

Supreme Court No. 94681-7  
Court of Appeals No. 33990-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Petitioner

v.

JEROME CURRY, JR., Respondent

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ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT .....	1
II. ISSUES PRESENTED .....	1
III. STATEMENT OF THE CASE .....	1
III. ARGUMENT WHY REVIEW SHOULD BE DENIED .....	4
IV. CONCLUSION.....	8

## TABLE OF AUTHORITIES

### *Washington Cases*

<i>State v. DeWeese</i> , 117 Wn.2d 369, 816 P.2d 1 (1991) .....	5
<i>State v. Chávez</i> , 31 Wn. App. 784, 644 P.3d 1202 (1982) .....	7
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995). .....	5
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	5
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	6
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.2d. 714 (2010) .....	7

### *Federal Cases*

<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.1461 (1938).....	5
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### *Other Authorities*

RAP 13.4. ....	4
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## I. IDENTITY OF RESPONDENT

Jerome Curry, Jr., respondent here and appellant below, asks this Court to deny the State's petition for review from the Court of Appeals published decision *State v. Curry*, 33990-4-III issued May 16, 2017.

## II. ISSUES PRESENTED

1. The Petition for Review should be denied because the published opinion in this matter is not in conflict with any decision of this Court or any Division of the Court of Appeals, and does not chill a citizen's right to self-representation.
2. The Court of Appeals properly found that Mr. Curry's request to proceed pro se was not unequivocal.

## III. STATEMENT OF THE CASE

Jerome Curry was charged by amended information with possession of heroin and methamphetamine for events that occurred on December 29, 2014. CP 108. On May 7, 2015, Mr. Curry's attorney moved for him to proceed pro se or select new counsel. (5/7/15) RP 1; CP 48-51.

The court addressed Mr. Curry:

THE COURT: ...And sir, you're here before the court requesting that you be able to represent yourself; is that right?

THE DEFENDANT: Oh, yes, but no.

THE COURT: All right. You don't sound very certain about that. Tell me about that.

(5/7/15) RP 3.

THE DEFENDANT: Basically I have no choice, because I'm ready for trial, but I have not gotten all the materials that I need for trial, so I've got to go with what I got. So yes, I'm ready for trial. (5/7/15) RP 4.

Mr. Curry explained he was dissatisfied with his appointed counsel and wanted to represent himself:

THE DEFENDANT: Well, we have different issues on how to fight cases and –and it's like I don't want it to be delayed anymore, because I have obligations that I need to continue from on the streets. And, you know, if I can't continue my obligations that I need to do, you know, I might as well just do them myself. I can do bad by myself.

(5/7/15) RP 7.

Discussing potential trial delays, Mr. Curry said:

Because I basically, I mean, if I've got to sit and wait until the end of June, I might as well go ahead by myself. Because I - I mean, send me to prison or release me. One of the two. I mean, I ain't got time to sit here. I mean, I have obligations on the streets. I'm losing my home. And if I've got to lose my home, I might as well defend my own self.

(5/7/15) RP 13.

The court admonished Mr. Curry that it did not believe he was making a wise decision and questioned him:

THE COURT: And is this a voluntary decision just from your own thinking about it?

THE DEFENDANT: Sort of, kind of, yes.

(5/7/15) RP 15.

Mr. Curry's counsel told the court he had been assigned the case for 30 days, and had not yet received all the materials to evaluate the case. However, he believed he would likely be prepared for trial late the following month. (5/7/15) RP 15-17.

THE COURT: ...Mr. Curry further indicates that he's aware that there are dangers and pitfalls of self-representation, as I've described. Is that right, Mr. Curry?

THE DEFENDANT: Yes.

THE COURT: Nonetheless, he indicates it's his voluntary and steadfast decision at this time to proceed.

THE DEFENDANT: Well, it's not voluntary.

THE COURT: Pardon me?

THE DEFENDANT: It's not voluntary. It's I have no choice in the matter.

THE COURT: Well, it's either your freewill choice of doing this, or somehow there's been some pressure put on you.

*And the only pressure I recall you saying is the time pressure; that is, that you believe you don't have a choice because you don't want an extension of the trial date, since you have other affairs that you believe you need to take care of. And you'd rather have an outcome quicker rather than later on. That's what I understand you to say. Is that accurate?*

THE DEFENDANT: That's -- that's accurate.

THE COURT: Okay. So, with all that, the court finds it is appropriate to permit Mr. Curry to represent himself.

(5/7/15) RP 18-19.

In reversing the trial court, the Court of Appeals determined that the record as a whole indicated Mr. Curry's request for self-representation was equivocal. *Slip Op.\*8.*

#### IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals Properly Reviewed The Trial Court's Disposition Applying The Standard Set By This Court.

