IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT MCGRATH

STATE OF ALASKA,

Plaintiff,

vs.

DAVID S HAEG,
DOB: 1/19/1966
APSIN ID: 5743491
SSN: 471-72-5023

Defendant.

No. 4MC-S04-24 CR.

Opinion of Dr. Russell ✱
Highlight it.
Date on opinion rule

OPPOSITION TO MOTION TO PROCEED *PRO SE*

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW, the State of Alaska, by and through Assistant Attorney General Roger B. Rom, in opposition to defendant's Motion to Proceed *Pro Se*. This motion is based on evidence taken at hearing on August 15, 2006, and is supported by the attached Memorandum of Law. The basis for this opposition is that the defendant is not competent to proceed as *pro se*.

DATED September 18th, 2006 at Anchorage, Alaska.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Roger B Rom

Roger B. Rom
Assistant Attorney General
Alaska Bar No. 9011128

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MEMORANDUM OF LAW

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I. Factual and Procedural History Respond with my incomplete reply to COA + Ted Spraker

In 2004 the Alaska Department of Fish and Game (ADF&G) managed a Predator Control Program in the McGrath area. Permits were issued for certain game management subunits to allow wolves to be taken from the air with the use of an airplane. David Haeg applied for and received such a permit. In March 2004, David Haeg and Tony Zellers, both of whom were licensed under Title 8 as Alaska Big Game Hunting Guides, took a number of wolves with Zellers shooting the wolves they encountered from Haeg's private aircraft which Haeg piloted.

In early March 2004, Alaska State Trooper Brett Gibbens learned that Haeg and Zellers may have been taken wolves outside of their permitted area. Over the

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course of the next several months Gibbens investigation showed that Haeg and Zellers had taken a number of wolves outside of the legally permitted area and provided false information to ADF&G claiming the wolves were taken in a legal area. Eventually, search warrants were executed and the aircraft was seized. In June 2004 both hunters were interviewed by the troopers and admitted that they knew nine wolves were shot from the airplane outside the permit area. Both men were charged with various criminal counts. Zellers case resolved by way of a plea agreement, and Haeg proceeded to jury trial where he was convicted. On September 30, 2005, he was sentenced for five counts of Unlawful Acts by a Guide: same day airborne in violation of AS 8.54.720(a)(15), two counts of Unlawful Possession of Game in violation of 5AAC 92.140(a), one count of Unsworn Falsification in violation of AS 11.56.210(a)(2), and one count of Trapping in a Closed Season in violation of 5AAC 84.270(14). He filed a timely Notice of Appeal in the Court of Appeals.

Appellant initially retained attorney Brent Cole to represent him. After a failed plea negotiation, but prior to trial, appellant fired Mr. Cole and obtained representation by attorney Arthur S. Robinson. Mr. Robinson represented appellant through trial and began working on the appeal. Appellant fired Mr. Robinson and retained the services of Mark Osterman to perfect the appeal. Once the brief was substantially completed and appellant reviewed it, he fired Mr. Osterman. Appellant attempted to waive the assistance of counsel and to proceed *pro se*. The matter was remanded by the Court of Appeals for hearing which occurred in McGrath on August

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So Osterman could withdraw

15, 2006, to determine whether he could knowingly and intelligently waive his right to counsel and whether he is competent to represent himself on appeal.

II. Legal Authority for *Pro Se* Status get cases so is not "conditional"

A criminal defendant has a "conditional" constitutional right to waive counsel and represent himself. *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *McCracken v. State*, 518 P.2d 85, 90-91 (Alaska 1974); *Lampley v. State*, 33 P.3d 184, 189 (Alaska App. 2001) (trial court properly denied defendant's request to represent himself based in part, upon repeated threats to harm trial judge). In order to be granted *pro se* representation, a defendant must clearly and unequivocally express his desire to represent himself. *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541. This constitutional right applies at trial – but not to appeals. *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 120 S.Ct. 684, 692, 528 U.S. 152 (2000) (a criminal defendant has no federal constitutional right to represent himself on appeal). As the *Faretta* court recognized, the right to self-representation is not absolute. The defendant must "voluntarily and intelligently" elect to conduct his own defense, 422 U.S., at 835, 95 S.Ct. 2525 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)), and most courts require him to so in a timely manner. He must first be "made aware of the dangers and disadvantages of self-representation." 422 U.S, at 835, 95 S.Ct. 2525. A trial judge may terminate self-representation or appoint "standby counsel"—even over the defendant's objection—if necessary. *Id.* at 834 n. 46, 95 S.Ct.

done this

??

not ruling

AK?

did

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Rom wants me to have an attorney who is actually working for the State - as all my other attorneys have been

Osterman has stated I'm competent!

