

65648-1

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NO. 65648-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
DERRICK HILLS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SHARON ARMSTRONG AND MARY YU

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	11
1. THE TRIAL COURT PROPERLY DENIED HILLS'S REQUESTS FOR SUBSTITUTE COUNSEL	11
2. HILLS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL	16
3. THE COURT PROPERLY SENTENCED HILLS WITHIN THE STANDARD SENTENCING RANGE	24
D. <u>CONCLUSION</u>	29

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)..... 16

Morris v. Slappy, 461 U.S. 1,
103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)..... 13

United States v. Gonzalez-Lopez, 548 U.S. 140,
126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)..... 13

United States v. Kienenberger, 13 F.3d 1354
(9th Cir. 1994) 22

Wheat v. United States, 486 U.S. 153,
108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)..... 13

Washington State:

State v. Alexander, 125 Wn.2d 717,
888 P.2d 1169 (1995)..... 10, 11, 24, 25, 26, 27, 28

State v. Breedlove, 79 Wn. App. 101,
900 P.2d 586 (1995)..... 17

State v. Cross, 156 Wn.2d 580,
132 P.3d 80, cert. denied,
549 U.S. 1022 (2006) 13

State v. DeWeese, 117 Wn.2d 369,
816 P.2d 1 (1991)..... 14, 15, 18, 19, 20

State v. Fritz, 21 Wn. App. 354,
585 P.2d 173 (1978), review denied,
92 Wn.2d 1002 (1979)..... 17

State v. Lane, 56 Wn. App. 286,
786 P.2d 277 (1989)..... 27

<u>State v. Madsen</u> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	17, 18, 19
<u>State v. Staten</u> , 60 Wn. App. 163, 802 P.2d 1384, <u>review denied</u> , 117 Wn.2d 1011 (1991).....	15
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998).....	12-14, 16-18, 20, 22
<u>State v. Thomas</u> , 68 Wn. App. 268, 843 P.2d 540 (1992), <u>review denied</u> , 123 Wn.2d 1028 (1994).....	28
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	13, 15

Constitutional Provisions

Federal:

U.S. Const. amend. VI	13, 16
-----------------------------	--------

Washington State:

Const. art. I, § 22.....	16
--------------------------	----

Statutes

Washington State:

RCW 9.94A.530	28
RCW 9.94A.535	24

A. ISSUES

1. To justify appointment of new counsel, a criminal defendant must show good cause. A general loss of confidence or trust in counsel is insufficient reason to warrant substitution of counsel. At his first post-arraignment hearing, Hills sought to discharge appointed counsel for failing to return his phone calls and failing to visit him until earlier in the day. The court denied Hills's motion to discharge counsel. Based on this record, has Hills failed to show that the trial court abused its discretion by denying his motion to substitute counsel?

2. A defendant's request for self-representation must be timely and unequivocal. If a defendant's request to proceed pro se is conditioned upon the denial of a motion for new counsel, then the request must be unequivocal in the context of the record as a whole. After having lost his motion to substitute counsel, Hills moved to proceed pro se. Hills maintained his decision to represent himself and declined the court's offer to appoint new counsel on the morning of trial, despite having been warned by two judges of the risks of self-representation. Has Hills failed to show that the trial court abused its discretion by granting his motion to proceed pro se?

3. A court may exercise its discretion to impose an exceptional sentence downward on a conviction for possession of cocaine with intent to deliver based on the “extraordinarily small” amount of the controlled substance involved, or the defendant’s “low level” of participation in the crime. The trial court denied Hills’s motion for a downward departure, finding that Hills possessed a small amount of cocaine at the time of his arrest, and engaged in three suspected drug transactions immediately prior to being arrested. Does this record show that the court exercised its discretion in declining to impose an exceptional sentence downward?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Derrick Hills with Violation of the Uniform Controlled Substances Act: Possession with Intent to Deliver Cocaine. CP 1. The jury convicted Hills as charged, and the trial court imposed the low end of the standard sentencing range,

60 months. CP 15, 34-42; 6RP 23.¹ The court stayed Hills's prison sentence pending this appeal and released Hills on his own recognizance. CP 37; 6RP 24, 27.

