SUPREME COURT NO. _____

NO. 39770-0-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ENCARNACION SALAS, IV,

Petitioner.

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

The Honorable Brandon Johnson, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

Encarnacion Salas IV, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the Court of Appeals' unpublished opinion in State v. Salas, no. 39770-0-III, filed on June 17, 2025. A copy of the opinion is attached as an appendix (App.).

B. ISSUES PRESENTED FOR REVIEW

1. When defense counsel raises concerns about competency to stand trial, those concerns must be given significant weight. Did the trial court err in failing to order a professional competency evaluation when standby counsel raised concerns that Salas was not competent to stand trial?

2. A greater level of competency is necessary to exercise the right to self-representation than simply to stand trial with the assistance of counsel. Did the court err in finding Salas made the necessary knowing, intelligent, and voluntary waiver of the right to counsel when 1) there were concerns about his competency and no professional evaluation was

ordered and 2) Salas was not informed that the sentence of life without parole was not merely possible, but mandatory upon convictions for the charged offense of aggravated first-degree murder?

C. STATEMENT OF THE CASE

Encarnacion Salas IV was charged with aggravated murder after being implicated in the death of a fellow inmate at the Washington State Penitentiary in Walla Walla. CP 3.

His first appearance occurred on January 23, 2023, one month after the information was filed. CP 3; RP 1. At the time, Salas remained in custody of the Department of Corrections (DOC). RP 21. After a brief recitation of his rights by the court, Salas immediately asked to represent himself. RP 8. The court engaged in a brief colloquy, asking Salas whether he had attended law school or had any legal degree. RP 8. Salas answered that he did not. RP 8. The court asked Salas if he was familiar with the rules of evidence; Salas responded he was not. RP 8. Salas agreed that he understood he would be held to the same standard as an

attorney, including the requirement to follow the rules of evidence and other court rules. RP 8-9. The court then granted Salas' request to proceed pro se, informing him he could request re-appointment of counsel at any time. RP 9.

Salas, then objected to the date of arraignment as not being within 14 days, citing CrR 6.11. RP 10. The prosecutor noted arraignment had not yet occurred, as this was merely the first appearance. RP 12-13. The prosecutor offered to proceed immediately to arraignment. RP 12-13. However, when asked for his plea, Salas refused because, he argued, the charges should be dismissed. RP 18. When pressed by the court for a plea, Salas stated, "I am not guilty. That is my plea." RP 21.

At a pre-trial hearing, Salas waived his right to a jury and asked for a bench trial. RP 25-26. He again argued his arraignment was untimely, this time citing CrR 4.1 RP 48. The court attempted several times to explain to Salas that, because he was in DOC custody serving a prior sentence, rather than held in county jail on the pending charges, the 14 days did not begin to

run until his first appearance, which occurred on January 23, 2023, the same date as his arraignment. RP 41-46.

The next issue discussed was discovery. The prosecutor reported it was provided the same day as the omnibus hearing on March 29. RP 54. The court denied Salas' motion to dismiss for violation of the discovery rules. RP 68-72. The court also appointed standby counsel. RP 77-78.

The only other discovery that had not yet been disclosed was a collection of medical records. RP 105. After in camera review due to confidentiality concerns, the court determined they were not relevant and not required to be disclosed under CrR 4.7. RP 105-08. The court again denied Salas' motion to dismiss for violation of the discovery rules in not disclosing the medical records before the omnibus hearing. RP 108-09.

Salas then asked the court to reconsider dismissal based on the date of arraignment. RP 115-16. The court again attempted to explain that arraignment was timely under the criminal rules because it occurred the same day as the first appearance. RP 115-

19. After the state's opening statement, Salas again argued the court should dismiss due to the date of arraignment. RP 125.

At this point, standby counsel alerted the court to her concerns regarding Salas' competency. RP 127-28. She argued there was reason to doubt his competency because of the way he repeatedly argued the same motion after the court had already ruled on it without understanding why the judge had ruled against him and could not let it go. RP 127-28. Salas stated he agreed with standby counsel. RP 128.

The court responded that continually raising the same issue did not show an inability to understand the proceedings or assist in his defense. RP 132. The court then engaged in an extremely brief colloquy, asking Salas if he had ever been diagnosed with a mental disease or defect. RP 133. Salas indicated he had not. RP 133. He then asked Salas if he understood "why we're here today" and if he understood the charges against him. RP 133. Salas answered "yes" to both questions. RP 133. The court then

declared Salas "appears to meet the definition of being competent" and continued the trial. RP 133.

Salas' opening statement consisted of one sentence: "Given our -- based off of the state's evidence, they'll be able to plea the case and in the end, the Judge, you, Your Honor, will be able to make a decision." RP 134.

The state presented evidence linking Salas to the death of fellow inmate Dayva Cross by evidence of DNA, blood trail, surveillance video, and Salas' own statements. RP 169-70, 317-24, 340, 348-62. Over the course of the two days of trial testimony, Salas engaged in virtually no meaningful cross examination of witnesses and objected to none of the exhibits. RP 134-366.

On the second day of trial, Salas again asked the court to dismiss the case based on the date of arraignment and the failure to provide timely discovery. RP 255-56. The court declined to rule on these issues again. RP 256.

Salas waived his right to testify and again moved to dismiss for violation of the discovery rules. RP 368-72. The only evidence Salas attempted to submit pertained to the timing of discovery, not the substance of the charges. RP 374-83. After more argument by Salas, the court reiterated it had already denied the motion to dismiss. RP 384-88.

Salas' closing argument consisted of two sentences: "You'll be able to view evidence and form an opinion. And I have nothing further." RP 395. The court found the elements of aggravated first-degree murder were established beyond a reasonable doubt and found Salas guilty. RP 398-409; CP 8-13.