Roms job is to maintain a communication [illegible] is best maintained by me being no counsel/ whis[illegible]

2525. The Supreme Court has further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not "seriously undermin[e]" the "appearance before the jury" that the defendant is representing himself. *McKaskle v. Wiggins*, 465 U.S. 168, 187, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Additionally, the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal "chores" for the defendant that counsel would normally carry out. *Id.* at 183-184, 104 S.Ct. 944. Therefore, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer. 120 S.Ct. at 691.

Yes he is ☆ Quote Jackies cases

Wrong! If a defendant feels

Courts disfavor self-representation. Not even the *Faretta* majority attempted to argue that *pro se* representation is wise, desirable or efficient, and some critics argue that the right to proceed *pro se* at trial is akin to allowing the defendant to waive his right to a fair trial. 120 S.Ct. 691 n.9. The Supreme Court has found, that although the right to defend oneself at trial is "fundamental," representation by counsel is the standard, not the exception. *Patterson v. Illinois*, 487 U.S. 285, 307, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (noting the "strong presumption against" waiver of right to counsel). The Supreme Court recently noted that "a *pro se* defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney." 120 S.Ct. at 691.

Not in trial – trial is to show attorneys be [illegible] to protect their own interests

Isn't having corrupt attorneys who work with the prosecution to obtain a conviction at their own client more akin to forcing a defendant to waive his right to a fair trial.

Compare to my representation to my attorneys ☆

"conditional" "Unfunded" trial"

Synonyms or antonyms?

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Given this strong bias against *pro se* representation, the waiver of the right to counsel is not unlike a change of plea. In making these determinations, a trial court must also advise a defendant of his right to counsel, the importance of having counsel, and the dangers of proceeding without counsel. *Evans v. State*, 822 P.2d 1370, 1374 (Alaska App. 1991). Not only must the trial court explain in detail the advantages of legal representation, but it must be satisfied that the defendant understands those advantages as well. *James v. State*, 730 P.2d 811, 813-14, *modified on Reh'g*, 739 P.2d 1314 (Alaska App. 1987). Where the record does not objectively support a finding of knowing and intelligent waiver, the Court of Appeals will reverse a conviction of a *pro se* defendant. *McIntire v. State*, 42 P.3d 558, 562-63 (Alaska App. 2002) (reversing conviction for inadequate inquiry).[1]

These advisements are critical to establishing a valid waiver. They must include an explanation of the function of defense counsel, e.g., conduct *voir dire* to ensure selection of impartial jury, cross-examine state witnesses, object to inadmissible—

1 In *Gladden v. State*, 110 P.3d 1006, 1009-11 (Alaska App. 2005). Gladden was charged with the fairly uncomplicated charge of driving on a suspended license. He watched the court system video which "explained the benefits of counsel in general terms" and the trial judge actually gave him copies of United States Supreme Court opinions, including the landmark opinion of *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) ("the obvious truth that the average defendant does not have the professional legal skill to protect himself when [ ] the prosecution is presented by experienced and learned counsel.") The court of appeals concluded that, "[t]he record suggests that Gladden understood the value of an attorney, at least in general terms." 110 P.3d at 1010. In fact, Gladden insisted on representing himself—arguing that Alaska-licensed "attorneys" were not the same as "counsel" guaranteed to him by the Sixth Amendment. This argument itself certainly suggested that Gladden had a grasp of the significance of the right he was waiving. The case was not complex, and the prosecution's entire case consisted of a certified copy of his DMV record and the testimony of the officer who saw him driving. Yet, the court of appeals reversed, holding that the trial court's inquiry was inadequate, and too general. *Gladden*, 110 P.3d at 1010.

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evidence, call and examine defense witnesses, and argue the case to the jury. And, they must also include an explanation of the dangers of self-representation; it is not sufficient for the trial court to simply advise a defendant that it would be foolhardy to proceed without counsel. The purpose of this inquiry is "so that the record will establish that `[the defendant] knows what he is doing and his choice is made with eyes open.'" James, 730 p.2d at 814 n.1 (quoting, I ABA Standards for Criminal Justice § 3-3.6 commentary at 6.39-40 (2nd ed. 1982)), *modified on reh'g*, 739 P.2d 1314 (Alaska App. 1987). A defendant's past experience with the criminal justice system, although a factor in the ultimate decision on the waiver issue, is not an adequate substitute for these explanations. *McIntire*, 42 P.3d at 562 (*pro se* defendant had been previously been convicted of seven misdemeanors and a felony, had viewed the court system video many times; and was assisted by two paralegals at trial; his experience with criminal justice system did not cure judge's inadequate inquiry).

