 9A.20.021(1)(c).

Moreover, after the trial began on July 25, Modica declined reappointment of counsel and a continuance to permit counsel an opportunity to investigate the charge, despite Judge Washington's admonition that the charge was "more complicated" and it involved "a lot of hours of tapes, a lot of legal issues...." 6RP 53. He likewise declined the court's invitation to take extra time himself to prepare the tampering with a witness charge. 7RP 4. Thus, Modica's decisions after his valid Faretta waiver belie his claims on

communicated during the Faretta hearing: "The absence of a temporal focus ... helps lead ... to an erroneous conclusion....")

¹¹ Batten v. Abrams, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, review denied, 95 Wn.2d 1033 (1981).

appeal; he has not met his burden of establishing that his waiver was invalid. See Hahn, 106 Wn.2d at 901.

The cases that Modica relies on to support his contention, that he lacked the requisite knowledge to effect a valid Faretta waiver, are inapposite because in each cited case it was the court's failure at the time of the waiver colloquy to advise the defendant of the seriousness of the crimes that proved fatal.¹² Modica does not cite any authority for his proposition that the court was required to conduct a second colloquy.¹³

Modica also insists that his waiver was equivocal. Yet, Modica again disregards the relevant time—the July 12 hearing. He fails to cite to any part of the pertinent colloquy as proof of equivocation. Instead, he refers to the myriad conversations that he had with Judge Washington after he knowingly and

¹² Modica relies on State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001); State v. Nordstrom, 89 Wn. App. 737, 950 P.2d 946 (1996); and State v. Buelna, 83 Wn. App. 568, 922 P.2d 1371 (1996).

¹³ Yet, Judge Washington repeatedly stressed the disadvantages of self-representation. 6RP 8-9 ("I'm trying to make sure that ... you are willing to ... go forward representing yourself, rather than take advantage of the skills that your assigned attorney would bring to the case."); 6RP 25 ("Basically, my goal continues to be to encourage you to have an attorney...."); 6RP 46-47 ("At any time along the way here, it's your right, ... to say, ... I want to represent myself, and I will stop asking these questions. But that is my goal, to have an attorney representing you."); 6RP 71 ("Mr. Modica, at this time, your decision has been to go pro se and you are looking at going to trial tomorrow without having interviewed any witnesses or done any legal work at all. So, I don't think that's a good idea, but that's what will happen tomorrow.")

unequivocally waived his right to counsel. For the reasons argued above, this claim also fails.

Modica's assertion, that he faced a "Hobson's choice between his right to effective assistance of counsel and his right to a speedy trial," is contrary to the law and to the record. See Deweese, 117 Wn.2d at 378. In DeWeese, as in the instant case, the court engaged with the defendant in a lengthy colloquy on the risks and disadvantages of self-representation. DeWeese, at 378; appendix A. DeWeese claimed that he "had no choice" but to represent himself and that he was "forced to represent" himself at trial. DeWeese, at 378. Similarly, Modica claimed that he "felt that [he] had no other choice" but to represent himself and that he was "forced" to represent himself at trial. 6RP 2, 4. In the instant case, as in DeWeese, the disingenuous complaints mischaracterize the fact that each defendant *did* have a choice, and each choose to reject the services of an experienced defense attorney. DeWeese, at 378; 6RP 27 (Judge Washington responded to Modica's remarks: "You have created a situation by your insistence on going to trial when you want to go trial. You have created a situation where defense counsel can't do their job."); see also 6RP 35 ("So, I want the record to be clear that it is this Court's opinion, from

listening to you and to the facts of this case, that you have created a situation where you must represent yourself...."). Thus, in the instant case, as in DeWeese, those comments neither amounted to equivocations, nor tainted the validity of their Faretta waivers. DeWeese, at 378.

The record also contradicts Modica's claim that he had no choice but to proceed pro se because of his belief in his counsel's incompetence. He never sought assistance from his trial counsel. Standby counsel said:

I guess I would also add that Mr. Modica has never asked me a question. He never called me. He never called Mr. McCoy,¹⁴ even though I gave him our numbers.... Even though I have been in court with three or four times, he has never asked me a question....And it's my impression that he really doesn't want our advice or help.

6RP 12-13. Additionally, Judge Washington asked Modica his opinion on different standby counsel assisting him at different times during the trial. Modica stated, "My opinion is that, if counsel can be competent, able, skilled, **and I believe that they are**, I accept that." 6RP 36 (emphasis added).

¹⁴ Marvin McCoy, another attorney with SCRAP.

Modica's reliance on Luvene, Woods, and Stenson is misplaced. In those cases the courts failed to engage in any meaningful colloquy and, taken in the context of the record as a whole, the defendants' requests to proceed pro se were properly characterized as "expressions of frustration" and equivocal. See State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995); State v. Woods, 143 Wn.2d 561, 586-88, 23 P.3d 1046 (2001);¹⁵ State v. Stenson, 132 Wn.2d 668, 737-42, 940 P.2d 1239 (1997).¹⁶

By contrast, Judge Trickey conducted a thorough colloquy. He began by insuring that Modica was "not simply ... unhappy." 3RP 5. Although Judge Trickey recognized that Modica may have had "momentary dissatisfaction" with his attorneys, 3RP 11-12, it is evident from the context of the record, taken as a whole, that Modica unequivocally wished to proceed pro se.¹⁷

¹⁵ Woods argued on appeal that the trial court erred because it failed to engage in a proper colloquy about his right to self-representation. The Woods' court noted that the trial court was not required to engage in a colloquy "because Woods did not make an unequivocal request to represent himself." Woods, 143 Wn.2d at 587.

¹⁶ In addition to finding Stenson's request equivocal, the court also found it was conditional because Stenson's request was in the alternative to appointment of new counsel. Stenson, 132 Wn.2d at 741-42.

¹⁷ Moreover, a review of 6RP establishes that Judge Washington discussed in detail with Modica: 1) options to self-representation if he felt frustrated with counsel, 6RP 3-10; and 2) the possibility of deposing Karen Modica to perpetuate her testimony (the State agreed to not include the tampering with a witness charge in the deposition), reappointing counsel and granting a recess to allow for trial preparation. 6RP 25-60. Modica rejected each suggestion; he stated, "Let's (continued)"

d. The Trial Court Properly Denied Modica's Untimely Request For Reappointment Of Counsel.

The requirement of an unequivocal waiver is, in part, to protect trial courts from "manipulative vacillations by defendants regarding representation." DeWeese, at 376. A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial. State v. Johnson, 33 Wn. App. 15, 651 P.2d 247 (1982), review denied, 99 Wn.2d 1001 (1983). Once a defendant unequivocally waives his right to counsel, he may not later demand reappointment of counsel as a matter of right. DeWeese, at 376. Reappointment is "wholly within the trial court's discretion." Id. at 376-77.

Trial began July 25. Throughout the July 25th, 26th, and 27th proceedings, Judge Washington stressed the risks and disadvantages of self-representation, but Modica continued to insist

go to trial." 6RP 60. The following day, after the court allowed Modica the night to consider his options, Modica stated that his (continued) "position would be to have standby counsel by me and proceed as pro se." 7RP 3. As often noted, the right to self-representation:

[i]s guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool. This right is afforded the defendant despite the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice.