2. SUBSTANTIVE FACTS

On February 3, 2010, Seattle Police Officer Martin Harris observed Hills engage in three suspected drug transactions in Seattle's Belltown neighborhood, an area known for frequent drug activity. 3RP 48-61. In the first exchange, Hills handed "something" to a Hispanic male who put the item in a "crack pipe" and smoked it. 3RP 49. Although the item was too small for Harris to see, Harris believed that Hills had engaged in a drug transaction. 3RP 72-73.

To be sure, Harris continued watching Hills and saw him break up some objects in a manner consistent with a person breaking up a "cookie" of crack cocaine for sale on the street. 3RP 52, 77. Hills placed the items in his right pocket and walked a short distance before engaging in a second transaction with a black

¹ The Verbatim Report of Proceedings consists of seven volumes, designated as follows: 1RP (3/8/10, 3/15/10, 4/23/10), 2RP (5/4/10), 3RP (5/5/10), 4RP (5/6/10), 5RP (6/18/10), and 6RP (6/25/10).

female. 3RP 55-56. The female handed Hills money in exchange for a small item that Harris could not discern. 3RP 56. Harris assumed that it was a drug transaction based on his personal experience purchasing narcotics on the street. 3RP 56.

Following the exchange with the female, a white male approached Hills. 3RP 60. Hills took something from his pocket, put it in his mouth, and then dropped it to the ground. 3RP 60-61. The man picked up the item and handed Hills money. 3RP 61. Harris testified that drug dealers commonly conceal rocks of crack cocaine in their mouth to avoid arrest. 3RP 61. Based on the three exchanges, Harris called in nearby officers to arrest Hills. 3RP 62.

While arresting Hills, Seattle Police Officer David Peplowski saw a tissue from Hills's right pocket fall to the ground. 3RP 86-87. Two small rocks of suspected crack cocaine "popped" out of the tissue that later tested positive for cocaine. 3RP 86-87, 142. After being consumed by half in field and laboratory testing, the cocaine amounted to .0039 gram. 3RP 90, 140, 142. Two officers testified that they had seen similar sized "crumbs" sold on the streets, and that people buy two or three dollars' worth of cocaine "all the time." 3RP 53-54; 4RP 28-29. According to one officer, a "\$20 rock" of crack cocaine can net a dealer \$40 "if it's broken up properly and

distributed." 4RP 29. Peplowski found cash hidden in Hills's sock and in several different pockets. 3RP 88.

The State filed charges against Hills on February 8, 2010. CP 1. The court arraigned Hills two weeks later, and scheduled his first case setting hearing for March 8, 2010. Supp. CP ___ (Sub. 7, Notice of Scheduling). At the March 8 hearing, Hills asked "to be reappointed," while describing his frustrations with his appointed counsel, Victoria Freer. 1RP 3. Although Freer had only represented Hills for two weeks, Hills sought to have Freer discharged based on her failure to return his "numerous" calls and set a bail reduction hearing. 1RP 3-4. When Hills admitted that he had refused to see Freer earlier in the day, the court admonished Hills, stating that "you can't refuse to see her and then come into court and say she's not spending enough time with you." 1RP 4.

Consequently, the court denied Hills's motion to substitute counsel and continued the hearing one week for Hills to meet with Freer. 1RP 5. Upon hearing the court's decision, Hills inquired, "What about me being -- I would like to go," before being interrupted by his attorney. 1RP 5. Surmising that Hills might want to represent himself, the court advised Hills:

Sir, if what you're saying is you want to represent yourself, you have a constitutional right to do that, but I'm not going to hear your motion today. I want you to talk with [your attorney], and then I have a fairly large number of questions I need to ask you to make sure that's what you're really asking to do. So let's -- let's set that aside for the minute, but we'll see you in one week.

1RP 6.