The court then recited its reasons for finding Salas competent. RP 410-15. The court noted that, throughout the proceedings, Salas appeared articulate, wanted to represent himself, and wanted to avoid delay by having a bench trial. RP 410-11. The court noted Salas spent the trial poring over rule books and taking notes. RP 412. The court noted that, after a prior trial, Salas' conviction had been reversed on appeal,

whereupon he was again convicted at a second trial. RP 413. The court concluded Salas made tactical decisions aimed at setting up appellate issues. RP 413-14. The court noted Salas' prison email messages also showed understanding of his situation. RP 415.

Salas then moved for a new trial based on prosecutorial misconduct, which the court again denied. RP 417-18. Salas indicated he would be following up with a written motion but did not do so. RP 417-18.

At Salas' request, standby counsel was appointed to represent him at sentencing. CP 6; RP 421. Counsel immediately repeated her concerns regarding Salas' competence. RP 422. The court indicated it would go ahead with sentencing. RP 424. Standby counsel noted her objection to the sentencing going forward, and specifically stated that, to understand her concerns about competence, one would have to see Salas in person, rather than on the video-conferencing technology being used for the sentencing hearing. RP 425-26.

The court then imposed the only sentence possible under the law: life without the possibility of parole. RP 429-30; CP 15.

On appeal, the Court affirmed Salas' convictions, holding that the trial court did not abuse its discretion in failing to order a professional competency evaluation, despite standby counsel's concerns and that Salas effectuated a knowing, intelligent, and voluntary waiver of the right to counsel despite the doubts about his competency and the failure to inform him that the life without parole sentence was mandatory. App. at 12-13, 15-17. Salas seeks this Court's discretionary review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. This Court should accept review and hold that a professional evaluation is necessary in view of standby counsel's competency concerns.

At the prosecutor's suggestion, standby counsel was appointed to help Salas, who was insisting on representing himself. RP 76-77. When she observed Salas' behavior, standby counsel raised concerns that Salas was not competent to stand trial. RP 127-28. Yet the Court of Appeals affirmed the trial

court's decision not to order a professional evaluation of Salas' competency. App. at 12-14. This Court should accept review under RAP 13.4(b)(1) and reverse because the Court of Appeals decision stands in conflict with State v. McCarthy, 193 Wn.2d 792, 801, 446 P.3d 167 (2019), State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991), and other cases discussed below requiring the court to give significant weight to counsel's competency concerns. Review is also warranted under RAP 13.4(b)(3) because this case presents a significant question of law regarding the Fourteenth Amendment due process right not to be tried while legally incompetent: whether trial courts are also required to give great weight to competency concerns expressed by standby counsel for a pro se litigant. Finally, review is warranted under RAP 13.4(b)(4) because the distinction made by the Court of Appeals between standby counsel and counsel appointed to represent the accused is a question of substantial public interest that warrants this Court's guidance to lower courts.

Competency to stand trial is a fundamental due process issue. State v. Dufloth, 19 Wn. App. 2d 347, 353, 496 P.3d 317 (2021) (U.S. Const. amend. XIV; State v. Ortiz-Abrego, 187 Wn.2d 394, 402-03, 387 P.3d 638 (2017)). No one may be subjected to trial while lacking basic competency. Id. Additionally, procedures must be adequate to protect the right not to be tried while incompetent. Dufloth, 19 Wn. App. 2d at 353 (citing In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001)).

This Court has held that specific compliance with the procedures mandated by chapter 10.77 RCW satisfies due process concerns. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Under that chapter, whenever there is a doubt as to the accused's competency, the court must order a competency evaluation by a qualified professional. RCW 10.77.060 (1)(b). "Incompetency" means a person lacks the capacity to understand the nature of the proceedings or to assist in the defense as a result of mental disease or defect. RCW 10.77.010(19). A genuine

doubt as to competency means "there is reasonable cause to believe, based upon actual interactions with or observations of the defendant or information provided by counsel, that a defendant is incompetent to stand trial." RCW 10.77.010(15) (emphasis added).

Here, there was "reason to doubt" Salas' competency based on the concerns expressed by his standby attorney. When defense counsel raises concerns about competency to stand trial, those concerns must be given significant weight. McCarthy, 193 Wn.2d at 801; Lord, 117 Wn.2d at 901. The Court of Appeals rejected this rationale, distinguishing regularly appointed counsel from counsel appointed as standby to assist a pro se defendant. App. 12-14.

"Washington courts have found that a trial court errs in not ordering a competency evaluation when there is significant evidence that the defendant is not competent." McCarthy, 193 Wn.2d at 804. This is especially true if there is evidence both from defense counsel and from expert witnesses. Id. (discussing

State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001) and State v. Fedoruk, 5 Wn. App. 2d 317, 339-40, 426 P.3d 757 (2018)). By contrast, courts have upheld the denial of a competency hearing when defense counsel expressed no concerns. McCarthy, 193 Wn.2d at 805 (discussing Lord, 117 Wn.2d at 901-04).

In Fedoruk, 5 Wn. App. 2d at 339-40, the court reversed a conviction due to the failure to order a competency evaluation. In that case, Fedoruk had been found competent before trial but began exhibiting extreme behavior during trial. Id. at 338-39. His attorney expressed competency concerns and moved for a mistrial. Id. A post-trial competency evaluation found Fedoruk not competent to proceed with sentencing. Id.