(continued)

upon exercising his right to proceed pro se. On July 29th, after the jury was sworn, Modica expressed his wish to relinquish his pro se rights. 9RP 6. The State objected noting that Modica's motion "appears to be calculated simply to delay the proceeding in which we have a material witness in custody, witnesses present in the courtroom and staged for trial." 9RP 9. Modica concedes his motion was untimely. Br. of App. at 25. Thus, the trial court was under no obligation to grant the motion.

More importantly, the motion was clearly a "manipulative vacillation" rather than a legitimate timely request for counsel.¹⁸

DeWeese, at 376.

State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979) (citation omitted).

¹⁸ There is ample evidence in the record that Modica's motion was a "manipulative vacillation." For example, moments before starting trial, he learned that over the weekend the police arrested his wife, Karen, on a material witness warrant and she was currently in-custody pending her trial testimony. See generally 5RP; see also, CP 69-74 (motion to detain material witness); 6RP 20-24 (prosecutor detailed Modica's witness tampering). Previously, Modica's trial strategy was single mindedly focused: prevent Karen from testifying. See, e.g., Ex 18, track 1 (Modica explained why Karen needed to make herself unavailable for trial and he assured his grandmother that Karen would not be arrested if she failed to show for court); track 4 (confirmed that the plan was to have Karen stay with Modica's grandmother and avoid court); track 6 (Modica told his grandmother that the case could not proceed without witnesses and he confirmed that she explained to Karen why she could not show up at court. Modica was uneasy because Karen was not answering the phone—he feared that someone would just show up at the door, get Karen, and bring her to court). Furthermore, just prior to voir dire the trial court ruled that the taped conversations between Modica and his grandmother (evidence of per se witness tampering) would be admissible. 7RP 72.

Additionally, Modica failed to provide the court with meaningful answers to probative questions, such as: "What has changed to cause you to have this significant change of opinion?" 9RP 9; "Why didn't you listen to your father's advice and get an attorney?" 9RP 17; and "When did this realization come to you that you don't have [the] skills to conduct this trial?" 9RP 18. Judge Washington reminded Modica:

You had a choice to have an attorney. I told you. I gave you advice that that you should have an attorney. An attorney that was with you gave you advice that you should have an attorney. And you decided not to. You are a full grown, intelligent man.

9RP 16.

The court denied Modica's motion. 9RP 14-21. Judge Washington assured standby counsel "that the parties have all given Mr. Modica ample time to decide to take advantage of the representation of an attorney." 9RP 21.¹⁹ "Self-representation is a grave undertaking, one not to be encouraged. Its consequences, which often work to the defendant's detriment, must nevertheless

¹⁹ Modica argues that his standby counsel "proposed a solution [to depose Karen and to declare a mistrial] which would have preserved Mr. Modica's rights, allowed Ms. Modica's prompt release, and resulted in no prejudice to the State." Br. of App. at 26. But it was the court that proposed the exact (continued) solution before the jury was sworn (n.17 supra; 6RP 25-27, 39-60), and Modica rejected it. 6RP 60 ("Let's go to trial.").

be borne by the defendant." DeWeese, at 379. Thus, when Judge Washington told Modica, "I'm going to have you live with your decision at this point and we are going to proceed," he exercised proper discretion.

2. THE RECORDED TELEPHONE CONVERSATIONS ARE NOT CONSTITUTIONALLY PROTECTED OR UNLAWFUL BECAUSE MODICA CANNOT DEMONSTRATE: A) A LEGITIMATE EXPECTATION OF PRIVACY, AND B) THAT SOCIETY IS WILLING TO RECOGNIZE THAT EXPECTATION AS REASONABLE, AND C) THAT AT LEAST ONE PARTY TO THE COMMUNICATION DID NOT CONSENT TO ITS RECORDING.

- a. Facts Relevant To The Recording Issue.

The King County Jail installed its current telephone system specifically to allow the jail's special investigations unit to monitor all outgoing (non-attorney) inmate telephone calls "for safety and security purposes." 7RP 69; 12RP 84, 86. In addition to posted signs that warn inmates that all telephone calls are recorded, every call begins with a pre-recorded message, which is heard by both the inmate and the call's recipient, that the call will be recorded.

7RP 69; Ex. 18-19, 21-22, 25-26. Each call begins:

Hello, this is a collect call from . . . [name of inmate as given by inmate] an inmate at King County Detention Facility. This call **will be recorded** and subject to monitoring at any time. To accept the charges dial three, to decline the charges dial nine or hang up

now. Thank you for using Public Communication Services. You may begin speaking now.

The call cannot continue until after the recorded message plays and the call's recipient dials or presses three. 12RP 84, 90-91.

More than once Modica acknowledged that he knew the jail recorded his telephone calls. See, e.g., 6RP 68-69 ("My conversation with everybody is recorded...."); 7RP 70 ("The jail phones are monitored" and "[the calls] are taped and once you say you agree to that and push the button and say, yes, you are being monitored, you can be taped.").²⁰ Yet, despite actually knowing that the jail recorded each outgoing call, time and again Modica used the jail telephones and conspired with others in his attempts to tamper with Karen Modica:

"And if you get a chance, tell [Tommie]²¹ to run by the house and **tell Karen to keep her mouth shut.**" Ex. 19, track 1, at ~13:40-13:47.

"Tell her don't do nothing until I get this letter out today ... **she ain't even got to show up.** Just tell her just to lay back.... She ain't gotta say nothing. Just tell her to take the Fifth." Ex. 22, track 11, at ~01:19-02:16.

"I'm just trying to get them to drop the whole case....**As long as the other person knows to do**

²⁰ See also CP 16, a grievance by another inmate concerning the lack of privacy in calls made from the jail that Modica included in his pleadings, which further demonstrates why Modica lacked a legitimate expectation of privacy.

²¹ Tommie is Modica's father. 6RP 20.

the same thing--to stay away." Ex. 25, track 1, at ~08:46-09:45.

[Stewart] "If she don't come, what'll happen?"

[Modica] "It's over....**It's best if that person stays completely away.**" Ex. 25, track 4, at ~04:40-04:49.

The trial court admitted the tapes pursuant to

RCW 9.73.030(3), which in pertinent part provides:

Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained 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.

The court reasoned that, although the jail was not a "speaking party," it was a party "[t]o the extent that the State has to make a decision whether the phone call is allowed...." 7RP 69. For purposes of clarity, perhaps the court's ruling should have made explicit that, by virtue of the pre-recorded message, the jail injected itself into the communication as a party. It is undisputed that the "announcement" was recorded in each call.

Modica alleges that the recordings of his telephone conversations with his grandmother, Grace Stewart, violated

article 1, § 7 of the Washington constitution.²² He claims that he had a reasonable expectation of privacy in the communications.

But Modica does not explain *why* any such expectation would be reasonable when he repeatedly acknowledged that he was aware the jail recorded all of his conversations and he consented to the recordings thereof. He also provides no authority for the alleged constitutional violation. Rather, he cites to a portion of one of the Washington Privacy Act's ("Act") statutes.²³ Yet, whether the Act has been violated is a different question from whether Modica's constitutional rights were violated.²⁴

²² Const. art. I, § 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

²³ The Act was codified in RCW §§ 9.73.010-.140. Modica relies on the following language:

Except as otherwise provided in this chapter, it shall be unlawful for ... 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 communication;

RCW 9.73.030(1)(a) (emphasis added). The general rule applies equally to private "conversations." RCW 9.73.030(1)(b).