Hills told the court at his hearing the next week that he wanted to proceed pro se, and the following exchange ensued:

COURT: Tell me why you want to go pro se.
HILLS: I feel that because due to her scheduling and me being represented fairly and getting a fair trial and being held up, I see it in my best interest, I guess, if I can't be reappointed to represent myself. I don't know law or nothin'. I'm not that good, but I see that I --
COURT: Well, even if you had to go pro se and we set your trial today, within speedy trial, your speedy trial expiration looks to be May 14th. So you'd have a trial in early May. Going pro se isn't going to make it any sooner.
HILLS: Well, and it would start from the 22nd?
COURT: It's --
HILLS: My -- from --
COURT: It started from the last hearing you had. So your expiration is 5/14. So going pro se I don't think is going to speed it up.
HILLS: Okay. Like I say, it's probably in the best and for my fairness, **I still will probably have to be reappointed or go pro se** I don't have a problem with that. I do want to be able to say

something in my own case and my own defense if I have to, than not being not able to [sic]. But also would like to be represented fairly to have a fair trial. And I feel I would not receive that.

1RP 6-8 (emphasis added). Freer added that she and her supervisor had visited Hills separately and that Hills maintained his wish to represent himself. 1RP 8.

Consequently, the court engaged Hills in a lengthy colloquy about his choice to proceed pro se, specifically questioning Hills about the nature of the crime charged, his standard sentencing range upon conviction, the court's inability to assist him at trial, and Hills's inexperience with evidentiary and procedural rules. 1RP 8-10.

Hills inquired whether he could "be pro se with side counsel," and the court informed Hills that having standby counsel did not relieve him of his obligation to represent himself at trial. 1RP 10. The court told Hills that he was making a "terrible decision" to proceed pro se and that "[p]ro se's typically don't do very well in the courtroom." 1RP 10. After being "strongly" encouraged to work with his attorney, Hills responded that he did not feel "it's in my best interest" or that he would receive a fair trial. 1RP 10. The court followed up, asking:

COURT: So in light of the penalty you might suffer if you are found guilty, and the fact that you don't know anything about trying a case and the difficulties of representing yourself, is it still your desire to be pro se in this case?

HILLS: I feel I'm at a bind [sic] not having a choice to go ahead with pro se.

COURT: I find that the defendant has knowingly and voluntarily waived right to counsel. I will permit him to represent himself. So is it your desire, sir, to set your case for trial today?

HILLS: Yes.

1RP 10-11.

The parties set the matter for trial on May 3, 2010. 1RP 11. At omnibus, Hills served the State with a motion to suppress the evidence against him. 1RP 13. Hills requested that the court set a bail reduction hearing for the following week, but did not request an attorney to assist him at the hearing, or at trial. 1RP 12-19.

On May 4, 2010, the parties appeared before the Honorable Mary Yu for trial. 2RP 3. The court began by first asking whether Hills understood "what it means to go to trial without an attorney." 2RP 3. Hills explained that there had been a "mix up" and that all he wanted was another lawyer, but the court "only looked at it as [him] going pro se." 2RP 4. In response, the court told Hills that he did not have a right to select specific, court-appointed counsel;

nevertheless, the court offered to appoint him new counsel for trial. 2RP 4-5. Hills declined the court's offer to appoint him counsel and elected to proceed pro se because "counsel would make me have to have a continuance." 2RP 5.

The court warned Hills that she could not assist him at trial, and questioned him extensively about the crime charged, the mandatory prison term upon conviction, and the consequences of self-representation. 2RP 6-10. When Hills maintained his choice, the court inquired:

COURT: All right. Just, again, wanted to make sure that you know and -- which causes me some concern about you proceeding on your own without counsel. And I know that you want to get this done and you want to get it over with but, Mr. Hills, at the same time, the penalty is so serious and severe which is why having an attorney can assist you in forcing the State to put on its evidence. And if you haven't studied law and you're not familiar with the rules of procedure and the rules of evidence, the likelihood of you being successful may not be great.

HILLS: I understand.

COURT: And when we -- all right. So do you still want to proceed on your own?

