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STATE OF WASHINGTON

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NO. 81450-3

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

KURT MADSEN,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney

WILLIAM L. DOYLE  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

**ORIGINAL - FILED BY E-MAIL ATTACHMENT**

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**A. ISSUES**

1. Did the trial court properly exercise its discretion by deferring a request to proceed pro se where the defendant was frustrated with his lawyers, equivocal about whether he wanted to represent himself or obtain standby counsel, and then never renewed his motion until months later, when he was abusive and disruptive after trial began?

2. Is the holding of Indiana v. Edwards<sup>1</sup> -- that states can prohibit self-representation where a defendant suffers from severe mental illness -- inapplicable to this case where nothing in the record suggests that Madsen suffered from "severe mental illness," where the trial court did not deny pro se status based on the defendant's mental health, and where it appears that Washington does not have a special standard for evaluating a request for self-representation by a mentally ill defendant?

**B. FACTS**

**1. CRIME AND CHARGES.**

Madsen has at least two prior convictions for misdemeanor court order violations, and he was subject to a protection order entered in King

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<sup>1</sup> \_\_\_ U.S. \_\_\_, 128 S. Ct. 2379, 2388, 171 L.Ed.2d 345 (2008).

County Superior Court. 7RP 50-59, 161, 183-86, 194;<sup>2</sup> Pretrial Exs. 4-9, 12; Trial Ex. 2. The order restrained Madsen from having any contact with his former girlfriend, Deborah Stuart. 7RP 187; Trial Ex. 2.

Late on the night of September 2, 2004, Madsen repeatedly called Stuart at her home. 7RP 168, 175, 189. King County Sheriff's Deputy Martin Duran responded to Stuart's home, took a statement from Stuart, and wrote down the phone numbers of the incoming calls recorded on her phone log. 7RP 154-56, 159-60. Around 11:17 p.m., while Duran was still at Stuart's house, Madsen called again. 7RP 155-60, 169, 173-76, 192. Stuart picked up the phone, briefly spoke to Madsen, then handed the phone to Duran. 7RP 155-59, 192. Duran identified himself as a police officer, and asked the caller if he was Kurt Madsen. 7RP 156. The male caller admitted that he was. 7RP 158.

Madsen was charged in King County Superior Court with three counts of Domestic Violence Felony Violation of a Court Order. CP 18-19 (Cause Number 04-1- 06136-5 SEA). At trial, Stuart and Duran testified to receiving repeated telephone calls. Madsen acknowledged that he was aware of the protection order, but claimed he thought that Stuart

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<sup>2</sup> The verbatim report of proceedings will be referred to as follows: 1RP (January 24, 2006); 2RP (January 31, 2006); 3RP (February 6, 2006); 4RP (March 7, 2006); 5RP (March 9, 2006); 6RP (May 4, 2006); 7RP (May 2, 3, 4, and 8, 2006); 8RP (May 19, 2006); and 9RP (August 9, 2006). The May 4, 2006 proceedings are contained on two separate volumes (6RP and 7RP).

was in the process of dropping the order. 7RP 158. He also denied ever calling Stuart or talking to Deputy Duran. 7RP 212. A jury found Madsen guilty as charged. CP 47-50.

## **2. PRETRIAL PROCEDURAL HISTORY.<sup>3</sup>**

Charges were filed October 14, 2004. CP 18-19. On January 14, 2005, attorney Erik Kaeding filed a Notice of Appearance on Madsen's behalf. CP 117, 166. After failing to appear for a pretrial hearing, Madsen was on warrant status for most of 2005. He was arrested and appeared in court on December 14, 2005. CP 162-65, 167-69.

On January 24, 2006, before the Honorable Jeffrey Ramsdell, Kaeding moved to withdraw as counsel. 1RP 3-11; CP 170. Neither Kaeding nor Madsen had set a motion to proceed pro se for that calendar. 1RP 3-11; 8/9/06 Ex. 1 ("DVD"), track 1/24/06, ~01:36:15.<sup>4</sup> During the hearing, Madsen said that the whole charge was a "pathetic joke" and that he wanted a "pro se order." 1RP 5; DVD, track 1/24/06, ~01:37:20. Madsen also insisted that the court address issues regarding bail, his access to legal research, and his speedy trial rights. 1RP 7. Because none

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<sup>3</sup> A single-page timeline of key hearings and events is provided in Appendix A.