²⁴ See State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996) (The Privacy Act does not create or implicate any constitutional rights); State v. Corliss, 123 Wn.2d 656, 661, 870 P.2d 317 (1994) (noting if the Act and Const. art. 1, § 7 "were completely coextensive, there would have been no necessity for enactment of the privacy act.")

An analysis of the Act establishes that Modica's recorded communications are admissible under any of four legal theories:

1) the recordings were not private communications, and therefore not regulated by the Act, and 2) even if the communications were private, all participants consented to the recordings, 3) even if the communications were private, they were exempt from the Act pursuant to RCW 9.73.030(2)(b), 4) because, as the trial court ruled, one party consented to the recordings.²⁵

b. Constitutional Claim

This Court should reject Modica's constitutional claim because neither the state nor the federal constitutions protect recorded communications unless i) the communication is both actually private; i.e., the defendant has a legitimate expectation of privacy, ii) that expectation is one that society is willing to recognize as reasonable, and iii) no party consented to the recording. Our Supreme Court rejected the contention that article I, section 7

²⁵ Although the first three theories of admissibility were not argued to the trial court, the trial court's ruling may be affirmed on any legal basis supported by the record. *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). Moreover, the State prevailed on the suppression motion. As the respondent, the State is not obliged to cross-appeal because it does not seek affirmative relief from the Court of Appeals. RAP 2.4(a); 5.1(d); *Bobic*, at 257-58.

provides any greater protection than the Fourth Amendment,²⁶ to conversations that are intercepted after one party consents. State v. Corliss, 123 Wn.2d 656, 663-64, 870 P.2d 317 (1994) citing State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).

In deciding whether an unconstitutional search occurred, the court considers whether the defendant had a legitimate expectation of privacy and whether that expectation is one that society is willing to recognize as reasonable. Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 516-17, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); State v. Rose, 128 Wn.2d. 388, 392, 909 P.2d 280 (1996). Neither expectation exists here.

- i. Modica did not have a legitimate expectation of privacy.

A legitimate expectation of privacy is one which includes an actual and subjective expectation of privacy. Katz, 389 U.S. at 361 (Harlan, J., concurring). It is not simply a "high hope" for privacy. State v. Kenny, 399 N.W.2d 821, 824 (Neb. 1987). Though Modica may have hoped for privacy, in light of the circumstances

²⁶ The Fourth Amendment provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

surrounding each telephone call, any such hope did not constitute a legitimate expectation of privacy. See id.

Modica actually knew that his telephone conversations *could* be monitored and *were* being recorded. He cannot demonstrate that he sought to preserve these conversations as private.²⁷ He also did not have a legitimate expectation of privacy. See United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996) (inmates do not have a reasonable expectation of privacy in their telephone calls from the jail when those calls are made under circumstances in which the inmate knows his communications can be intercepted), cert. denied 519 U.S. 912 (1996).²⁸ Though Washington courts have not yet addressed the question of an inmate's reasonable expectation of privacy in a telephone call, they have held that "an inmate's expectation of privacy is necessarily lowered while in custody." State v. Rainford, 86 Wn. App. 431, 438, 936 P.2d 1210,

²⁷ See Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979) (defendant must demonstrate, by his conduct "an actual (subjective) expectation of privacy.")

²⁸ Other Washington cases have held that a communication or conversation cannot be private when the inmate knows it is being intercepted. See, e.g., State v. Jones, 95 Wn.2d 616, 627, 628 P.2d 472 (1981) (arrestee interrogation complied with statute when *surrounding circumstances demonstrated* that arrestee *knew* recording was being made); State v. Grove, 65 Wn.2d 525, 527, 398 P.2d 170 (1965) (inmate's expectation that letter to wife was confidential and protected by privilege fails to support suppression where inmate delivered unsealed letter to jail guard knowing it would be censored).

review denied, 133 Wn.2d 1019 (1997); State v. Campbell, 103 Wn.2d 1, 23, 691 P.2d 929 (1984) ("An inmate's expectation of privacy is necessarily lowered while in custody").

Modica's reliance on State v. Young, 123 Wn.2d 173, 86 P.2d 593 (1994), is misplaced. Young involved police use of infrared technology to surveil the location and activity of persons who were inside a residence and not otherwise visible to police. Id. at 183. The court found the use of infrared thermal detection "particularly intrusive." Id. at 184. Not only could the infrared surveillance be conducted without Young's knowledge, but Young had a legitimate expectation of privacy in his home. Id. at 183, 189.²⁹

In contrast, Modica was in a county jail, not a private residence. Unlike the defendant in Young, who because of technological advances, was unaware of and did not consent to the

²⁹ State and federal decisions consistently provide heightened constitutional protection for one's home. See, e.g., Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961) ("[T]he right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" stands at the "very core" of the Fourth Amendment); State v. Berber, 48 Wn. App. 583, 589, 740 P.2d 863 ("a person's residence is a highly private place under most circumstances and gives rise to a legitimate expectation of privacy."), review denied, 109 Wn.2d 1014 (1987). See also Lanza v. New York, 370 U.S. 139, 143, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962) (it is "obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.")

invasion into his privacy, Modica was aware of and did consent to the jail recording his calls. For this reason, Modica's reliance on State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996), State v. Baird, 83 Wn. App. 477, 922 P.2d 157 (1996), and State v. Christensen, 153 Wn.2d 186, 102 P.2d 789 (2004), is similarly misplaced. All three cases involved unlawful recordings because each was made without the knowledge of any of the participants. Faford involved a citizen secretly listening to a neighbor's telephone communications via radio scanner; Baird involved a jealous husband covertly recording conversations between his wife and another man; and Christensen involved secret eavesdropping of a telephone communication held by two other people. But here, there was nothing surreptitious about the recordings—both participants knew that their conversations were being recorded. Although Modica argued below that inmates *should be allowed* some confidentiality because some of the calls were of a personal nature, he chose to use the jail phones with full knowledge that his calls could be monitored and would be recorded. 7RP 71-72; Ex. 18, 19, 21, 22, 25, 26. Consequently, any "high hopes" Modica may have had that his communications were private do not constitute a legitimate expectation of privacy.

- ii. Any expectation of privacy Modica might have had is not one society is willing to recognize as reasonable.

Even if Modica could demonstrate a legitimate expectation that his conversations were private, this is not an expectation that society is willing to recognize as reasonable. A "legitimate" expectation of privacy must be more than a defendant's mere subjective expectation. It must also be one that society is prepared to accept. United States v. Jacobsen, 409 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); State v. Rose, 128 Wn.2d. at 392.

Jail detainees do not have the same rights as private citizens: "Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.'" Wolff v. McDowall, 418 U.S. 539, 555, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (citation omitted). Washington courts have noted the same restrictions on rights of inmates, holding "that an inmate's expectation of privacy is necessarily lowered while in custody." State v. Rainford, 86 Wn. App. at 438.³⁰ One such restriction on

³⁰ See also State v. Baker, 28 Wn. App. 423, 424-25, 623 P.2d 1172 (1981) (allowing routine pat-down searches of prisoners even without articulable suspicion).

privacy involves use of the telephone—jails may monitor and record inmate telephone calls for institutional security purposes.

Society is also unwilling to recognize Modica's subjective expectation as reasonable because all of the telephone calls at issue constituted the crimes of violation of a no-contact order and tampering with a witness.

- a) Jails may monitor and record inmate telephone calls for institutional security purposes.