This Court should deny review of the decision by the Court of Appeals as it does not fall within the considerations governing acceptance of review. RAP 13.4(b). The Court's decision is not in conflict with any decision by this Court or any published decision of the Court of Appeals.

A defendant's motion to proceed pro se may be granted only if the request is unequivocal. The requirement that a request be stated unequivocally "derives from the fact that there is a conflict between a defendant's right to counsel and to self-representation." *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). The courts are instructed to indulge every reasonable presumption *against* a waiver of the fundamental constitutional right to be assisted by counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.1461 (1938). To protect defendants from making a capricious or impulsive waiver of counsel, his request to represent himself must be unequivocal. *State v. Stenson*, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997). Thus, determining whether the request to proceed pro se is unequivocal depends upon the particular facts and circumstances of each case. *Johnson*, 304 U.S. at 464.

The Court of Appeals decision in this matter follows this Court's direction in *State v. Luvane*, 127 Wn.2d 690, 903 P.2d 960 (1995). In *Luvane*, the defendant moved the court to allow him to proceed pro se. Like Mr. Curry, the defendant told the court he was "prepared to go for myself", "I'm not even prepared about that" and "[t]his is out of my league for doing that." *Id.* at 698-99. The



*Luvene* Court reasoned that taken in the context of the record as a whole, the statements were expressions of frustration about a delay in going to trial and not an unequivocal assertion of his right to self-representation.

Here, the Court of Appeals noted that Mr. Curry's statements, like *Luvene's*, reflected an overriding and singular interest in avoiding a delay. *Slip Op.* \*6. The Court here went on to note "Mr. Curry never identified any strategic reason for preferring an early trial date. He was instead resigned to just get things over with, reasoning, "I can bad do by myself." *Id.*

The State argues that the Court's opinion has introduced a new standard for determining equivocality in this context. (Pet. for Rev. p. 5.) This is incorrect. Rather, as in *Luvene*, the Court of Appeals recognized the complexity of resolving a question of equivocation. *Slip Op.* \*5. The Court properly read this Court's direction in *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) and *Luvene*, finding "a defendant's request for self-representation is equivocal if it is based *merely* on displeasure with counsel's need for a continuance." (*Slip Op.* \*5) (*emphasis added*). That is the case here.

In an earlier case, *State v. Chávez*, 31 Wn. App. 784, 644 P.3d 1202 (1982), the Court encouraged trial courts to consider the subjective reasons a defendant refuses assistance of counsel. The Court listed numerous legal strategic reasons that might underlie the defendants request:

Although each case is different, trial courts should attempt to determine the subjective reasons for the defendant's refusal. A defendant may believe he will be denied any opportunity to speak for himself; that no appointed lawyer would zealously represent him at a state fee; that a distrust of the judicial system necessitates a pro se appearance for a fair trial; the defendant may even feel that appearance pro se may afford a later basis for reversal on appeal; that based upon television portrayals a criminal trial is a simple matter; that the jury would be sympathetic to a lay person who acts as David against the Goliath of the State; because of a blind faith in his innocence and the infallibility of the judicial system, or simply a desire to save money.

*Chávez*, 31 Wn. App. at 798.

Regardless of the underlying reasons, the request must be unequivocal. In *State v. Madsen*, 168 Wn.2d 496, 229 P.2d. 714 (2010), this Court reiterated its admonition that a trial court indulge every reasonable presumption *against* a defendant's waiver of his right to counsel. *Id.* at 504. There, the defendant *unequivocally* and timely attempted to exercise his right to proceed without counsel, and it was error to deny him his right to proceed pro se. *Id.*

This matter was properly resolved under *Luvenc*. The State emphasizes that because Mr. Curry made a timely request and used the proper procedure that means his request was unequivocal. (Pet. for Rev. p. 9). This conclusion does not include the entire record in context. During the colloquy with the court Mr. Curry several times said that he was not voluntarily choosing to represent himself. The very act of filing the motion and later telling the court he was not voluntarily trying to represent himself is the essence of equivocation. Although Mr. Curry provided answers during the colloquy which were satisfactory to the court, the threshold issue of unequivocality was incorrectly decided by the trial court.

The Court of Appeals properly decided the issue in Mr. Curry's case based on the reasoning and decisions of this Court. It did not introduce a new standard or cloud the analysis the court uses in determining whether a waiver of counsel is unequivocal.

#### V. Conclusion

Based on the foregoing facts and authorities, Mr. Curry respectfully asks this Court to deny review of the State's petition.

Dated this 14<sup>th</sup> day of July 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, certify under penalty of perjury of the laws of the State of Washington and the United States, that on July 14, 2017 I sent an electronic copy, by prior agreement between the parties, or sent by USPS mail, first class, postage prepaid, a true and correct copy of the Answer to the Petition for Review to the following:

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