<sup>4</sup> The State has designated Ex. 1 of Madsen's Motion for a New Trial — a DVD containing video of the pretrial proceedings for 1/24/06, 2/6/06, 3/7/06, and 3/9/06. Although these proceedings were transcribed as part of the report of proceedings, the DVD sheds light on Madsen's demeanor, and helps show why Judge Ramsdell and Madsen's counsel had concerns about Madsen's competency.

of these motions were set for the calendar, Judge Ramsdell had no factual basis to rule, so he told Madsen, "We're not going to do the issues you want to do right now." 1RP 7. Judge Ramsdell then directed the Office of Public Defense to get counsel for Madsen. 1RP 5-11. He set a hearing for the next week, and explicitly told Madsen that if Madsen still wanted to proceed with his pro se motion after an opportunity to confer with new counsel, he would be "more than happy" to set and hear the motion. 1RP 5. Defense counsel Michael McCullough of the Associated Counsel for the Accused ("ACA") was assigned to the case. 2RP 3.

On January 31, 2006, McCullough was confirmed as Madsen's counsel. 2RP 3. At this hearing, Madsen asked the court to rule on some pro se motions that he had drafted. 2RP 5. Judge Ramsdell told Madsen that he either represented himself or an attorney represented him, but he was not entitled to hybrid representation. 2RP 5. Madsen did not ask to proceed pro se or to terminate counsel at that time. 2RP 3-6. Instead, Madsen and his counsel agreed to continue case-setting to February 2, 2006. CP 118, 171. On February 2, 2006, Madsen agreed to continue case-setting to February 16, 2006. CP 119, 172.

On February 6, 2006, defense counsel McCullough moved to reduce Madsen's bond. 3RP 3-11; DVD, track 2/6/06, ~11:52:39. Although Madsen noted that he could not get written materials at jail

because he was not pro se, Madsen did not make *any* requests to represent himself. 3RP 3-11. Madsen's motion to reduce bond was denied. 3RP 11; CP 120, 173.

On February 16, 2006, Madsen agreed to continue case-setting for five days. CP 121, 174. On February 21, 2006, case-setting was held. CP 175-76. The parties set an omnibus hearing for March 13, 2006 and trial for March 30, 2006. CP 175-76. There is no record of Madsen asking to proceed pro se at any of these February hearings. See CP 175-78.

On March 7, 2006, defense counsel McCullough set a motion to withdraw as counsel, or in the alternative, a motion to proceed pro se. 4RP 1-21; CP 179; DVD, 03/07/06, ~09:02:49. It appears McCullough and Madsen were unable to communicate. 4RP 3-4. Judge Ramsdell spent over fifteen minutes on the hearing, trying to clarify whether Madsen truly wanted to proceed pro se or whether he was just angry with McCullough. 4RP 1-21; DVD, 03/07/06, ~09:02:49-09:17:10. But Madsen persistently evaded Judge Ramsdell's questions on the pro se issue. 4RP 6-16. Instead, Madsen criticized his counsel's work and continually interrupted the judge. 4RP 5-16; see DVD, 03/07/06, ~09:02:49-09:17:10. When Judge Ramsdell said that he was trying to help Madsen out, Madsen responded, "Bullshit." 4RP 9. Judge Ramsdell repeatedly asked Madsen if he wanted new counsel or instead wanted to

represent himself. 4RP 6, 9, 12, 14-15. Madsen answered that he would rather represent himself, but then mentioned that an ACA supervisor, Don Madsen, could assist him. 4RP 11-12. Based on Madsen's erratic courtroom behavior, Judge Ramsdell then expressed concerns about Madsen's competency. 4RP 12. Defense counsel McCullough agreed that he, too, had concerns. 4RP 12.