Institutional security concerns justify such recordings of inmate telephone conversations and render them reasonable for Fourth Amendment purposes. Van Poyck, 77 F.3d at 291; See, e.g., United States v. Amen, 831 F.2d 373, 379 (2nd Cir.1987) (upholding routine recordings of prison phones because of institutional security concerns), cert. denied 485 U.S. 1021 (1988). It makes no difference whether the defendant is a pre-trial detainee or a post-trial convict. United States v. Willoughby, 860 F.2d 15, 21-22 (2nd Cir. 1988), cert. denied 488 U.S. 1033 (1989) (citation omitted).

Judge Washington understood that society is unwilling to recognize as reasonable a jail detainee's expectation of unmonitored phone calls. He reminded Modica that when you are in

jail, "you give up certain rights ... and one of the rights is, perhaps your right to have personal conversations with no one listening to what you say." 7RP 71.

- b) Many of Modica's calls violated a no-contact order.

Through monitoring or reviewing recorded conversations, the special investigations unit often discovers violations of no-contact orders and other crimes. 12RP 86. Judge Washington correctly noted that, although the jail monitors and records calls for security purposes if an investigator discovers illegal conduct, the State may certainly use that information as the basis of another criminal charge.³¹ 7RP 71-74. That is precisely what occurred in this case. 4RP 3-6.

A pretrial order prohibited Modica from contacting Karen "personally, or through any other person."³² CP 67 (emphasis supplied). Despite knowing that any violation of the court's order

³¹ See, e.g., RCW 9.73.095(3)(b), which applies to DOC and state correctional facilities (requiring disclosure of recorded conversations for, among other things, the "prosecution or investigation of any crime."). Modica argues that RCW 9.73.095 does not apply to the King County Jail. Br. of App. at 38-39. The State agrees. Consequently, the State will not further address Modica's argument under § D.2.a.v of his brief.

³² Moreover, Modica was keenly aware that he was prohibited from having any contact with Karen. See, e.g., 7RP 73 ("I do have an NCO against Ms. Modica..."). In one call, Modica wanted Stewart to tell Karen to write to him, (continued)

constituted a criminal offense under Chapter 26.50 RCW, Modica repeatedly flouted the court's order by conspiring with family members in his attempts to tamper with Karen. The illegality of the calls is another reason why Modica's mere subjective expectation of privacy is not one that society is willing to recognize as reasonable.

Division 2 of this court addressed the issue of whether a person excluded from a residence by a court order has a legitimate expectation of privacy in the residence. State v. Jacobs, 101 Wn. App. 80, 2 P.3d 974 (2000). The court held that the defendant did not have any legitimate expectation of privacy:

[S]ociety does not recognize as reasonable the privacy rights of a defendant whose presence at the scene of the search is "wrongful":

Obviously, ... a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate."

Id. at 87 (citation omitted).

but cautioned that Karen "cannot put her name on it" and must use Stewart's return address. Ex. 22, track 11, at ~03:47-04:20.

This case is very similar to Jacobs. Just as the court order excluding Jacobs from the residence meant that his presence there was "wrongful," the no-contact order in this case meant that each of Modica's calls was "wrongful." Thus, while "a burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy," Modica cannot claim a "legitimate" expectation of privacy in his illegal calls.³³

- iii. Because one party consented to the recordings, they were constitutional.

The Fourth Amendment does not protect a private communication where *only one* party has consented to its interception. See United States v. White, 401 U.S. 745, 751-53, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (If the monitoring of an inmate conversation does not offend the constitution, neither does a simultaneous recording of the same conversation). Similarly, where one party to a conversation consents to its recording, there is no expectation of privacy, and thus no violation of Const. art. 1,

³³ Moreover, it is highly implausible that Modica had any subjective expectation of privacy, unlike the cabin interloper.

§ 7. State v. Corliss, 123 Wn.2d at 663-64 (and cases cited therein). A notice that a reasonable person would understand to mean that a telephone communication is subject to interception is sufficient to dispose of defendant's Fourth Amendment claim. United States v. Friedman, 300 F.3d 111, 123 (2nd Cir. 2002), cert. denied 538 U.S. 981 (2003). Here, the jail put *both* Modica and Stewart on notice that it was recording their conversations. Modica consented to the recordings: "The jail phones are monitored" and "[the calls] are taped *and once you say you agree to that* and push the button and say, ... you can be taped." 7RP 70. Consequently, Modica's constitutional claim fails.

c. Statutory Claim

Just as the recordings made by the jail do not violate Modica's constitutional rights, the recordings also do not violate the Privacy Act. As a preliminary matter, the Act is inapplicable because, as established above, there is no reasonable expectation of privacy in the conversations, and because the Act only applies to private conversations. State v. Clark, 129 Wn.2d at 225. Even if Modica's conversations were private, the recordings are nonetheless admissible under the Act because i) all parties consented to interception of the communications, and ii) the Act

creates an exception relevant to this case—an "unlawful request or demand" exception:

Notwithstanding the provisions of subsection (1) of this section, wire communications or conversations . . . (b) which convey threats of extortion, blackmail, bodily harm, **or other unlawful requests or demands**, . . . may be recorded with the consent of one party to the conversation.

RCW 9.73.030(2) (emphasis supplied). This exception permits the recording of a private communication with the consent of only one party and without prior judicial approval.³⁴ State v. Williams, 94 Wn.2d 531, 546-47, 617 P.2d 1012 (1980), citing State v. Bonilla, 23 Wn. App. 869, 874, 598 P.2d 783 (1979). Private communications recorded under this provision are fully admissible. See Williams, at 546-49.

- i. Because all parties consented to the recordings, they do not violate the Privacy Act.

Even assuming that the recorded telephone calls were private, they were properly admitted under the Act because each participant³⁵ consented to the interception. See

³⁴ The State concedes that it did not seek or obtain court authorization; therefore, the State will not further address Modica's argument under § D.2.a.iii of his brief.

³⁵ For purposes of this analysis, the State will presume, without conceding, that the King County Jail was not a party (as interpreted by Judge Washington) to these conversations.

RCW 9.73.030(1)(a). RCW 9.73.030(1)(a) clearly permits interception and recording of any conversation after "first obtaining the consent of all participants in the communication." Nothing in this statute defines consent or limits how it is to be obtained. Modica erroneously relies on RCW 9.73.030(3) to argue that it restricts methods of obtaining consent. Further, Modica omits critical language: the paragraph that Modica quotes begins, "Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained...." RCW 9.73.030(3). It is his failure to analyze implied consent that leads to his erroneous statement: "Putting someone on notice that their call would be recorded is not the same as obtaining consent." Br. of App. at 33. See State v. Townsend, 147 Wn.2d 666, 671-72, 57 P.3d 255 (2002) (finding that the defendant impliedly consented to the recording of some e-mail communications); see also United States v. Horr, 963 F.2d 1124 (8th Cir. 1992) (jail inmate's choice to use a jail telephone when he has actual knowledge that the communication may be monitored or recorded impliedly consents to interception and/or recording of the telephone call).