HILLS: Proceed on my own.

2RP 10.

The court questioned Hills further about the process and specifically asked whether anyone had coerced or tried to force Hills into appearing without an attorney. 2RP 12. Hills answered "No," and the court subsequently found, "I'm convinced that you're doing this with full knowledge and appreciation of the consequences of proceeding without an attorney." 2RP 12.

Hills represented himself throughout the trial, moving to suppress the evidence against him, making the opening statement and closing argument, raising objections, and cross-examining witnesses. 2RP 13-14, 64-66; 3RP 42, 65-73, 91-98, 107-12, 123-25, 141-43; 3RP 29-34, 49-60. Hills did not request an attorney to represent him at any point. After releasing the jury for deliberations, the court praised Hills for doing a "superb" job of representing himself and for conducting himself in a respectful, professional, and thoughtful manner. 6RP 20.

After Hills's conviction, the court appointed new counsel to represent him at sentencing. 5RP 2. Hills sought a downward departure based on the "extraordinarily small" amount of cocaine involved, under State v. Alexander.² 6RP 5; CP 57-74. The court

² 125 Wn.2d 717, 888 P.2d 1169 (1995).

denied the motion, finding Alexander distinguishable and noting that although Hills had a "small" amount of cocaine, the evidence suggested that he had engaged in three drug transactions before his arrest. 6RP 22. Consequently, the court imposed a low-end standard range sentence. 6RP 23.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED HILLS'S REQUESTS FOR SUBSTITUTE COUNSEL.

After having unsuccessfully represented himself at trial, Hills claims that the trial court erred by granting his request to proceed pro se. He argues that he was equivocal when he asked to represent himself. Further, Hills claims that "all [he] ever really wanted was the assistance of an attorney he could trust," implying that the court erred by denying his motion to substitute counsel. Appellant's Br. at 15.

Hills's claim fails. When Hills failed to provide the court with a legitimate reason for appointing substitute counsel at the March hearings, the court properly required Hills to choose between either representing himself, or continuing with current appointed counsel. Hills timely and unequivocally chose to represent himself, despite

Judge Armstrong's and later Judge Yu's warnings about the pitfalls of self-representation. Hills never wavered in his commitment to representing himself because he wanted to ensure that he received a trial as soon as possible. The Court should reject Hills's attempts, post-conviction, to recharacterize his position as equivocal in the trial court.

Although Hills does not explicitly argue that the court erred by denying his motion to substitute counsel, he impliedly makes this argument by claiming that the court "forced" him into self-representation when it denied his motion to substitute counsel. Appellant's Br. at 12. Given Hills's claim and the fact that Hills did not ask to represent himself until after the court denied his motion to substitute counsel, this Court should consider Hills's motions separately.³

³ This approach is consistent with the one taken by the Washington Supreme Court in State v. Stenson, 132 Wn.2d 668, 733-42, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). This framework is particularly appropriate given that Hills likens his case to Stenson, arguing that both he and Stenson made "conditional and equivocal" requests to proceed pro se. Appellant's Br. at 12.

A criminal defendant does not have an absolute Sixth Amendment right to choose a particular advocate.⁴ State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Nor does the Sixth Amendment guarantee a "meaningful relationship" between the defendant and his attorney. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). A general loss of confidence or trust in counsel is not sufficient to warrant new counsel. Stenson, 132 Wn.2d at 734; State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

To justify appointment of new counsel, a defendant must show good cause, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. Stenson, 132 Wn.2d at 734. When reviewing a trial court's refusal to appoint new counsel, the court considers: 1) the extent of the conflict, 2) the adequacy of the inquiry, and 3) the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). Whether an indigent defendant's dissatisfaction with appointed counsel is meritorious and justifies appointment of new

⁴ The right to counsel of choice does not extend to a defendant who requires appointed counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

counsel is within the trial court's discretion. Stenson, 132 Wn.2d at 733. "When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself." State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

At both the March 8 and 15 hearings, Hills failed to provide the court with a legitimate reason to substitute counsel. Hills told the court at the first hearing that he wanted counsel "reappointed" because Freer did not answer his calls, and did not come to see him until earlier that day. 1RP 3-4. Hills, however, admitted to having refused to see Freer when she came to visit him on March 8. 1RP 4. At the March 15 hearing, Hills told the court that he wanted counsel "reappointed or [to] go pro se" because he did not believe that Freer would fairly represent him. 1RP 7-8. Hills complained that Freer's "scheduling" prevented him from "getting a fair trial" and that he was "being held up." 1RP 7.