Still, Judge Ramsdell agreed with Madsen that he had the right to represent himself, but he tried to tell Madsen that any waiver of counsel needed to be knowing, intelligent, and voluntary. 4RP 14-15. Because he was making no headway at all in the inquiry, Judge Ramsdell deferred ruling on Madsen's motion. 4RP 12-17. Specifically, Judge Ramsdell said that he needed to find out if Madsen was competent to stand trial; he wanted to (1) allow Madsen to speak to new counsel and (2) have new counsel assess whether competency was truly a concern. 4RP 16-17. Judge Ramsdell added that, if Madsen still wished to proceed pro se at that point, he would hear the motion. 4RP 16-17. McCullough's motion to withdraw was granted, and a hearing was set for two days later. 4RP 19-21; CP 122, 179.

On March 9, 2006, Leona Thomas was confirmed as Madsen's new counsel. 5RP 3-10; CP 180-81. Judge Ramsdell asked Thomas if she had any concerns after speaking with Madsen; she said that she did not. 5RP

4. At this hearing, Madsen never requested to proceed pro se. 5RP 3-10; DVD, 03/09/06, ~09:05:29-09:11:28. In fact, at one point Thomas reminded Madsen that he was not pro se, and Madsen responded in part, "I know."<sup>5</sup> DVD, 03/9/07, ~9:07:52-09:08:06; 5RP 5.

On March 17, 2006, omnibus was continued a week. CP 182. On March 24, 2006, omnibus was held, and trial was continued to April. CP 183-85. On April 12, 2006, defense counsel filed her trial memorandum. CP 5-15. On April 20, 2006, defense counsel moved to change the trial judge. CP 16-17. Until the case was sent out to trial on May 2, 2006, nothing in the record shows that Madsen renewed a motion to proceed pro se, and Thomas never moved to withdraw as counsel.

### **3. TRIAL REQUESTS TO GO PRO SE.**

On May 2, 2006, the case was assigned to the Honorable Michael Heavey for trial, and pretrial hearings began with Thomas still acting as counsel. 7RP 4; CP 20, 186-87. When the parties appeared, Madsen did not initially raise any issues about proceeding pro se. 7RP 4-80. During pretrial motions, 7RP 4-80, Madsen was extremely disruptive. CP 20. *Before* Madsen sought to represent himself, he was warned not to speak

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<sup>5</sup> The report of proceedings mistakenly transcribes Madsen's response as, "No. No." 5RP 5. A review of the DVD shows that Madsen actually said, "I know." DVD, 03/9/07, ~9:07:52-09:08:06. The rest of Madsen's answer is difficult to decipher, but it was transcribed as, "I was going to give that to you though." 5RP 5.

directly to the court regarding legal issues and to write down any questions for his counsel. But despite the court's repeated warnings, Madsen directly addressed the court, and persistently interrupted his counsel, the prosecutor, and the judge. CP 21; see, e.g., 7RP 5, 44-46, 49-51, 59, 62, 64-65, 69, 71, 74-76. Judge Heavey at one point noted for the record that Madsen "once every three minutes makes a comment that is very loud that everybody in the courtroom can hear. Sometimes it's intended for me, sometimes it is intended for his attorney." 7RP 66. The court also found that Madsen's outbursts and responses often were rambling, unfocused, and unresponsive, and that Madsen consistently showed an inability to follow or respect the court's directions. CP 21; see, e.g., 7RP 22, 26, 32-33, 50.

After almost an entire day of pretrial motions, Madsen asked the court to proceed pro se because counsel had insufficient time to prepare for trial. CP 21; 7RP 80-86. He also expressed a desire for Thomas to locate a witness named "Tracy Anderson" to testify on his behalf, but Thomas explained that Anderson was uncooperative. CP 21; 7RP 85-86.

The court advised Madsen of some of the risks and consequences of self-representation. CP 21; 7RP 81-82. In response, Madsen again complained that Thomas had not had enough time to prepare for trial, and said that she was not given a "chance to even do anything." 7RP 82-83.

When asked if he wanted more time for her to prepare, Madsen said, "No, I'm not asking for more time because it's already too late for that." 7RP 83. When asked if he wanted a recess, Madsen responded, "No, no, because the City of Kent is the most ruthless court system in the world, I believe." 7RP 84. Madsen then launched into a diatribe about his prior Kent municipal court matters. 7RP 84.

The court advised Madsen that he had the right to represent himself, and again asked if he wished to proceed pro se. Madsen responded that he was being forced by circumstances to make that choice. 7RP 86-88. He listed numerous other complaints. 7RP 89-90. Ultimately, the court orally denied Madsen's motion to proceed pro se. 7RP 89.