In McCarthy, by contrast, the court approved the trial court's decision not to order a professional evaluation when, although the defendant showed evidence of some delusions, no party raised any competency concerns. 193 Wn.2d at 806. This holding relied in part on Lord, where the court held that having

delusions, without more, did not amount to a significant or legitimate reason to doubt competency such that a professional evaluation was necessary. See Lord, 117 Wn.2d at 901-04.

Similarly, in Fleming, the court held that a trial court did not abuse its discretion in failing to order a competency evaluation and hold a hearing where defense counsel did not request it. 142 Wn.2d at 864, 867.

In this case, standby counsel raised the concern that Salas was incompetent to stand trial. RP 127-28. This was based on her observation of him perseverating on one perceived legal issue. Id. The trial court could and did observe the same behavior. RP 132.

Salas asks this Court to grant review because the Court of Appeals decision conflicts with McCarthy, Lord, Fedoruk, and Fleming, by permitting trial courts to disregard significant competency concerns expressed by trained legal professionals assisting pro se litigants as standby counsel. In failing to give great weight to counsel's competency concerns, the court also fails to follow procedures adequate to protect the due process

right not stand trial while incompetent. In a case with a pro se defendant, courts should be required to give great weight to concerns raised by appointed standby counsel regarding the defendant's competency to stand trial and represent himself. Salas asks this Court to accept review under RAP 13.4(b) and reverse.

2. This Court should grant review and hold that Salas' waiver of the right to counsel was not valid when there were doubts about his competency and he was not informed that, upon conviction, a life without parole sentence would be mandatory.

Salas was in no position to effectuate a knowing, intelligent, and voluntary waiver of the right to counsel for two reasons. First, as discussed above, there were significant doubts about his competency to even stand trial, let alone to represent himself. Second, while he was told of a potential life without parole sentence, he was not informed that, upon a conviction, this sentence would be mandatory, with no discretion for the judge to impose any other sentence. This case raises a second issue regarding what it means to effectuate a knowing, intelligent, and

voluntary waiver of the right to counsel. This Court should grant review of this significant question of constitutional law under RAP 13.4(b)(3).

The constitutional right to the effective assistance of trained defense counsel stands in conflict with the right to self-representation. U.S. Const. amends. VI and XIV; Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Luvene, 127 Wn.2d 690, 698, 903 P.2d 960 (1995). Any waiver of the right to counsel must be unequivocal, in addition to being knowing, intelligent, and voluntary. City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996); Luvene, 127 Wn.2d at 698-99. Courts must give every reasonable presumption against a waiver of the right to counsel. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

A colloquy, on the record regarding the risks of self-representation is "strongly recommended" before allowing a defendant to proceed pro se. City of Bellevue v. Acrey, 103

Wn.2d 203, 211, 691 P.2d 957 (1984). That colloquy should include discussion of the seriousness of the charge, the possible maximum penalty, and the existence of technical procedural rules governing the presentation of his case. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83 (2008). Courts may also consider other factors such as the accused's education, experience with the justice system, mental health, and competency. State v. Burns, 193 Wn.2d 190, 203, 438 P.3d 1183 (2019).

A decision finding a waiver of the right to counsel is reversible on appeal when the order is manifestly unreasonable, is based on untenable grounds, or was reached by applying the wrong legal standard. In re Pers. Restraint of Rhome, 172 Wn.2d 654, 668, 260 P.3d 874 (2011). Here, the court's decision was based on untenable grounds when the court failed to adequately consider Salas' mental condition and failed to accurately advise him of the mandatory life sentence he faced.

In addition to standby counsel's expressed concerns about competency, Salas' behavior leading up to trial gave grave reason to doubt his ability to competently waive the assistance of legal counsel and represent himself. The facts of this case are analogous to those in State v. Englund, 186 Wn. App. 444, 458, 345 P.3d 859 (2015). In that case, the defendant, charged with unlawful possession of a firearm, was completely fixated on his constitutional right to bear arms. Id. Because of this fixation, he did not reply to the trial judge's questions with relevant answers. Id. The trial judge concluded he was not competent to exercise his right to self-representation and denied his request for pro se status. Id. On appeal, this Court affirmed. Id.

A similar irrational fixation impeded Salas's ability to represent himself in this case. He did not meaningfully engage on legal questions other than his motions pertaining to the timing of discovery and arraignment. He even went so far as to refuse to enter a plea at arraignment, insisting the charges must be dismissed instead. RP 18. He perseverated on the same

arguments after the court repeatedly ruled on them and explained the applicable law. RP 48, 72, 108-09, 125, 255-56, 368-72, 385-88. He made no argument on the substance of the charged offense or any of the evidence offered against him at trial. CP 134, 395. This raises significant doubts about Salas' competency to stand trial and certainly to knowingly and intelligently waive the right to counsel and conduct his own defense.

A greater level of competency is necessary to represent oneself than merely to stand trial while represented by trained defense counsel. Rhome, 172 Wn.2d at 660; Indiana v. Edwards, 554 U.S. 164, 177-78, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). In light of this heightened standard, the trial court erred in failing to order a competency evaluation when Salas' standby counsel raised doubts about his competency to even stand trial. RCW 10.77.060 (1)(b). Because a person may meet the low standard for competency yet still lack the competence to defend himself pro se, an evaluation is even more critical when the person seeks to give up the right to the assistance of trained counsel. See

Edwards, 554 U.S. at 178; State v. Sabon, 24 Wn. App. 2d 246, 259-60, 519 P.3d 600 (2022). Here, the court erred in failing to order a professional evaluation of Salas' competency before allowing him to waive his right to counsel. Without such an evaluation, the court lacked sufficient information to determine whether Salas' waiver was truly knowing, intelligent, and voluntary.