None of Hills's stated reasons warranted the court appointing new counsel. Hills did not claim that he had a conflict of interest, an irreconcilable conflict with Freer, or a complete breakdown in communication with Freer. Rather, Hills claimed that he did not

trust Freer's ability to represent him based on her "scheduling," failure to return his phone calls, and failure to visit him prior to the day of his first hearing.

Hills's general dissatisfaction with, and loss of confidence in, Freer was not a legitimate reason to appoint new counsel. See Varga, 151 Wn.2d at 200-01 (holding that the trial court did not err by denying defendant's motion for new counsel based on the defendant's "general dissatisfaction and distrust" of counsel). Similarly, Freer's "scheduling" and inability to return Hills's phone calls, or visit him sooner at the jail, were insufficient reasons to substitute counsel. See State v. Staten, 60 Wn. App. 163, 166-69, 802 P.2d 1384, review denied, 117 Wn.2d 1011 (1991) (holding that the trial court properly denied defendant's motion to substitute counsel based on appointed counsel's failure to return the defendant's calls and visit him in jail).

Having failed to provide the court with a legitimate reason to appoint new counsel, Hills had to choose between representing himself, or being represented by Freer. The court properly required Hills to choose given Hills's failure to articulate a sufficient reason to substitute counsel. DeWeese, 117 Wn.2d at 376; Staten, 60

Wn. App. at 169. The court did not abuse its discretion by denying Hills's motion to substitute counsel.

2. HILLS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.

Having appeared pro se at trial and lost, Hills now claims that his request to represent himself was conditional and equivocal. This claim fails. Hills timely and unequivocally chose to represent himself after Judge Armstrong properly denied his motion to substitute counsel. Hills maintained his choice, even after Judge Yu offered to appoint him new counsel on the morning of trial. The record establishes that Hills made a knowing, voluntary, and intelligent waiver of his right to counsel.

A criminal defendant has a constitutional right to self-representation. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The unjustified denial of this right requires reversal. Stenson, 132 Wn.2d at 737. A court's disposition of a request to

proceed pro se is reviewed for an abuse of discretion. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). A court abuses its discretion when a decision is manifestly unreasonable, based on facts not in the record, or the result of applying the wrong legal standard. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

A defendant's request to proceed pro se must be timely and unequivocal. Stenson, 132 Wn.2d at 737. To be timely, a defendant's request should be made "a reasonable time before trial." State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). The timeliness of the defendant's request is measured from the date of the defendant's initial request. Madsen, 168 Wn.2d at 508. If the defendant's request is made well before trial and unaccompanied by a motion for continuance, then the defendant's right to self-representation exists as a matter of law. Id.

A defendant's request must be unequivocal to "protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants

regarding representation."⁵ Stenson, 132 Wn.2d at 740.

A defendant may request to proceed pro se, while alternatively requesting new counsel, without necessarily rendering his request to proceed pro se equivocal. Madsen, 168 Wn.2d at 507. If a defendant's request is conditional, then the request must be unequivocal in the context of the record as a whole. Stenson, 132 Wn.2d at 741-42.

Upon finding that a defendant's request for self-representation is timely and unequivocal, the court must also find that the request is voluntary, knowing, and intelligent, usually by a colloquy on the record. Madsen, 168 Wn.2d at 504. The record must reflect that the defendant "understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense." DeWeese, 117 Wn.2d at 378.