On May 3, 2006, the next day, Madsen continued to disrupt the proceedings. See, e.g., 7RP 97-98, 112-15, 117, 121-25, 134-35. After repeated interruptions, the court had Madsen removed to the jail. 7RP 123-25. When Madsen returned in the afternoon, and still before jury selection, the court provided more detail about its ruling denying Madsen's request to proceed pro se. 7RP 138. The court noted that Madsen seemed reluctant to represent himself and rolled his eyes when asked if he knew what to say to jurors. The court also noted that Madsen brought his motion just as jury selection was to begin. 7RP 138-39. The court then

asked Madsen *again* if he wished to represent himself. 7RP 138. Rather than taking the opportunity to proceed pro se, Madsen refused to answer the question and continued to interrupt the court. 7RP 138-39.

On May 4, 2006, Madsen refused to be transported to come to court and the court signed an order denying Madsen's motion to proceed pro se. 7RP 142-45; CP 20-22.

Trial before the jury began on May 8, 2006, and Madsen continued to interrupt the judge and prosecutor, prompting another warning from the trial court. See, e.g., 7RP 147-51, 208-09. On May 9, 2006, the jury found Madsen guilty of all three counts of felony violation of a court order. CP 47-50.

Before sentencing, Madsen's new counsel, Juanita Holmes, moved for a new trial, arguing that Madsen was denied the right to represent himself. 9RP 2. After reviewing transcripts and the DVD of pretrial proceedings, Judge Michael Spearman denied the motion, finding that Madsen had been properly indulged every reasonable presumption against a waiver of right to counsel, that his requests to Judge Ramsdell were equivocal, and that his conduct suggested potential competency problems. 9RP 21-26. The court also found that the request to represent himself before Judge Heavey was equivocal, untimely, and would have hindered the due administration of justice. 9RP 21-28.

Madsen appealed arguing, inter alia, that the trial court erred by denying his attempts to represent himself. CP 150.<sup>6</sup> The Court of Appeals rejected these arguments and held that early requests were simply deferred, not refused, and the motions at trial were properly rejected for several reasons. State v. Madsen, No. 58662-9-I (Slip Op., filed March 10, 2008). Madsen petitioned for review on the pro se issue and review was granted.

**C. ARGUMENT**

Madsen asserts that the trial court erroneously denied him pro se status based on "inchoate concerns" about his competency, and applied the wrong legal standard to that decision. Madsen's arguments are factually and legally flawed.

The trial court did not preclude Madsen from representing himself based on concerns about competency. Rather, the court simply deferred ruling on Madsen's motion until the court was able to fully assess whether Madsen's waiver was knowing and intelligent. Ultimately, Madsen did not renew his motion for self-representation until trial and, by then, he was abusive and disruptive, causing the trial court to require counsel.

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<sup>6</sup> Madsen raised a sentencing issue in the Court of Appeals that is not included in his petition for review so that issue is not before this Court. RAP 13.7(b).

Neither trial judge applied a special legal standard for mentally ill defendants since no such standard existed when this case was tried. Instead, the judges examined the case based on Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975), which simply requires that a defendant who is competent to stand trial must be granted pro se status if he knowingly and intelligently waives his right to counsel. There is no evidence that Madsen suffered from serious mental illness. Whether there should be a special standard for defendants who suffer from serious mental illness is simply irrelevant to this case. Finally, it is doubtful that such a special standard exists under Washington law.

**1. THE TRIAL COURT PROPERLY DEFERRED MADSEN'S REQUEST TO PROCEED PRO SE FOR A HOST OF LEGITIMATE REASONS, NOT SIMPLY BASED ON AN "INCHOATE COMPETENCY CONCERN."**

Madsen asserts that the trial court erred by failing to *immediately* grant his unequivocal request to proceed without a lawyer, and by denying pro se status simply based on "inchoate concerns" about competency. These arguments stem from pretrial proceedings before the Honorable Jeffrey Ramsdell, not the proceedings before the Honorable Michael Heavey, so the arguments in this brief will focus on the pretrial proceedings. The arguments are flawed, and should be rejected.