In addition to the competency concerns, Salas' waiver was not intelligently informed when he was told merely that life without parole was the maximum possible sentence, not that it was mandatory and was the only sentence that could be imposed upon a conviction. An intelligent waiver of the right to counsel requires some understanding of the "dangers and disadvantages" of proceeding pro se. Acrey, 103 Wn.2d at 209 (citing Faretta, 422 U.S. at 808 n. 2, 835. "[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that

must be observed, before permitting him to waive his right to counsel at trial." Patterson v. Illinois, 487 U.S. 285, 298, 108 S. Ct. 2389, 2398, 101 L. Ed. 2d 261 (1988).

Salas was charged with aggravated first-degree murder. CP 3. Upon a conviction of aggravated murder, the sentencing court has no discretion. RCW 10.95.030; State v. Moen, 4 Wn. App. 2d 589, 603-04, 422 P.3d 930 (2018). The court may not consider mitigating factors. Id. The law requires a mandatory sentence of life without the possibility of parole. Id. No other or lesser sentence is possible. Id.

But the court advised Salas that the "maximum penalty is life in prison." RP 6. This was affirmatively misleading because the use of the term "maximum" implies the existence of a "minimum" and of other possibilities within a range. A sufficient colloquy to ensure an intelligent waiver must include "the range of allowable punishments." United States v. Moskovits, 86 F.3d 1303, 1306 (3d Cir. 1996) (quoting Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948)). "[T]o find a

defendant knowingly and intelligently waived his right to counsel, he must have substantially understood the severity of his potential punishment under the law and the approximate range of his penal exposure." United States v. Schaefer, 13 F.4th 875, 888 (9th Cir. 2021). But in Salas' case, there was no range, only a mandatory life sentence without the possibility of parole.

The court failed to advise Salas on the "range of allowable punishments," when it advised him only that life without parole was the maximum sentence, but did not advise him that it was the only allowable sentence. Without advice on this essential fact, Salas was unable to make a knowing, intelligent, and voluntary waiver of his right to counsel.

Mental health considerations and knowledge of the possible sentencing range are integral to a knowing, intelligent, and voluntary waiver of counsel. Schaefer, 13 F.4th at 888; Rhome, 172 Wn.2d at 665. Salas' waiver of the right to counsel was invalid because the court failed to order a professional assessment of his mental competency despite his concerning

behavior and the concerns of standby counsel. It was also invalid due to the court's misleading advisement about the sentencing consequences. This Court should accept review under RAP 13.4(b)(3), hold there was no valid waiver of Salas' Sixth Amendment right to the assistance of counsel, and reverse his conviction.

E. CONCLUSION

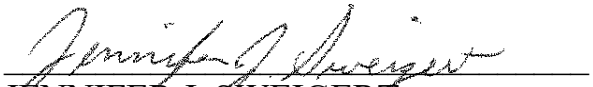
For the foregoing reasons, Salas asks this Court to accept review and reverse.

DATED this 17th day of July, 2025.

I certify that this document was prepared using word processing software in 14-point font and contains 3,869 words excluding the parts exempted by RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

FILED
JUNE 17, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ENCARNACION SALAS, IV, Appellant.	)	No. 39770-0-III UNPUBLISHED OPINION

STAAB, J. — Encarnacion Salas IV appeals his conviction for aggravated first degree murder, raising several issues on appeal. First, Salas contends the trial court erred when it failed to order a competency evaluation after standby counsel raised concerns about his competency to proceed to trial. Second, he challenges the trial court's finding that Salas's waiver of counsel was knowing, intelligent, and voluntary. Specifically, he contends that his Sixth Amendment right was violated and reversal is required where the

court told him only that a life without parole sentence was possible, not that it was mandatory. Additionally, he argues that the victim penalty assessment (VPA) must be struck from his judgment and sentence. Finally, Salas submitted a supplemental statement of additional grounds (SAG) raising five arguments.

We find no errors and affirm Salas's conviction. We remand with instructions to strike the VPA from his judgment and sentence and otherwise affirm his sentence.

BACKGROUND

On December 23, 2022, while incarcerated and serving a sentence for a prior murder conviction, Salas was charged by information with aggravated first degree murder for killing another inmate. Salas was not arrested on the new charge. Instead, the State issued a summons.

Salas's first appearance occurred on January 23, 2023. The transcript suggests that at the time of this hearing, Salas was in Department of Corrections (DOC) custody and appeared remotely by video. The trial court informed Salas that he was being accused of aggravated first degree murder, a class A felony, which meant the maximum penalty was life in prison. Additionally, he was informed that the life imprisonment was without the possibility of release or parole.

After advising Salas of his constitutional rights, the court inquired whether Salas intended to hire an attorney or wanted counsel appointed. Salas responded by moving to

proceed pro se. After clarifying that Salas wanted to represent himself, the following colloquy occurred:

> THE COURT: All right. Well, you want to represent yourself and be your own attorney? Is that what you were saying?
>
> THE DEFENDANT: That is correct, Your Honor.
>
> THE COURT: Okay. Let's have a conversation about that.
>
> Have you attended law school?
>
> THE DEFENDANT: I have not.
>
> THE COURT: Do you have a law degree or have you passed the Bar Association—the bar in—anywhere, including Washington?
>
> THE DEFENDANT: Negative.
>
> THE COURT: Are you familiar with the rules of evidence?
>
> THE DEFENDANT: Not too much.
>
> THE COURT: Okay. So do you recognize if you represent yourself in this matter, you will be held to the same standard of knowledge that a licensed attorney would be held to?
>
> THE DEFENDANT: I understand that.
>
> THE COURT: And that means that going forward, you would have to comply with all of the evidentiary rules contained in the rules of evidence, all of the court rules of learning how cases proceed, and all of the statutes applicable to your case.
>
> THE DEFENDANT: That is correct.
>
> THE COURT: So whatever day then (indiscernible) for purposes of today, I will grant your motion to represent yourself.
>
> I would encourage you to consider that decision because it puts you at a very serious disadvantage in defending yourself.
>
> THE DEFENDANT: Yes.
>
> THE COURT: You are welcome at any time during these proceedings to notify the Court that you do want to have counsel appointed to represent you.