⁵ A defendant's request to proceed pro se can be "a 'heads I win, tails you lose' proposition for a trial court. If the court too readily accedes to the request, an appellate court may reverse But if the trial court rejects the request, it runs the risk of depriving the defendant of his right to self-representation." DeWeese, 117 Wn.2d at 377 (citation omitted). Judge Yu recognized this quandary, telling Hills that "I don't want this to come back to me frankly when it goes up to the Court of Appeals, that somehow you wanted an attorney and that our court didn't provide you with one." 2RP 7.

Hills timely and unequivocally requested to represent himself. At the first hearing on March 8, Hills started inquiring into representing himself after the court denied his motion to discharge counsel.⁶ 1RP 5. One week later, Hills's first words to the court were that he wanted to proceed "pro se." 1RP 7. Given that Hills requested to represent himself before a trial date had even been set, there can be no question that Hills's request was timely. See Madsen, 168 Wn.2d at 508 (recognizing a defendant's right to self-representation exists as a matter of law when the defendant requests to proceed pro se "well before" trial).

Although Hills requested to represent himself, he also asked to have new counsel "reappointed." 1RP 7. The fact that Hills simultaneously sought two remedies, self-representation and new counsel, is "irrelevant" to whether Hills's request was unequivocal in the context of this record. See Madsen, 168 Wn.2d at 507 (holding that the defendant unequivocally requested to represent himself despite having also requested new counsel); DeWeese, 117 Wn.2d at 378-79 (same).

⁶ Although Hills's counsel prevented him from finishing his sentence, the court surmised the nature of his request, stating, "Sir, if what you're saying is you want to represent yourself, you have a constitutional right to do that, but I'm not going to hear your motion today." 1RP 5.

After the court properly denied Hills's motion to substitute counsel, Hills unequivocally chose to represent himself rather than be represented by Freer. The court warned Hills that he was making a "terrible decision" and that "[p]ro se's typically don't do very well in the courtroom." 1RP 10. Further, the court reminded Hills of the potential penalty and his lack of trial experience. 1RP 10. Nonetheless, Hills responded that he would "go ahead with pro se" because he was in "a bind." 1RP 11.

Hills's "bind," however, was one of his own making. The court did not err by requiring Hills to choose between representing himself, or being represented by Freer, when Hills failed to provide the court with a legitimate reason to substitute counsel. See DeWeese, 117 Wn.2d at 379 (holding a trial court may require a defendant to choose between remaining with current counsel or proceeding pro se after properly denying a defendant's request for substitute counsel). As Hills concedes, he did not have a right to standby counsel, nor did he have a "right to choose any particular advocate." Appellant's Br. at 12; Stenson, 132 Wn.2d at 733.

Rather, Hills had a right to appointed counsel, which he knowingly, voluntarily, and intelligently waived after having been warned of the perils of relinquishing it. Two judges engaged Hills in

extensive colloquies on the record about the crime charged, the mandatory prison sentence upon conviction, and Hills's inexperience with procedural and evidentiary rules. 1RP 8-10; 2RP 6-11. After each colloquy, Hills maintained his decision to proceed pro se. 1RP 11; 2RP 11.

Hills's final exchange with Judge Yu reveals the extent to which Hills knew and fully understood the choice he was making:

COURT: All right. Just, again, wanted to make sure that you know and -- which causes me some concern about you proceeding on your own without counsel. And I know that you want to get this done and you want to get it over with but, Mr. Hills, at the same time, the penalty is so serious and severe which is why having an attorney can assist you in forcing the State to put on its evidence. And if you haven't studied law and you're not familiar with the rules of procedure and the rules of evidence, the likelihood of you being successful may not be great.

HILLS: I understand.

COURT: And when we -- all right. So do you still want to proceed on your own?

HILLS: Proceed on my own.

2RP 10. Judge Yu offered Hills a chance to get out of the "bind" that he had created and he refused. Given this record, Hills cannot claim that he was forced into representing himself, or that he did

not knowingly, voluntarily, and intelligently waive his right to counsel.