A defendant has a constitutional right to self-representation. Wa. Const. art. I, § 22; Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). But, before a trial court permits a defendant to represent himself, the court is required by law to find that the waiver of counsel is knowing, intelligent, and voluntary. The court must "indulge in every reasonable presumption" against a defendant's waiver of his right to counsel. In re Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). Denial of the right to proceed pro se is reviewed for an abuse of discretion. State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002).

This Court has demanded an extensive colloquy between trial court and the defendant to establish a knowing waiver. State v. Hahn, 106 Wn.2d 885, 896 n.9, 726 P.2d 25 (1986) (setting forth recommended questions). The colloquy presumes that the defendant and counsel have already discussed legal and factual issues in the case. Hahn, 106 Wn.2d 896 n.9. The lawyer can greatly assist the court by fully explaining the risks of self-representation in light of the facts and possible defenses because the trial court will generally not have discovery and will not be privy to confidential communications between lawyer and client. Thus, if the defendant can consult with a lawyer before deciding to represent

himself, then the lawyer can inform the court as to whether the defendant's choice is knowing and intelligent, rather than impulsive.

Madsen asserts that the trial court refused his motions to proceed without counsel. Pet. for Review at 1-2. This assertion is not supported by the record. Between Madsen's appearance in court after re-arrest and the date trial proceedings began, at least nine hearings were held.<sup>7</sup>

Although Madsen attempted to argue motions on his own during some of those hearings, the pro se issue was directly addressed at only two hearings: January 24<sup>th</sup> and March 7<sup>th</sup>.

On January 24<sup>th</sup>, Madsen asked to proceed pro se but, since he was clearly dissatisfied with counsel and because the trial court had been given no notice of the motion, and was in no position to rule at that hearing, the court deferred ruling until Madsen could speak to his new lawyer. The court expressly did not rule on the motion to go pro se, and invited Madsen to renew the motion after consulting with new counsel. 1RP 5.<sup>8</sup> Six weeks passed and five hearings were held without Madsen renewing

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<sup>7</sup> January 24<sup>th</sup>, January 31<sup>st</sup>, February 2<sup>nd</sup>, February 6<sup>th</sup>, February 16<sup>th</sup>, February 21<sup>st</sup>, March 7<sup>th</sup>, March 17<sup>th</sup>. See Appendix A.

<sup>8</sup> The court said, "Not right now, okay? ...I'm going to have somebody from [Office of Public Defense] appointed to represent you, okay? After you have a chance to talk with them, if you still want to proceed pro se, I'm more than happy to hear the motion. But I'm not going to let you forge ahead on this until you've had an opportunity to talk with counsel first."

his motion to go pro se, suggesting Madsen was satisfied to work with his new counsel for at least some portion of that time period.

On March 7<sup>th</sup>, Madsen appeared in court again and asked to either go pro se or fire his attorney and appoint a different attorney, perhaps Mr. McCullough's supervisor, Don Madsen. 4RP 12. The court's attempts to inquire of Madsen as to the pro se issue were punctuated with repeated interruptions and argument on irrelevant substantive legal motions by Madsen. 4RP 11-14. It was apparent that Madsen and counsel were both frustrated. 4RP 3-4. The court could barely get a word in edgewise. When it became apparent that no progress was being made toward accomplishing a pro se colloquy, the court deferred ruling on Madsen's motion for two days until new counsel could be appointed. 4RP 16-17.<sup>9</sup>

After Leona Thomas was appointed as his lawyer on March 8<sup>th</sup>, Madsen did not renew his motion until almost two months later, after trial began before the Honorable Michael Heavey. Again, this period of delay suggests that Madsen was not determined to represent himself, and that he was at least temporarily satisfied with counsel.

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<sup>9</sup> The court also said, "I want new counsel to have an opportunity to talk to Mr. Madsen, find out what their perspective is with regard to him, find out whether he can communicate with that attorney or whether or not we're at the same loggerhead, and revisit this as soon as they've had an opportunity to do that. And then if Mr. Madsen wishes to proceed pro se with standby counsel, I'll entertain the motion. But I think I need somebody to talk to him and find out, number one, whether he's competent, and if there are no issues with regard to that, great. And, number two, whether or not he's going to get along with new counsel and not want to represent himself."