THE DEFENDANT: Very well.
THE COURT: All right.

Rep. of Proc. (RP) at 8-9.

Following this colloquy, the State indicated that Salas was not being held on this matter and the State was not seeking bail since Salas was already in custody serving a prior sentence.

Salas then raised an objection to the timing of his arraignment, citing "criminal law 6.11," and arguing that the rule required that he be arraigned within 14 days of the information being filed. He asserted that dismissal was required because of a due process violation. The court noted Salas's somewhat incoherent objection, renewed its encouragement that Salas have an attorney represent him for his case, and denied the motion to dismiss. Salas declined the offer for counsel, stating that he wanted to stand by his right to proceed pro se.

Though arraignment was originally set at a different time, in light of Salas's choice to represent himself the court offered, and Salas agreed to conduct arraignment at that time. The court then read the information into the record for Salas's benefit. After some discord over the entry of Salas's plea, Salas entered a plea of not guilty.

At a later pretrial hearing, Salas waived his right to a jury trial and requested a bench trial. At this same hearing, the court again expressed its concern with Salas representing himself. In response, Salas renewed his argument that his arraignment was

untimely. The court denied Salas's motion to dismiss his charges, stating that his arraignment was timely because it was done the same day as his first appearance.

In addition to the discussion about CrR 4.1, discovery issues were brought to the court's attention. In particular, the State informed the court that all of the discovery was provided to Salas except for certain medical and mental health records regarding the victim. Salas objected, and the court informed him that it was not going to dismiss his charge based on an alleged discovery violation. The court again advised Salas that it would be in his best interest to have the assistance of an attorney and that he would still be held to the same standard regardless of his lack of familiarity with the rules of criminal evidence. The State then requested that the court appoint standby counsel for trial just in case Salas had a question during the proceedings. The court agreed, and appointed standby counsel, Rachel Cortez, to represent him.

At the beginning of trial, Salas raised objections to discovery and his arraignment, seeking dismissal of his charges. The court attempted to explain to Salas that his arraignment was timely under the criminal rules and that the discovery documents were not relevant or required to be disclosed under CrR 4.7. After Salas continued to bring these issues to the court's attention, standby counsel discussed her concern with Salas's competency:

> MS CORTEZ: And, Your Honor, again, for the record, I know that I do not represent Mr. Salas; that he represents himself.

> This has been something that I have gone back and forth with, have asked other stand-by counsel their opinions. I was just appointed to this case—or somewhat appointed to this last Thursday.
>
> I have concerns about Mr. Salas's competency, which is why I've asked to essentially put a stop to this trial, so that potentially that can be reviewed.
>
> My concern here in just watching the trial process as it started is that he keeps bringing up the same court rule and also not indicating his understanding as to why the judge is making the ruling. His inability to let go of that issue leads me to believe that he is not competent to proceed in the trial.
>
> So I do have a competency issue that I wanted to raise. And, again, I was just appointed very shortly. So this wasn't something I could—I don't even know if I could bring that up. I know that the [S]tate and the Court can file competency evaluations.
>
> But I have concerns, Your Honor, and it needs to at least be said. Thank you, Your Honor.

RP at 127-128.

After hearing from standby counsel, the court then asked to hear from Salas who stated, "Your Honor, I seems [sic] to be in accord with Ms. Cortez." RP at 128. The court asked Salas to clarify, to which he responded "I'm in agreement with Ms. Cortez." RP at 129. After hearing from the State, the court made the following determination regarding competency:

> THE COURT: Okay. Give me one moment. So there—Mr. Salas has had three appearances in this court. Today is the first time that he has appeared in person. He had his first appearance on January 23 of this year. That was before Commissioner Fulton. That was his first appearance and also arraignment when this trial date was set.
>
> There was a second appearance on March 29th. That was for pretrial. That was before this judicial officer, again, via Webex.

And then the third appearance prior to today was on April 13th in the morning when we had our status hearing on this case, as well as a number of others to determine which case was going to go to trial this week.

It was at that point on April 13th that, for lack of a—well, at the Court's strong encouragement, Mr. Salas agreed to stand-by counsel being appointed, but nonetheless was adamant that he wanted to represent himself.

During those hearings, the Court did not note any perceived issues that would give the Court rise to have questions concerning Mr. Salas's competency today.

The Court will agree with Ms. Cortez that Mr. Salas has been adamant on the Rule 4.1 and Rule 4.7 arguments. I do not believe that, by itself, demonstrates a lack of capacity. Frankly, if it did, I would have to have a number of attorneys who appear before me evaluated, because they tend to make the same arguments more than once as well.

Under 10.77.010 "incompetency" means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.

So, Mr. Salas, you are representing yourself, which adds a twist to this to some extent.

Have you been diagnosed with a mental disease or defect at some point?

THE DEFENDANT: No.

THE COURT: Do you understand the—why we're here today?

THE DEFENDANT: Yes.

THE COURT: And do you understand the charge against you?

THE DEFENDANT: Yes.

THE COURT: Okay. I think the Court is going to find, without further evidence or testimony, that Mr. Salas appears to meet the definition of being competent for purposes of RCW 10.77 and that we can otherwise proceed.

> Ms. Cortez, I will say if you observe anything or feel that something has changed, you are welcome to re-raise that issue with the Court.