Hills's attempts to liken this case to Stenson and United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994) are unavailing. Neither Stenson nor Kienenberger opted to proceed pro se rather than have new counsel appointed on the morning of trial. Indeed, "almost all" of Stenson's conversation with the court focused on his wish for substitute counsel. Stenson, 132 Wn.2d at 742. Stenson "repeatedly discussed" which new counsel should be appointed, filed a written motion requesting that certain counsel be appointed for specific roles, and did not correct the court when it found that he "really [did] not want to proceed without counsel." Id. Under these circumstances, the appellate court found that Stenson's request to proceed pro se was conditional and equivocal, and that the trial court properly refused to allow Stenson to represent himself. Stenson's repeated insistence that new counsel be appointed stands in stark contrast to Hills, who requested new counsel at the March hearings, and then refused new counsel on the day of trial.

The facts of Kienenberger are similarly distinguishable. In Kienenberger, the defendant made "numerous" requests to

represent himself that were always paired with a request that the court appoint “advisory” or “standby” counsel to assist him on procedural matters. 13 F.3d at 1356. Here, Hills asked for standby counsel once, at the March 15 hearing, and then never asked for counsel to assist him again.

From the start, Hills wanted to be released or to proceed to trial as quickly as possible. 1RP 4-5 (telling the court at his first hearing that he wanted to “get out on [his] own recognizance” and declaring himself “ready for trial”). When Hills failed to provide the court with a legitimate reason to substitute counsel, Hills stubbornly chose to represent himself rather than be represented by appointed counsel, even when the court went out of its way to offer him new counsel on the morning of trial. Hills maintained his intransigence, despite two judges' multiple warnings about the difficulties and dangers of self-representation. This Court should reject Hills's post-conviction attempts to recharacterize his waiver as equivocal, and find that the trial court properly exercised its discretion to allow Hills to proceed pro se.

**3. THE COURT PROPERLY SENTENCED HILLS
WITHIN THE STANDARD SENTENCING RANGE.**

Hills argues that the trial court misapprehended its discretion under State v. Alexander⁷ to impose an exceptional sentence downward. Hills essentially renews his claim that the court should have sentenced him to less prison time based on the small amount of cocaine found in his possession at the time of his arrest. Hills's claim fails. The trial court recognized its discretion under Alexander and found these facts distinguishable. The court properly imposed a sentence within the standard range.

To impose an exceptional sentence outside the standard sentencing range, the court must find a "substantial and compelling" reason to justify the departure. RCW 9.94A.535. A court may impose an exceptional sentence downward if it finds by a preponderance of the evidence that mitigating circumstances exist. RCW 9.94A.535(1). In Alexander, the court upheld the trial court's imposition of an exceptional sentence downward on a drug conviction for possession with intent to deliver based on (1) the "extraordinarily small" amount of cocaine involved, and (2) the

⁷ 125 Wn.2d 717, 888 P.2d 1169 (1995).

defendant's low level of involvement in committing the crime.

125 Wn.2d 717, 723, 888 P.2d 1169 (1995).

Although the Alexander court held that each ground provided a substantial and compelling reason to depart from the standard range, the court did not decide whether the amount of cocaine involved, .03 gram, was "extraordinarily small," or whether the defendant's involvement in the crime, leading an undercover officer to a drug dealer and taking a share of the buy money, amounted to a "low level" of involvement. Id. at 723. Indeed, the court expressly limited its holding, noting in multiple places that it accepted the trial court's factual findings as verities on appeal without reaching their underlying sufficiency. Id., 727 n.18, 739 n.21.

Unlike in Alexander, the State did not concede below that the amount of cocaine found on Hills at the time of his arrest was "extraordinarily small." CP 82. Rather, the State argued in closing and at sentencing that Hills possessed an amount of cocaine that that is "commonly bought and sold on the streets of Seattle." CP 83; 4RP 48-49 (referencing Officer Harris's and Officer Diamond's testimony that street-level drug dealers sell "crumbs" of cocaine in Seattle). Further, the .0039 gram of cocaine admitted into evidence at trial was not an accurate reflection of the actual

amount of cocaine found on Hills at the time of his arrest. Field and laboratory testing each consumed half of the substance, suggesting that the actual amount of cocaine in Hills's possession was closer to four times the amount, .0156 gram. 3RP 90, 140.