Significantly, Modica does not deny that both he and Stewart were provided clear information that their conversations were being

recorded. Rather, Modica asserts: "There is not a **single** case ... that says that a mere statement that the recording is occurring, by a non-party, is sufficient to establish consent to record telephone conversations." Br. of App. at 32. But see, United States v. Roy, 349 F. Supp. 2d 60 (D. Mass. 2003).³⁶ Modica is mistaken. The facts in Roy are almost identical to the facts here. Roy was indicted for eight crimes, including witness tampering. Id. at 61. While Roy was incarcerated, the prison recorded several of his outgoing telephone conversations. Id. The following recorded message preceded each call:

You have a collect call from [name of inmate as given by inmate] an inmate at Worcester County Jail. This call is from a correctional institution and is subject to monitoring and recording. If you do not wish to accept this call, please hang up now. To accept the call, press zero.

³⁶ Numerous other courts across the Nation have concluded that recordings made under circumstances such as this case are made with consent of the parties. Consent need not be explicit, but can be implied from the circumstances. Van Poyck, supra at 292. Here, Modica chose to use the jail telephone knowing that his conversation would be recorded. This consent is valid even if the inmate was never told that use of the telephone system constituted consent to be recorded or that the jail could use the recording(s) as incriminating evidence. United States v. Workman, 80 F.3d 688, 694 (2nd Cir.), cert. denied, 519 U.S. 938, and cert. denied 519 U.S. 955 (1996). Modica explicitly acknowledged that his calls were being recorded. 6RP 68-69; 7RP 70. Such explicit statements demonstrate actual notice and consent. United States v. Faulkner, 323 F. Supp 2d. 1111, 1117 (D. Kansas 2004).

Id. at 62. Both the inmate and the call's recipient hear the message and the call cannot begin until after the recorded message has played and the call's recipient has opted to continue it by pressing zero. Id.

Roy challenged the admissibility of the recordings, arguing that they violated Title III.³⁷ Id. The question before the court, therefore, was whether the fact that Roy heard the recorded message and nevertheless continued with his call sufficient to find that he impliedly consented to the calls being recorded.³⁸ The court found that the recorded message that preceded each call provided Roy with clear information about the scope of the interception. Roy, at 63. Thus, the court held that by continuing to proceed with the conversations, Roy impliedly consented to the recordings thereof. Id. The court noted, "While there may be close questions in this area occasionally, ... this is not one of them." Id.

³⁷ The Federal Wiretap Act, 18 U.S.C. §§ 2510 *et seq.*, commonly referred to as "Title III" authorizes interception of private communications when only one party consents to the interception. See 18 U.S.C. § 2511(2)(c).

³⁸ Just as the consent exception under Title III encompasses implied consent, Roy, at 63 (citations omitted), so does the consent exception under the Act. See Townsend, 147 Wn.2d 666.

Likewise, it is not a close question in the instant case. As in Roy, Modica heard a recorded message that preceded each call—only his message told him not just that his call was *subject to* recording as in Roy, but that his call *will be recorded*. The scope of the interception in this case could not have been clearer. Modica nevertheless continued with his conversations. As a result, he impliedly consented to the recordings thereof. See id. Accordingly, the only remaining question is whether Stewart consented. The Roy court answered that question as well.³⁹

Here, as in Roy, the call's recipient (Stewart) expressly consented to participate in the telephone conversation and the terms thereof by dialing or pressing a particular number before any communication with the inmate (Modica). Citing other federal authority, the Roy court agreed that "upon dialing '1' the party reached at the number dialed by the inmate consents to the [call and recording] prior to any communication with the inmate." Roy, at 63, quoting Gilday v. Dubois, 124 F.3d 277, 296 (1st Cir. 1997). Here, Stewart expressly consented to the call and recording by

³⁹ One distinction between the exception in Title III and the exception in the Act is that Title III requires only one-party consent whereas the Act requires the consent of all participants. Compare 18 U.S.C. § 2511(2)(c) with RCW 9.73.030(1)(a).

dialing or pressing "3," a point conceded by Modica.⁴⁰ Thus, based on Modica's implied consent and Stewart's express consent, the recordings are admissible under the Act.

- ii. Modica's statements conveyed unlawful requests or demands.

As noted above, the Act contains an "unlawful requests or demands" exception. In Williams, the defendant argued that an "overbroad interpretation of the 'catchall' phrase could negate the privacy act protections whenever a conversation **relates in any way** to unlawful matters." Williams, 94 Wn.2d at 548 (emphasis supplied). The court agreed that such a broad interpretation of the catchall phrase would undermine the legislative intent "to establish protections for individuals' privacy and to require suppression of recordings of even conversations **relating to** unlawful matters if the recordings were obtained in violation of the statutory requirements." Id. (citations to authority omitted. Emphasis supplied). Thus, to give effect to the legislature's intent, the court narrowly construed the catchall phrase by limiting the unlawful requests or demands to other acts "of a similar nature." Id.

⁴⁰ The jail phones are monitored" and "[the calls] are taped *and once you say you agree to that* and push the button and say, yes, ... you can be taped." 7RP 70.

Modica undoubtedly conveyed unlawful requests or demands. Ex 18-19, 21-22, 25-26. In this case, the communications were not tangentially related to some unlawful matter. Rather, they were unlawful requests or demands. The very purpose of the calls was illegal. See RCW 9A.72.120(1)(b).⁴¹ Modica called Stewart, his co-conspirator, specifically to assist him in his efforts to have Karen absent herself from the proceedings. Indeed, as noted above, the calls themselves were illegal because they constituted violations of a no-contact order. CP 67. Construing "unlawful request or demand" to include the calls at issue here does not constitute the broad interpretation of the catchall phrase over which the Williams court expressed concern. Additionally, it comports with the legislature's intent to exempt from the Act any recorded communication where the purpose was to convey an unlawful request or demand.

Modica summarily dismisses the unlawful request or demand exception as inapplicable in any circumstance other than an emergency situation. Br. of App. at 37-38. But this is the precise argument that the Williams court rejected:

⁴¹ A person is guilty of tampering with a witness if he attempts to induce a witness to "absent himself or herself from such proceedings...."

There is no indication in either the language or history of subsection (2) that the legislature intended to establish all of the exceptions for solely emergency situations. The mere fact that two of the exceptions apply to emergency situations does not enable us to conclude that the legislature also intended to restrict the third exception to emergency situations. Similarly, the legislative history showing the legislature intended to restrict subsection (2)(a) to emergency situations does not allow us to infer that the same intention underlies the very different requirements of subsection (2)(b).

Williams, at 548. Thus, pursuant to RCW 9.73.030(2) of the Act, the recordings are admissible under the unlawful requests or demands exception.

3. THE RECORDINGS DID NOT VIOLATE WASHINGTON ADMINISTRATIVE CODE 289-24-200(4) BECAUSE THE LEGISLATURE REPEALED ITS ENABLING STATUTE, THEREBY RENDERING 289-24-200(4) INVALID.

Modica maintains that the recordings violated Washington Administrative Code ("WAC") 289-24-200(4).⁴² He concedes that the enabling statute, RCW 70.48.050, was repealed.⁴³ Yet, he seemingly contends that RCW 70.48.071, which the Legislature passed at the same time it repealed RCW 70.48.050, results in the

⁴² WAC 289-24-200(4) provides that "[the] location of telephone facilities shall insure reasonable privacy, and telephone conversations shall not be monitored, tape recorded, or spot-checked except by court order."

⁴³ The text of former RCW 70.48.050 is attached as appendix B-1. In addition, RCW 70.48.010, which provided the Legislative Declaration, was repealed by Laws 1987, ch. 462, § 23 (effective Jan. 1, 1988).

WAC's continued validity.⁴⁴ This Court should reject this argument because once the Legislature repealed RCW 70.48.050, it necessarily eliminated any authority for Title 289 of the WACs and rendered it invalid.