RP at 131-33.

The case proceeded to a bench trial where Salas represented himself with standby counsel present. The court found that the elements of aggravated first degree murder were established beyond a reasonable doubt and found Salas guilty. Furthermore, at the request of the State, the court made detailed findings of its observations regarding Salas's demeanor, attentiveness, and capacity and his waiver of counsel. Following entry of these findings, Salas moved for a new trial, stating that he would follow up with a written motion for prosecutorial misconduct. The court denied the oral motion, informing Salas he could file a written motion.

At sentencing, standby counsel was appointed as his attorney at Salas's request. Cortez informed the court she was still concerned that Salas was not competent and that she would be filing a ch. 10.77 RCW form with the court. The court stated that the issue was previously raised and that it was already addressed by the court. For this reason, the court informed the parties it was going to proceed with sentencing.

The court imposed a life sentence without the possibility of parole. Additionally, it imposed the $500 VPA.

Salas appeals.

ANALYSIS

1. COMPETENCY EVALUATION

Salas contends the court erred when it failed to order a competency evaluation prior to trial despite the fact standby counsel raised concerns about Salas's competency. The State argues that nothing in the record suggests that Salas was not competent and the trial court thus did not abuse its discretion when it did not order a competency evaluation.

As an initial matter, the parties cite different standards of review. Salas contends a claimed denial of a constitutional right, such as the right to due process, is reviewed de novo. The State contends that the standard of review for ordering a competency evaluation is abuse of discretion.

"Whether a trial court should have . . . ordered a competency evaluation is . . . reviewed for [an] abuse of discretion." *See State v. McCarthy*, 193 Wn.2d 792, 803, 446 P.3d 167 (2019); *State v. Fedoruk*, 5 Wn. App. 2d 317, 335, 426 P.3d 757 (2018). "The trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Fedoruk*, 5 Wn. App. 2d at 335. Thus, this court reviews the trial court's decision not to order a competency evaluation for abuse of discretion.

"An accused person must be legally competent to stand trial." *State v. Dufloth*, 19 Wn. App. 2d 347, 353, 496 P.3d 317 (2021). "The fundamental right not to stand trial unless competent is guaranteed by the due process clause of the Fourteenth Amendment."

Id.; *see also* U.S. CONST. amend. XIV. "Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process." *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Under Washington's competency statutory scheme,

> Whenever there is a doubt as to competency, the court on its own motion or on the motion of any party shall first review the allegations of incompetency. The court shall make a determination of whether sufficient facts have been provided to form a genuine doubt as to competency based on information provided by counsel, judicial colloquy, or direct observation of the defendant. If a genuine doubt as to competency exists, the court shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

RCW 10.77.060(1)(b)(i). Under the statute, "genuine doubt as to competency" means that "there is reasonable cause to believe, based upon actual interactions with or observations of the defendant or information provided by counsel, that a defendant is incompetent to stand trial." RCW 10.77.010(15).

The defense "bears the 'threshold burden' of establishing that there is a reason to doubt the defendant's competency." *Dufloth*, 19 Wn. App. 2d at 354. Although the court gives "considerable weight" to the attorney's opinion regarding competency, "that opinion is not necessarily dispositive." *Id*. Instead, the trial court should focus on whether there is a "'factual basis to doubt the defendant's competence.'" *Id.* (internal quotation marks omitted).

Washington law requires that a trial court order "a competency hearing whenever there is reason to doubt competency." *McCarthy*, 193 Wn.2d at 803. However, once it is determined that a defendant is competent, a trial court is not required to revisit the issue "unless some objective incident or event occurs where the court is provided with new information that indicates a significant change in the defendant's mental condition." *Id*. "Reason to doubt" is "'not definitive, but vests a large measure of discretion in the trial [court].'" *Id*. at 804 (alteration in original). Although there are not any "fixed signs," a court may look to the defendant's "demeanor, conduct, and medical and psychiatric reports." *Dufloth*, 19 Wn. App. 2d at 355.

With these principles in mind, we turn to whether the trial court abused its discretion when it determined there was no reason to doubt Salas's competency. Procedurally, we note that no motion to review Salas's competency was before the court. Neither Salas, nor the State, nor the court alleged incompetence. Instead, Salas's competence was questioned by stand-by counsel who admittedly did not represent Salas. *See State v. Pugh*, 153 Wn. App. 569, 580, 222 P.3d 821 (2009) (standby counsel does not represent the pro se defendant but rather provides the defendant with technical information and is available in case self-representation is terminated). Although Salas agreed he was "in accord" with standby counsel, he then confirmed to the court that he had never been diagnosed with mental disease or defect at any point.

On appeal, Salas contends that the trial court abused its discretion by failing to give significant weight to standby counsel's concerns about competency. This argument fails because it assumes that concerns voiced by standby counsel should be given the same weight and deference as concerns raised by an attorney of record. The record here does not support this argument. Nothing suggests that standby counsel had close contact with Salas, was privy to any privileged communication, or had unique insight into his thought process or mental health.[1] Instead, it appears that standby counsel's concerns were based entirely on observations made in court; the same observations available to the trial court.

Regardless, merely raising a concern is not sufficient by itself to require the court to order a competency evaluation. Instead, the defense first "bears the 'threshold burden' of establishing that there is a reason to doubt the defendant's competency." *Dufloth*, 19 Wn. App. 2d at 354. Then, the court decides whether "sufficient facts have been provided to form a genuine doubt as to competency based on [the] information provided." RCW 10.77.060(1)(b)(i). While a claim of incompetence can initiate the process, the

[1] *See Drope v. Missouri*, 420 U.S. 162, 177 n.13, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) ("Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered.") (internal citations omitted).

court must still independently assess whether there is a genuine doubt about the defendant's competence before ordering an evaluation.