Deferral of a motion is not denial of that motion. Both times the court delayed a decision on motions to proceed pro se the court also assured the defendant that his motion would be heard after consultation with counsel. A trial court is not required to *immediately* rule on any motion, much less a request as important as a motion to proceed pro se.

Madsen distorts the record as to the competency issue. The trial court never *denied* Madsen's motion to go pro se based on a concern -- inchoate or concrete -- that Madsen was incompetent. Competency was discussed briefly at the close of the hearing on March 7<sup>th</sup>. Madsen had by this point appeared before Judge Ramsdell several times and, especially at the March 7<sup>th</sup> hearing, Judge Ramsdell had observed Madsen's inability to control himself in court. Judge Ramsdell also realized that Madsen had, in less than two months, managed to alienate two separate attorneys. Thus, based on his observations of Madsen's demeanor and conduct, he asked counsel McCullough whether there were reasons to question Madsen's competency. McCullough agreed there might be, which simply provided the trial court with an additional reason to defer ruling until a new lawyer, with perhaps a less antagonistic relationship with Madsen, to assess the situation. The trial court's approach was eminently reasonable and, in

fact, seems to have quelled Madsen's frustration with counsel, at least until the beginning of trial in May. Neither of these rulings was an abuse of discretion.

**2. MADSEN WAS NEVER DENIED PRO SE STATUS BECAUSE HE WAS MENTALLY ILL AND, IN ANY EVENT, IT APPEARS WASHINGTON LAW DOES NOT FORCE REPRESENTATION ON MENTALLY ILL DEFENDANTS.**

A defendant must be mentally competent to stand trial. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (1960); RCW 10.77.050. Competency requires a showing that the defendant (1) understands the nature of the charges and (2) is capable of assisting in his defense. State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986). Expert testimony can be helpful, but is not required. Hahn, 106 Wn.2d at 896.

In Faretta v. California, the Supreme Court held that a competent defendant who unequivocally asks to represent himself must be granted that right, regardless of his legal training and even if he will perform poorly. Faretta v. California, 422 U.S. at 807. The right to self-representation was inferred from five different rationales, including the notion that respect for the defendant's autonomy as a person dictated that he be permitted to control his fate. Id. at 817-21. A trial court may not accept a waiver of counsel, however, unless the waiver is knowing and

intelligent. Id. at 807. A defendant's waiver must be made with "eyes open" as to the dangers of self-representation. Hahn, at 895. Washington has consistently adhered to the Faretta rule. Id.

Faretta was, however, "literate, competent, and understanding." 422 U.S. at 835. In Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 125 L.Ed.2d 321 (1993), the Supreme Court struggled with whether to apply a different waiver rule as to a borderline-competent defendant with a long history of mental illness who wanted to waive counsel and enter a guilty plea. The Supreme Court held that such a person could waive his right to counsel and plead guilty. Godinez, 509 U.S. at 397-99.

Recently, the Supreme Court considered a case arguably falling between Faretta and Godinez. In Indiana v. Edwards, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2379, 2388, 171 L.Ed.2d 345 (2008), a defendant with serious mental infirmities asked to represent himself at trial. The Indiana trial court ruled that Edwards was competent to stand trial but not competent to defend himself without counsel, so the trial court denied his motion to proceed pro se. The Indiana Supreme Court held that, under Faretta, respect for individual autonomy was paramount, and required that a mentally ill defendant be granted the right to represent himself if he knowingly waived his right to counsel. 866 N.E.2d 252, 260 (2007).

The Supreme Court reversed the Indiana court, however, holding that "the Constitution permits states to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Edwards, 128 S. Ct. at 2388. The Court did not hold, however, that the Constitution demands such an exception to the Faretta rule. Thus, states may either apply Faretta as before, or apply a state rule that sets a special standard for defendants with "severe mental illness."

The question of what competency standard should apply to the mentally ill is not presented in this case, however, since there is no evidence in the record that Madsen was mentally ill, and the trial court did not rely on any special mental health standard to either defer or deny his motions. Thus, the State respectfully suggests that this Court refrain from addressing that issue in this case, since any comments will be advisory. The trial court here did not deny pro se status based on Madsen's mental condition.