The Legislature may delegate to administrative agencies authority to promulgate rules and regulations "to carry out an express legislative purpose, or to effect the operation and enforcement of a law." State v. Miles, 5 Wn.2d 322, 325, 105 P.2d 51 (1940). The WAC has no greater authority than that it is given by statute. See Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978) ("An administrative agency is limited in its powers and authority to those which have been specifically granted by the legislature.")

In 1981, under the authority of chapter 70.48 RCW, and as part of a larger set of rules for the operation of detention, correctional, and special facilities, the State Jails Commission promulgated WAC 289-24-200. In 1983, the State Corrections Standards Board ("SCSB") replaced the State Jails Commission as the agency responsible for the administration of chapter 70.48

⁴⁴ The text of RCW 70.48.071 is attached as appendix B-2.

RCW. Effective January 1, 1988, Substitute House Bill ("SHB") 738 repealed RCW §§ 70.48.010 and .050, and the SCSB ceased to exist. Laws 1987, ch. 462, § 23.

The Legislative history of SHB 738, relating to the repeal of both RCW §§ 70.48.010 and .050, make it clear that the Legislature no longer thought statewide mandatory custodial care standards were necessary.⁴⁵ The enactment of RCW 70.48.071 shows that the Legislature also no longer found it necessary to have a statewide board, or statewide rules, governing the operation of county and city correctional facilities.⁴⁶ Rather, the Legislature decided to place authority for the operation of county and city correctional facilities into the hands of the counties and cities charged with their day-to-day operation.⁴⁷ (appendix B-2).

⁴⁵ See Final Legislative Report, 50th Legislature, Regular and First Special Sessions (1987) at 126 (providing that "state mandated operating standards for local jails are eliminated."). SHB 738 also amended RCW 70.48.020 by eliminating the definition of "Mandatory Custodial Care Standards" (which had been defined as "those minimum standards, rules, or regulations that are adopted pursuant to RCW 70.48.050(1)(a) and RCW 70.48.070(1) for jails to meet federal and state constitutional requirements relating to the health, safety, security, and welfare of inmates.") See also Laws 1987, ch. 462, § 17 (Legislature repealed RCW 70.48.070, which established the statewide standards).

⁴⁶ This conclusion is further supported by the fact that the WACs have not been altered since the SCSB was eliminated in 1988, and by the non-existence of any agency charged with altering the WACs.

⁴⁷ If the Legislature thought that the WACs still applied to the counties, then it would not have enacted RCW 70.48.071, which directed counties to adopt their own standards for the operation of correctional facilities.

Thus, because RCW 70.48.050 provided the only authority for the creation and revision of WACs regarding the management of county correctional facilities, repeal of that statute necessarily eliminated any authority for the WACs and rendered them invalid. See Cazzanigi v. General Electric Credit Corporation, 132 Wn.2d 433, 938 P.2d 819 (1997) (a repealing act terminates all rights dependant upon the repealed statute and all proceedings based on it). Consequently, the WACs cannot control the admissibility of the recordings.

Contrary to Modica's contention, the Legislature did not state that SHB 738 "in no way impacted the validity of the existing WACs." Br. of App. at 41. Rather, SHB 738 contained a section which provided that "The transfer of the powers, duties, and functions of the corrections standards board shall not affect the validity of any act performed before the effective date of this section." Final Legislative Report, 50th Legislature, Regular and First Special Sessions (1987). This section merely states that that any acts performed before January 1, 1988 (the effective date of the section) are valid; it does not affect the validity of any act

performed after January 1, 1988.⁴⁸ Furthermore, because the new statute, RCW 70.48.071, directly conflicts with WAC 289-24-20, the WAC is invalid. See H & H Partnership v. State, 115 Wn. App. 164, 170, 62 P.3d 510 (2003) (recognizing that an agency regulation that modifies or conflicts with a statute is invalid).

Even if this Court determines that Title 289 of the WACs remains valid, despite the repeal of its enabling statute, it will not result in suppression of the recordings. The only authorized remedy for a violation of Title 289 of the WACs is that the Board (which no longer exists) could issue notices of non-compliance or of closure of a facility, which failed to bring itself into compliance.⁴⁹ Thus, without suppression as an available remedy, the WACs cannot affect the propriety of Modica's conviction for tampering with a witness and this Court should reject any contrary argument.

⁴⁸ Modica's reliance on the "Bill of Request" (attached as appendix B to his brief) is meaningless. The proposed inclusion of county employees as individuals authorized to intercept offender conversations, pursuant to RCW 9.73.095, was not limited to telephone conversations. Rather, RCW 9.73.095 addresses myriad circumstances under which DOC may intercept or record **nontelephonic** offender conversations. See RCW 9.73.095(1), attached as appendix B-3.

⁴⁹ Former RCW §§ 70.48.070 and .080 repealed by Laws 1987, ch. 462, §§ 22-23; WAC 289-30-020.

D. CONCLUSION

Modica failed to meet his burden of proving that his Faretta waiver was invalid. The record establishes that Modica knowingly and unequivocally waived his right to counsel. Moreover, his untimely, manipulative vacillation, regarding representation wholly supports the court's discretionary ruling to not reappoint counsel.

The recorded jail conversations did not violate the state or federal constitutions, or the Act, or the WACs (which are no longer in effect).⁵⁰ Accordingly, the trial court properly admitted the tapes. Consequently, this Court should confirm Modica's conviction for tampering with a witness.

DATED this 13 day of July, 2006.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By: 

RANDI J. AUSTELL, WSBA 28166
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

⁵⁰ The civil division of the King County Prosecutor's Office spoke with the Code Reviser's Office on or about July 3, 2006. The Code Reviser indicated that the decodification of Title 289 of the WACs will be reflected in its next update. If this information proves correct, the State will submit a statement of additional authority.

APPENDIX A

1 -o0o-

2
3 (Proceedings begun at 11:19 a.m.)
4

5 MR. FERRELL: Your Honor, this is State of
6 Washington versus Mr. Desmond Modica, 05-1-07759-6 KNT,
7 Mr. Flora on behalf of Mr. Modica, (inaudible) court. The
8 Court may recall, just to make sure the record is clear,
9 this matter was continued over from the omnibus on the 8th
10 to today's date. And I believe there was an indication
11 that Mr. Modica wishes to proceed pro se.

12 THE COURT: Mr. Modica, we did put this down
13 today so that we'd have time to talk about this. Is it
14 still your desire to represent yourself in this matter?

15 MR. MODICA: It is my desire to represent
16 myself in this matter, yes. Counsel has not changed their
17 positions regarding their delay on my behalf.

18 THE COURT: Their delay, I'm not sure --

19 MR. MODICA: They want to (inaudible) 6 weeks
20 (inaudible) little problem.

21 THE COURT: I see. They want to continue so
22 they can be prepared. You know, it's usually a good idea
23 to have a prepared lawyer representing you at trial. I
24 know no one likes to sit jail, I know how you strongly
25 feel about the 3.3 issue, but wouldn't you rather have a

1 well prepared attorney to represent you? This is a
2 serious charge, isn't it? It -- what is the charge in
3 this --

4 UNIDENTIFIED SPEAKER: Assault second degree,
5 domestic violence; resisting arrest; and now count three
6 is assault four.