Salas contends that the trial court abused its discretion in finding that there was no reason in the record to doubt Salas's competency. The only fact he points to in support of this argument is his repeated motions to dismiss based on arguments that arraignment was not held in accordance with CrR 4.1. However, as the court noted, this act alone did not call into question his competency when considered in light of all of the circumstances. Incompetency means that a person "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(19). Merely claiming Salas was fixated on certain issues does not demonstrate he lacked the capacity to understand the nature of the proceedings or that he was unable to assist in his defense.

The trial court's determination that there was no evidence of incompetence is supported by the record. Salas did not have a history of mental health diagnosis or treatment. He knew why he was in court, and understood the nature of the charges. Throughout all of the proceedings, the court was able to observe Salas's demeanor, attentiveness, and capacity. The court noted that Salas was articulate in his requests and made reasoned decision after considering his options. He discussed logistics and procedure while raising issues of timing and discovery. During trial, he made objections while writing notes and referring to the rule book.

Under these circumstances, the trial court did not abuse its discretion in failing to order a competency evaluation.

2. SELF-REPRESENTATION

Salas contends his waiver of counsel was not knowing, intelligent, and voluntary because (1) the decision to allow Salas to proceed pro se was unreasonable in light of the considerable doubts about his competency to stand trial, and (2) the court told Salas that a life with parole sentence was possible, not that it was mandatory. We find no error.

This court reviews "a trial court's decision on whether a defendant's waiver of the right to counsel was voluntary, knowing, and intelligent," for an abuse of discretion. *State v. Howard*, 1 Wn. App. 2d 420, 425, 405 P.3d 1039 (2017). However, because this right is so fundamental, if the finding is erroneous, this court cannot treat it as harmless error. *Howard*, 1 Wn. App. 2d at 426; *see also State v. Silva*, 108 Wn. App. 536, 542, 31 P.3d 729 (2001). The burden of proof rests with the defendant to demonstrate the waiver was not knowing and intelligent. *Howard*, 1 Wn. App. 2d at 426. Likewise, "[w]e review a trial court's decision on a defendant's request to proceed pro se for abuse of discretion." *State v. Phan*, 25 Wn. App. 2d 185, 192, 522 P.3d 105 (2022).

Both the Sixth Amendment to the United States Constitution and the Washington State Constitution provide a criminal defendant with "the right to [assistance of] counsel." U.S. CONST. amend. 6; WASH. CONST. art. I, § 22. These same provisions apply to self-representation. *Howard*, 1 Wn. App. 2d at 424. However, there is a conflict

between the right to counsel and self-representation because "self-representation constitutes a waiver of the right to counsel." *Id*. For this reason, "the right to self-representation is not absolute." *Id*. Instead, a court may allow a defendant to represent himself, but only if his waiver "is voluntary, knowing, and intelligent." *Id*. Similarly, a "defendant wishing to invoke his right to self-representation must make an affirmative, unequivocal demand to waive counsel and proceed pro se." *Phan*, 25 Wn. App. at 193.

Salas claims that the court erred when it allowed him to proceed pro se given the considerable doubts about his competency to stand trial, let alone conduct his own defense. Initially, we note that the parties fail to recognize, much less apply the different standards regarding competency to stand trial versus competency for self-representation. *See In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 661-62, 260 P.3d 874 (2011) (noting that "a trial court [can] limit the right to self-representation when there is a question about a defendant's competency to waive counsel . . . even if the defendant has been found competent to stand trial"). Regardless, Salas's argument fails.

As discussed, the trial court engaged in a colloquy on the record to ensure Salas understood the risks of self-representation. This was after Salas made an affirmative, unequivocal demand that he wished to proceed pro se. The court indicated that it did not have concerns about Salas's competency. As such, it was not an abuse of discretion to allow Salas to represent himself even after standby counsel raised concerns about competency.

Next, Salas asserts that his waiver of counsel was not knowing, intelligent, and voluntary because the court informed him that a life sentence without parole was possible, not that it was mandatory. Thus, the issue pertains to whether Salas was properly informed of the maximum sentence for his charge.

Our Supreme Court has established that a colloquy between the defendant and the trial court is the "'preferred means of assuring that defendants understand the risks of self-representation.'" *Howard*, 1 Wn. App. 2d at 426 (quoting *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). The court explained that at a minimum, and relevant to this appeal, that the colloquy "'should consist of informing the defendant of the nature and classification of the charge, *the maximum penalty upon conviction* and that technical rules exist which will bind [the] defendant in the presentation of his case.'" *Id.* (alteration in original) (quoting *Acrey*, 103 Wn.2d at 211). In the absence of a colloquy, the record should demonstrate "that the defendant understood the seriousness of the charges and knew the possible maximum penalty." *Acrey*, 103 Wn.2d at 211.

Here, the court informed Salas that he was being accused of aggravated first degree murder. Additionally, the court stated it was a Class A felony, which meant the maximum penalty was life in prison, a $50,000 fine, or both. Further, that the life imprisonment was without the possibility of release or parole. Salas was also informed of his constitutional rights, including the right to be represented by an attorney at no expense if he could not afford one. After Salas moved to proceed pro se, the court

conducted a colloquy that apprised Salas of the obstacles he would face representing himself. Even after this colloquy, the court told Salas that if he changed his mind and wished to proceed with counsel, he could advise the court at any point. And on several subsequent occasions, the court urged Salas to reconsider his choice to represent himself. Despite this, Salas still requested to proceed pro se.