Should this Court consider the issue, however, the following observations are provided. First, Madsen is correct that the right to proceed without counsel is expressly provided in the Washington constitution in article 1, section 22. See Supp. Br. in Support of Pet. for

Review at 3. This express language recognizing a right to self-representation suggests that Washington courts should only rarely, if ever, deviate from the Faretta rule. A defendant who knowingly and intelligently waives his right to counsel should be permitted to represent himself, regardless of his legal acumen or skill. Indeed, this Court applied Faretta to a psychotic defendant in State v. Hahn, *supra*.

Still, there is a single case from this Court, predating Faretta, that applies a special standard to a mentally ill defendant. In State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968), this Court considered the case of a defendant who had been denied pro se status. Kolocotronis had been admitted to mental hospitals 12 times in the eight years preceding trial, was hallucinating in jail, and was deemed incompetent by a sanity commission. Kolocotronis, at 93-94. His condition improved just before trial so the trial court found him competent to stand trial but not competent to handle his own defense. Five justices of this Court concluded that U.S. Supreme Court authority required inquiry beyond competency to stand trial; they held that a trial court must also assess a defendant's ability and competency to act as his own counsel. *Id.* at 101 (discussing Westbrook v. Arizona, 384 U.S. 150-51, 86 S. Ct. 1320, 16 L.Ed.2d 429 (1966)). The Court did not cite any Washington law in support of its holding.

As it turns out, the Kolocotronis court was mistaken -- the federal constitution did not require independent examination of a mentally ill person's ability to conduct his own defense. Faretta, supra. See also Godinez, 509 U.S. at 397-400 (discussing the limits of Westbrook) and State v. Hahn, 106 Wn.2d at 890 n.2 (recognizing that Kolocotronis was overruled by Faretta). Since there is no independent state constitutional or statutory basis for the Kolocotronis decision, that decision is not binding on this Court now.

Moreover, establishing a special rule as permitted by Edwards is likely to be difficult. "Severe mental illness" is not defined in Edwards. Nor is the expression defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Mental health experts, lawyers, defendants, and trial courts will likely disagree as to what the phrase means. And, it is not clear from Edwards what the Court meant when it said the pro se status could be denied a mentally ill defendant if their illness affected their functioning "to the point where they are not competent to conduct trial proceedings by themselves." Edwards, 128 S. Ct. at 2388. Presumably, the decision whether a defendant is incompetent to represent himself under Edwards should be a legal decision for the trial courts, informed by expert opinion where appropriate. At what point, however, is a defendant's performance not good enough to pass constitutional muster? By what

standard is the performance to be judged since even sane defendants can represent themselves with little education and/or legal knowledge? And, the trial court will be *predicting* future performance at trial.

In any event, it appears a special rule contemplated by Edwards would apply to only a very small number of defendants. First, defendants with "severe mental illness" appears, by any interpretation, to be a very narrow category of defendants. Edwards, for example, was seriously ill with schizophrenia and delusions over an extended period of time. See Edwards, 128 S. Ct. at 2382-84, 2389-90. Second, in many cases Faretta will not come into play because a defendant with severe mental illness will be found incompetent to stand trial at all, so the Edwards question will not arise. Third, a defendant with severe mental illness may be competent to stand trial but unable to make a knowing, intelligent waiver because he is uncooperative or unable to engage in the colloquy needed to find a knowing, intelligent waiver. Fourth, many defendants with severe mental illness have poor impulse control and disrupt the proceedings. Their disruptive behavior will still disqualify them from self-representation, independent of Edwards. Thus, there should be very few cases where an Edwards exception is truly determinative, even if it is found to exist in Washington.

Finally, trial and appellate courts should also consider the possibility that a defendant might attempt to manipulate the pro se legal issue to create error for appeal, rather than out of a genuine desire to proceed pro se. It is possible that Madsen was engaging in such gamesmanship. When Judge Heavey attempted to bring some finality to the pro se issue in Madsen's case, he refused to discuss the issue at all with the court. 7RP 138-39. It appears that he wanted the court to deny his pro se motion so that he could raise the issue on appeal.