Similarly, the State did not concede that Hills played a minor role in the crime. To the contrary, the State repeatedly argued and the evidence showed that Hills was "the primary and sole dealer" of cocaine. CP 82-84. Unlike the defendant in Alexander, who served as a "middle man" facilitating a drug transaction, Hills worked alone, engaging in three suspected drug transactions immediately prior to his arrest, with cocaine in his possession at the time of his arrest. 125 Wn.2d at 719; 3RP 49-61, 105. Although Officer Harris could not see the substance being exchanged, Harris saw the first buyer place the substance in a "crack pipe" and smoke it. 3RP 49-51. Harris testified that he had participated in over 3,000 drug arrests and that he was "a hundred percent sure" that he saw Hills engage in drug transactions prior to being arrested. 3RP 73.

Given the factual disparity between this case and Alexander, the court properly exercised its discretion to impose a standard range sentence. Hills misconstrues the court's comments at

sentencing to mean that the court believed that it did not have the discretion to depart from the standard sentencing range. The court, however, indicated that it had read Alexander, its own trial notes, and the certification, and concluded that the "the facts of that case are not like this." 6RP 21-22.

Although the court acknowledged that the amount of cocaine introduced into evidence was "small," the court did not find that the cocaine was "extraordinarily small," as required in Alexander to justify a downward departure. 6RP 22; 125 Wn.2d at 726-27. Further, the court did not find that Hills had a "low level" of involvement in the crime, the alternative ground in Alexander warranting a downward departure. 6RP 22-23; 125 Wn.2d at 728-30. Indeed, the court noted twice that Hills had engaged in three transactions prior to his arrest. 6RP 22-23.

Contrary to Hills's claim, the court properly considered these transactions at sentencing because they were facts proven at trial.⁸

⁸ To convict Hills of possession of cocaine with intent to deliver, the jury must have concluded that Hills's prior exchanges were drug transactions. The State had no other evidence to prove Hills's intent to deliver the cocaine, such as Hills's confession or possession of a scale, a large amount of cash, or large quantity of cocaine. State v. Lane, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (holding that the jury could reasonably infer that the defendants possessed cocaine with the intent to deliver it based on the scale, large amount of cash, and considerable quantity of cocaine in the defendants' household).

See RCW 9.94A.530(2) (permitting the trial court at sentencing to rely on information that is "proved" at trial); State v. Thomas, 68 Wn. App. 268, 273-74, 843 P.2d 540 (1992), review denied, 123 Wn.2d 1028 (1994) (holding officers' testimony that the defendant appeared to be selling drugs prior to his arrest was relevant and admissible to prove what the defendant intended to do with the cocaine in his possession at the time of his arrest).

Hills speculates at length about why the court believed his prior transactions precluded an exceptional sentence, hypothesizing that the court *might* have conflated Alexander's separate bases for an exceptional sentence downward, or that the court *might* have improperly considered the amount of alleged cocaine delivered in the transactions prior to Hills's arrest. Hills's arguments, however, rest on speculation and sidestep the court's ultimate finding distinguishing Alexander from the case at bar.⁹ 6RP 22.

The court candidly admitted to being "empathetic" to Hills and "struggling" to reconcile Alexander with this case. 6RP 22.

⁹ The fact that Hills possessed less cocaine than Alexander at the time of his arrest is irrelevant given the court's limited holding in Alexander, expressly refusing to "reach the question whether .03 gram is in fact an 'extraordinarily small' amount of a controlled substance." 125 Wn.2d at 727 n.18.

After considering the facts, the court concluded that there was no basis for an exceptional sentence downward. The court properly exercised its discretion to deny Hills's request for a downward departure.

D. CONCLUSION

For the reasons stated above, the Court should affirm Hills's conviction and sentence.

DATED this 13th day of April, 2011.

Respectfully submitted,

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