7 THE COURT: Okay. What do you think about
8 that?

9 MR. MODICA: Your Honor, you're right, you're
10 absolutely right. But I question it because of, you know,
11 the competency of my appointed counsel. I mean, they
12 haven't represented themselves correctly, and therefore
13 (inaudible) box where I must ask to represent myself.

14 MR. FERRELL: I think the record should
15 reflect that this was originally an ACA case, in which I
16 believe Dana Brown, Counselor Brown was on. And the -- at
17 some point it appears that Ms. Brown withdrew and then
18 SCRAP was then appointed.

19 THE COURT: Mr. Modica was concerned about
20 his first set of attorney representation because he felt
21 that they set over the case setting without his permission
22 and he wanted a trial date set within 15 days of
23 arraignment. It was not set until I believe the 18th or
24 19th day, he argued strenuously to dismiss on speedy trial
25 grounds. I denied that. There was irreparable damage

1 rendered in the court's opinion between the ACA attorneys
2 and Mr. Modica, so I allowed the ACA attorneys to
3 withdraw.

4 SCRAP had been appointed. The problem is,
5 Ms. (Inaudible) who is counsel, is in a long trial in
6 Judge Jarvis's court room in the first matter, and
7 unavailable to work with Mr. Modica at this time. So --
8 and Mr. Flora, to be fair, (inaudible) had indicated we
9 can't do this case unless we get a continuance because of
10 staffing issues and so forth. And I said, well, no,
11 (inaudible) in and we have to take up the time for trial
12 later. I was hopeful that counsel could persuade
13 Mr. Modica to agree to continue.

14 Mr. Modica does not want to continue. I
15 think that's very clear. So the thing is, Mr. Modica, I
16 have to make sure your decision is unequivocal, which
17 means it's done with the understanding of the consequences
18 and the seriousness of the offense, and not simply because
19 you're unhappy. You understand what I'm saying on that?

20 MR. MODICA: (Inaudible).

21 THE COURT: Okay. Well then, do we have a
22 copy of the amended information? Let me go through the
23 elements -- or whatever the current information is, we
24 don't have -- ECR is still down.

25 MR. FERRELL: Yes, Your Honor. (Inaudible)

1 the original. And also (inaudible) information
2 (inaudible).

3 THE COURT: You understand, Mr. Modica, I
4 would be doing this at your request because you want to go
5 to trial on July 21. That's what I understand is one of
6 your basic (inaudible). If you represent yourself, you're
7 going to be ready to go to try the case that day?

8 MR. MODICA: Correct.

9 THE COURT: All right. The law is clear, I
10 have to ask you whether you understand what it is you're
11 charged with on the record. So the first is count one,
12 assault in the second degree, domestic violence. It's
13 alleged in the information that the defendant, Mr. Modica,
14 did, on or about May 18th, 2005, intentionally assault
15 another, and thereby recklessly inflict substantial bodily
16 harm upon Karen Modica. You understand that's count one?

17 MR. MODICA: Sure.

18 THE COURT: And you understand that those are
19 the elements State would have to prove beyond a reasonable
20 doubt if the matter went to trial?

21 MR. MODICA: I do.

22 THE COURT: And do you understand that
23 assault in the second degree is a Class B felony
24 punishable by a maximum of 10 years in prison, and is it
25 \$50,000 fine for Class B or 20?

1 MR. FERRELL: Twenty.

2 THE COURT: \$20,000 fine. You understand
3 that those are the maximum possible penalties?

4 MR. MODICA: Yeah.

5 THE COURT: And also, I think, there's a
6 domestic violence designation. Does that effect -- well,
7 it's a felony so it would take away your right to have a
8 firearm, but the domestic violence would be an additional
9 reason your firearm was taken. Plus it's a felony, so you
10 lose other civil rights including the right to vote if
11 your convicted of it. You understand that?

12 MR. MODICA: Uh-huh.

13 THE COURT: Okay. You understand, count two,
14 you are charged with resisting arrest, alleged on or about
15 May 19th, 2005, that you did intentionally prevent an
16 attempt by a peace officer, to wit, deputy Woodruff,
17 Crowley, and Morell, from lawfully arresting you. You
18 understand that that's the crime charged in count two?

19 MR. MODICA: I understand.

20 THE COURT: And that I believe is a gross
21 misdemeanor?

22 MR. FERRELL: Simple misdemeanor, Your Honor,
23 punishable by up to 90 days in jail and a \$1,000 fine.

24 THE COURT: Okay. Simple misdemeanor. So
25 you understand the maximum possible penalty is 90 days in

1 jail and a \$1,000 fine?

2 MR. MODICA: I understand.

3 THE COURT: And the State has added a third
4 count. It's alleged that on or about May 18th, 2005, that
5 you did intentionally assault Karen Modica, a human being,
6 and that's a criminal assault in the fourth degree,
7 domestic violence. You understand that that's what count
8 three is now?

9 MR. MODICA: Yes, I do.

10 THE COURT: And that is a gross misdemeanor,
11 punishable by a year in jail and/or a \$5,000 fine. You
12 understand that?

13 MR. MODICA: Yes.

14 THE COURT: Now, none of these are required
15 to run consecutively, but because there's two misdemeanors
16 in it, the Court, in its discretion, could run a
17 consecutive ^(to your) two year felony charge. Doesn't have to, but
18 could. You understand that's a possibility?

19 MR. MODICA: Yes.

20 THE COURT: Okay. Have you ever represented
21 yourself before?

22 MR. MODICA: No.

23 THE COURT: Okay. There's a lot to this, and
24 I want to state for the record, unequivocally, it's my
25 counsel to you that you should not represent yourself.

1 That you are at a disadvantage, however strongly you feel
2 about your case, because you are not an experienced and
3 licensed attorney who does this every day. And so
4 that's -- I have to tell you that's my view of these
5 things. I know of a lot of folks who represent
6 themselves. They think, well, I only have my case to
7 worry about so I'm going to do a lot better job than an
8 attorney who has more cases. But the fact of the matter
9 is, it's the experience factor and the training factor
10 which I assume you don't have. Do you have any training
11 in the law?

12 MR. MODICA: As a layman.

13 THE COURT: As a lay person. But you've
14 studied as a lay person then. Like in these motions
15 you've been bringing to the Court, you've studied the law
16 a little?

17 MR. MODICA: Yes, a little bit.

18 THE COURT: And you've not represented
19 yourself in any other criminal cases? Okay. We've gone
20 through what you're charged with, we've gone through the
21 maximum penalties, we've gone through the consecutive
22 versus concurrent. You realize that if I grant your
23 request that you're on your own, and the judge -- I can't
24 or any other judge can't come in and sort of help you out
25 and tilt the scales in your favor and say, gee,

1 Mr. Modica, you should have brought that motion or made
2 that argument or raised that objection. That's not the
3 role of the judge. You're on your own, you've got to do
4 this if you're going to do it. You understand that?

5 MR. MODICA: I understand that.

6 THE COURT: Do you know about the rules of
7 evidence, how we decide what comes into evidence and what
8 does not come into evidence?

9 MR. MODICA: Yeah.

10 THE COURT: All right. you understand
11 they're pretty technical and you have to be able to apply
12 and use those if you're going to represent yourself? You
13 understand that?

14 MR. MODICA: I do.

15 THE COURT: Okay. How about the rules of
16 criminal procedure, such thing as speedy trial and
17 discovery, are you familiar with those rules?