In addition to the colloquy, the record demonstrates that Salas understood the seriousness of the charges and knew the possible maximum penalty for aggravated first degree murder. For example, at trial, text messages were introduced where Salas stated he was looking at "yet again Murder in the First Degree" and that with "two murders different case numbers, or cases, you do life." RP at 339. Furthermore, in another exchange of text messages where Salas was discussing the incident, he said "bless the prison system LOL. Hashtag kill someone free tablets. It only cost your life." RP at 335. Finally, another exchange of texts reveal Salas telling his aunt that they received tablets for free "or the cost of our life." RP at 336. Because the court conducted a colloquy with Salas regarding the risks of self-representation, informed him of the maximum penalty for first degree murder, and the record demonstrates Salas understood the nature of his charges and the maximum penalty, his waiver was thus voluntary, knowing, and intelligent.

Finally, Salas relies on *United States v. Erskine*, 355 F.3d 1161 (9th Cir. 2004), which is factually distinguishable. There, the defendant expressly misunderstood the maximum penalty that he faced and the district court failed to correct the misunderstanding. *Id*. The defendant believed that he was facing a maximum term of one year but instead was facing five years. *Id*. at 1165. Here, there was no expression on the record that Salas believed his maximum sentence was anything other than life in prison. For this reason, *Erskine* is unhelpful to Salas's argument.

The trial court did not abuse its discretion when it let Salas proceed pro se and accepted his waiver of representation.

3. VICTIM PENALTY ASSESSMENT (VPA)

Salas contends this court should strike the provision of his judgment and sentence requiring him to pay the $500 VPA because he is indigent and the State concedes.

Under former RCW 7.68.035(1)(a) (2018), a judge was required to impose the $500 victim penalty assessment for one or more felony or gross misdemeanor convictions. However, in 2023, legislation amended this statute. *See* LAWS OF 2023, ch. 449, § 1. This amendment had an effective date of July 1, 2023, and included a provision instructing a court to not impose the penalty assessment if the court found the defendant indigent at the time of sentencing. *See* RCW 10.01.160(3). Defendants are entitled to the benefit of these amendments if their case is pending on direct appeal. *See State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018).

We accept the State's concession and remand with instructions to strike the $500 VPA from Salas's judgment and sentence because the court found him indigent at sentencing.

4. SAG

Salas articulates two additional issues in his supplemental SAG. Each will be addressed, in turn.

1. Prosecutorial Misconduct

Salas alleges prosecutorial misconduct in two separate instances. First, Salas contends the prosecutor violated discovery rules. In particular, he argues the prosecutor was not in compliance with CrR 4.7(a)(1) because the prosecutor failed to disclose documents by the omnibus hearing.

"In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To show prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *Id*.

We do not need to determine if the prosecutor's conduct was improper because Salas cannot show prejudice. On the record, the court addressed this issue and made a finding and/or conclusion that it did not "believe that [Salas was] prejudiced by the fact that the discovery may have been delivered a few hours later." RP at 385. Furthermore,

the court explained that it did not believe prosecutors were responsible for what happens internally and instead can only do what they can in terms of turning over material. Salas has failed to demonstrate or argue how this alleged error prejudiced him at trial. Consequently, the argument fails.

Second, Salas alleges the prosecutor failed to comply with the rules of professional conduct, 3.8 special responsibilities, that a prosecutor must timely disclose to the defendant all evidence or information known that tends to negate guilt.

Salas has failed to argue what evidence or information was withheld, provide any analysis, or inform this court of the nature or occurrence of any alleged error. As such, this court should decline to review this issue. *See State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). Alternatively, he fails to demonstrate any prejudice, which defeats his prosecutorial misconduct claim.

2. Timeliness of Arraignment

Salas contends that his due process rights were violated when he was arraigned in violation of CrR 4.1(a)(2). This rule provides that a defendant not detained in jail shall be arraigned no later than 14 days after that appearance which next follows the filing of the information or indictment. That if the defendant is not detained in jail or subject to such conditions of release, any delay in bringing the defendant before the court shall not

affect the allowance time for arraignment regardless of the reason for that delay. Salas goes on to list as a supporting fact that a "defendant must plea in arraignment before information or indictment is had" and that "he or she must plea to information or indictment, charges before due process." Supp. SAG at 8.

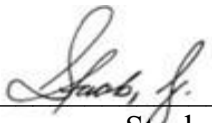
Although it is difficult to ascertain Salas's argument from his SAG, he has raised this issue several times throughout his proceedings and a similar motion was already addressed by the trial court. The 14-day rule from CrR 4.1(a)(2) requires arraignment to be held within 14 days of a defendant's first court hearing following the filing of the information. Here, a summons was filed on December 23 requiring Salas to appear one month later on January 23. At this first hearing, Salas appeared via Webex from prison. He was not in jail, was not being held on this matter, and the State did not seek bail. Salas was arraigned at this first hearing and entered a plea of not guilty. As such, he was arraigned within 14 days of his first appearance in accordance with CrR 4.1(a)(2).

3. Miscellaneous Comments

Salas's argument on competency is addressed above. Otherwise, he provides a paragraph with "core terms," that is indecipherable and we decline to address. *See Alvarado*, 164 Wn.2d at 569.

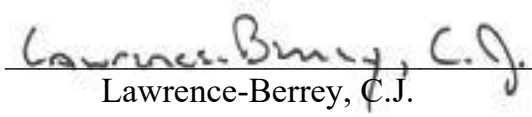
We affirm Salas's conviction and sentence, but remand for the limited purpose of striking the VPA from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Staab, J.

WE CONCUR:



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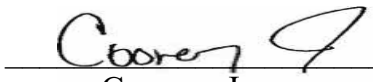

Cooney, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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