For these reasons, Washington courts should proceed with great caution in this area, and should establish an Edwards exception to Faretta only if the rare case arises where a defendant with a history of serious mental illness akin to Edwards' is found competent to stand trial but asks to represent himself. Trial courts should, as before, indulge every presumption against waiver of counsel, even for mentally ill defendants, and carefully question the defendant. But, if a defendant unequivocally insists on self-representation, if he is not disruptive, and if the request is timely so as not to require a continuance of proceedings, the request should be granted. Reliance on too expansive an interpretation of Edwards may lead to denial of the constitutional right to self-representation, and to reversal of cases by state or federal appellate courts.

**D. CONCLUSION**

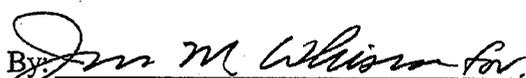
For the foregoing reasons, the State respectfully asks this Court to affirm Madsen's convictions since the trial court properly deferred ruling on his motions until it could be satisfied that any waiver of counsel was knowing. Moreover, the State respectfully asks this Court to refrain from a full discussion of the Indiana v. Edwards exception to Faretta until presented with a record and facts that call for consideration of that exception.

DATED this 15<sup>th</sup> day of January, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney

By:   
WILLIAM L. DOYLE, WSBA #30687  
Attorneys for Respondent  
Office WSBA #91002

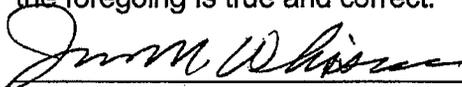
<b>Dates</b>	<b>Event</b>
<b>Prenatal</b>	
10/14/04	Information filed
1/14/05	Retained counsel Erik Kaeding files Notice of Appearance
	Omnibus application filed -- defendant subsequently on warrant status for most of 2005
12/14/05	Appearance after re-arrest --Arraignment -- Judge Ramsdell
1/24/06	Hearing before Judge Ramsdell -- Madsen says he wants to go pro se -- counsel withdraws -- court directs the Office of Public Defense to appoint counsel -- court defers ruling on pro se motion until Madsen has met with appointed counsel
1/31/06	Trial counsel McCullough confirmed -- Madsen attempts to personally argue motions -- court tells Madsen that he may not argue motions unless he is pro se -- Madsen and counsel agree to continue hearing.
2/2/06	Hearing continued at Madsen's request
2/6/06	Counsel moves to reduce bond -- denied -- Madsen does not seek to waive counsel and proceed pro se
2/16/06	Madsen agrees to continuance of case-setting
2/21/06	Case-setting hearing -- omnibus hearing and trial dates set -- no motions to proceed pro se
3/7/06	Counsel's motion to withdraw or motion of defendant to proceed pro se -- in a fifteen minute attempt at a colloquy, the defendant refuses to answer trial court's questions, swears at the judge, and mentions that an ACA supervisor might be a good substitute lawyer -- court and defense counsel state concerns about defendant's competency -- ruling on pro se motion deferred two days until new counsel can assess competency
3/9/06	New counsel Leona Thomas confirmed -- she has no concerns about competency -- Madsen does not renew motion to proceed pro se -- confirms that he knows he is represented by counsel, not pro se
3/17/06	Omnibus hearing and trial dates continued -- no mention of waiver of counsel
3/24/06	Omnibus hearing -- no mention of pro se issue
4/12/06	Defense trial brief filed -- no mention of pro se issue
4/20/06	Defense motion to change trial judge -- no mention of pro se issue
<b>Trial</b>	
5/2/06	Trial starts before Judge Heavey -- motions heard via counsel -- Madsen is extremely disruptive, interrupting the court or counsel "once every three minutes" with rambling, unfocused, unresponsive outbursts -- Madsen then asks to represent himself but the motion is denied
5/3/06	Madsen continues to disrupt proceedings -- trial court asks Madsen whether he still wishes to represent himself and he but Madsen refuses to discuss the issue with the court --
5/4/06	Madsen refuses to come from the jail to court.
5/8/06	Madsen transport to court, disruptive, warned that he might be removed from court
8/9/06	Motion for new trial made through counsel -- Madsen does not seek to argue pro se -- motion denied

## APPENDIX A

Certificate of Service by Electronic Mail

Today I provided service via electronic mail directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. KURT MADSON, Cause No. 81450-3, in the Supreme Court, 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.



Name  
Done in Seattle, Washington

1/15/09  
Date

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