18 MR. MODICA: Somewhat, I think.

19 THE COURT: You understand again, those are
20 technical rules which will govern the way the case would
21 proceed?

22 MR. MODICA: Uh-huh.

23 THE COURT: All right. In terms of
24 testimony, you understand there is a Fifth Amendment
25 (inaudible) Washington Constitution. You don't have to

1 testify. But if you did testify, you'd be subject to
2 cross-examination by the prosecuting attorney and that you
3 would have to be able to make that decision and represent
4 yourself in that matter, you understand that?

5 MR. MODICA: I understand that.

6 THE COURT: Okay. Have any threats or
7 promises been made to you to get you to waive your right
8 to counsel?

9 MR. MODICA: No.

10 THE COURT: You also understand that you'd be
11 on your own in terms of calling witnesses, preparing jury
12 instructions, arguing to the jury, doing opening
13 statements and closing arguments. All the things that a
14 trained and experienced lawyer is normally used to doing,
15 you're going to have to do those on your own if you
16 represent yourself, you understand that?

17 MR. MODICA: (Inaudible).

18 THE COURT: Okay. Well, I'm going to try one
19 more time. I really encourage you not to do this. You
20 may have a momentary dissatisfaction with these attorneys,
21 but they're trained and experienced and I would urge you
22 not to do this. I just think that individuals who
23 represent themselves without formal training and
24 experience are at a significant disadvantage, particularly
25 when you're facing serious charges as you face in this

1 case. So just want my views to be clear.

2 MR. MODICA: I understand I'm a 2 to 1
3 underdog.

4 THE COURT: I'm sorry?

5 MR. MODICA: I said I do understand I'm a 2
6 to 1 underdog.

7 THE COURT: Okay. You still want to
8 represent yourself?

9 MR. MODICA: Yes.

10 THE COURT: Does the State have anything else
11 to add to the caution?

12 MR. FERRELL: It's his right, Your Honor.

13 THE COURT: Mr. Flora, anything you want to
14 put in?

15 MR. FLORA: No.

16 THE COURT: All right. I will grant your
17 request. I find that it's knowingly and voluntarily done,
18 he has waived his rights to counsel, and that he can
19 represent himself. I would like to appoint stand-by
20 counsel for Mr. Modica. I would like it to be
21 (inaudible). If Ms. (Inaudible) isn't available -- I
22 mean, if he wants to go out on July 21, I'm going to try
23 and send this out on July 21, assuming that Mr. Ferrell's
24 available. So I would like to have stand by counsel
25 available. Is there a way you could reassign in the

1 office so another lawyer might be available?

2 MR. FLORA: Well, I was anticipating it, Your
3 Honor. I think it's pretty early (inaudible) so
4 Ms. (Inaudible) will be available.

5 THE COURT: Okay. So can you do that
6 promptly, and then inform Mr. Modica? So (inaudible) will
7 remain stand-by counsel, but help with subpoenas and so
8 forth.

9 Do we need to enter an omnibus order today?
10 Because it was on for omnibus hearing on Friday.

11 MR. FERRELL: We could do that --

12 THE COURT: Or do you want to put it on for
13 Friday when we know what stand-by counsel is?

14 MR. FERRELL: Yeah. And perhaps maybe
15 counsel could talk with Mr. Modica a little bit about the
16 purpose of omnibus, to where we can have a meaningful
17 omnibus on what to look for from the State. And I'll try
18 to, you know, here and there as (inaudible) Mr. Modica at
19 least in the right direction in regard to what's really at
20 issue in his omnibus hearing.

21 THE COURT: Okay.

22 MR. FERRELL: I'll advise him of some of the
23 issues that are addressed.

24 MR. MODICA: (Inaudible).

25 THE COURT: Maybe we should have a --

APPENDIX B

RCW 70.48.050 read as follows in 1986¹:

In addition to any other powers or duties contained in this chapter, the board shall have the powers and duties:

(1) To adopt such rules and regulations, after approval by the legislature, pursuant to chapter 34.04 RCW, as it deems necessary and consistent with the purposes and intent of this chapter on the following subjects:

(a) Mandatory custodial care standards that are essential for the health, welfare, and security of persons confined in jails. In adopting each rule or regulation pertaining to mandatory custodial care standards, the board shall cite the applicable case law, statutory law or constitutional provision which requires such rule or regulation. The board shall grant variances from custodial care standards to governing units which operate jails with physical deficiencies which directly affect their ability to comply with these standards, if the governing unit is eligible for and has applied for funds under RCW 70.48.110. The variances remain in effect until state funding to improve or reconstruct the jails of these governing units has been expended for that purpose;

(b) Advisory custodial care standards;

(c) The classification and uses of holding, detention, and correctional facilities. Except for the housing of work releases in accordance with board rules, a person may not be held in a holding facility longer than seventy-two hours, exclusive of weekends and holidays, without being transferred to a detention or correctional facility unless the court having jurisdiction over the individual authorizes a longer holding, but in no instance shall the holding exceed thirty days;

(d) The content of jail records which shall be maintained by the department of corrections or the chief law enforcement officer of the governing unit. In

¹ For clarity, the last iteration of RCW 70.48.050 is included here. Prior iterations did not significantly differ, granting the existing commission or board the same powers to adopt rules and regulations as existed in the 1986 version.

addition the governing unit, chief law enforcement officer, or department of corrections may require such additional records as they deem proper; and

(e) The segregation of persons and classes of persons confined in holding, detention, and correctional facilities;

(2) To investigate, develop, and encourage alternative and innovative methods in all phases of jail operation;

(3) To make comments, reports, and recommendations concerning all phases of jail operation including those not specifically described in this chapter;

(4) To hire necessary staff, acquire office space, supplies and equipment, and make such other expenditures as may be deemed necessary to carry out its duties;

(5) To adopt minimum physical plant standards pursuant to chapter 34.04 RCW for jails. The board may preempt any provisions of the state building code under chapter 19.27 RCW and any local ordinances that apply to jails or a particular jail if the provisions relate to the installation or use of sprinklers in the cells and the board finds that compliance with the provisions would conflict with the secure and humane operation of jails or the particular jail;

(6) To cause all jails to be inspected at least annually by designated jail inspectors and to issue a certificate of compliance to each facility which is found to satisfactorily meet the requirements of this chapter and the rules, regulations, and standards adopted hereunder: PROVIDED, That certificates of partial compliance may be issued where applicable. The inspectors shall have access to all portions of jails, to all prisoners confined therein, and to all records maintained by said jails; and

(7) To establish advisory guidelines and model ordinances to assist governing units in establishing the agreements necessary for the joint operation of jails and for the determination of the rates of allowance for the daily costs of holding a prisoner pursuant to the provisions of RCW 70.48.080(6).

RCW 70.48.071

All units of local government that own or operate adult correctional facilities shall, individually or collectively, adopt standards for the operation of those facilities no later than January 1, 1988. Cities and towns shall adopt the standards after considering guidelines established collectively by the cities and towns of the state; counties shall adopt the standards after considering guidelines established collectively by the counties of the state. These standards shall be the minimums necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff, and specific state and federal statutory requirements, and to provide for the public's health, safety, and welfare. Local correctional facilities shall be operated in accordance with these standards.

RCW 9.73.095

(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.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DESMOND MODICA, Cause No. 57115-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name Wynne Brame
Done in Seattle, Washington

^{ub}
7/13/06
Date

FILED DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
2006 JUL 13 PM 4:42