The proper standard of review of a trial court's findings regarding waiver of a constitutional right is whether the trial court's finding of waiver is supported by substantial evidence. *Walunga v. State*, 630 P.2d 527, 528 (Alaska 1980). Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a question of fact to be determined in light of the totality of the circumstances. *James v. State*, 730 P.2d 811, 817 (Alaska App. 1987), (Singleton, dissenting), *modified on reh'g*, 739 P.2d 1314 (Alaska App. 1987) (*citing Maynard v. Meachum*, 545 F.2d 273, 277-79

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Dr. Russell is one of the 2 physiologists in the entire state able to conduct the exam.

(1st Cir. 1976)). The Alaska Supreme Court requires that the trial court first establish that the defendant can represent himself in a "rational and coherent manner" and then determine whether "the prisoner understands precisely what he is giving up by declining the assistance of counsel" before allowing the defendant to appear *pro se*. *Evans*, 822 P.2d at 1373 (*citing McCracken*, 518 P.2d at 91). The trial judge must explain the advantages of legal representation in "some detail." *Evans*, 822 P.2d at 1373 (*citing McCracken*, 518 P.2d at 92). The record must reflect a clear waiver of the right to counsel. *Evans*, 822 P.2d at 1373 (citing, *O'Dell v. Anchorage*, 576 P.2d 104, 108 (Alaska 1978); *Smith v. State*, 651 P.2d 1191, 1194 (Alaska App. 1982)).

The court must hold a hearing to determine if a defendant is competent to represent himself and whether he waives his right to counsel. *Burks v. State*, 748 P.2d 1178, 1180 (Alaska App. 1988). Even if the court finds that a defendant is competent to represent one's self and makes a knowing, intelligent, and voluntary waiver of the right to be represented by counsel, the court can still deny the defendant's request to proceed *pro se*. If it appears that the defendant would be unable to obey the court's orders or if the court finds it would be necessary to require the defendant to be represented by counsel in order to regulate courtroom decorum, the motion should be denied.

Before a trial court allows a defendant to represent himself, it must determine whether, (1) the defendant is competent to waive his right to counsel, (2) he does in fact knowingly and intelligently waive that right, and (3) the person is minimally competent to represent himself. *Ramsey v. State*, 834 P.2d 811, 814 (Alaska

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App. 1992). The court must be satisfied with two things: that the defendant can represent himself in a "rational and coherent manner," *McCracken*, 518 P.2d at 91, and that he "can conduct his defense without being unusually disruptive." *Adams v. State*, 829 P.2d 1201, 1205 (Alaska App. 1992). Self-representation may be denied if the defendant clearly demonstrates an unwillingness to comply with rules and regulations. *Burks v. State*, 748 P.2d 1178, 1181 n.1 (Alaska App. 1988).

In *Gargan v. State*, 805 P.2d 998, 1000 (Alaska App.), *cert. denied*, 111 S.Ct. 2808 (1991), the court noted that the defendant may be required to be represented by counsel. In *Gargan*, the court found that where a defendant was unable to obey court orders, or unable to manage his own case within the rules of evidence and the general procedure of an orderly courtroom, co-counsel status may be denied. *Gargan*, 805 P.2d at 1001. Gargan was charged with solicitation to commit perjury and tampering with evidence when he attempted to manufacture evidence to exculpate his son who had been charged with burglary. At the joint trial Gargan represented himself while his son was represented by the public defender. Gargan included objectionable statements and violated a protective order in his opening statement. The public defender representing his son moved to sever the trial and for a mistrial as to the son. The motions were granted and the court required Gargan to be represented by a counsel at a new trial before a new jury because of his inability to focus his arguments or obey court orders. The Court of Appeals found that the trial court did not abuse its discretion. *Id.*

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Therefore, there is clear authority to permit this court to exercise it discretion and deny *pro se* status for appellant if the court determines he is unable to obey court orders or present his defense in a coherent manner. *Id.*

III. Legal Argument

At hearing on August 15, 2006, it quickly became apparent that Mr. Haeg is not competent to undertake *pro se* status. While he may be able to knowingly and intelligently waive his right to an attorney, he cannot control his conduct, nor can he provide a coherent strategy for his defense. He repeatedly failed to comply with clear directions from the court. Directions that were in violation of AK Supreme Court decisions

The hearing began at 11:00 a.m. and ended at 10:00 p.m. With a number of short breaks, a short lunch break, and a one and a half hour dinner break, it is estimated that more than eight hours of testimony was taken. During this lengthy testimony it was apparent that the appellant could not stick to the issues that were to be decided at the hearing. There was multiple issues that prompted it was in my fulfillment decision for me to proceed pro se. He constantly deviated from the issues before the magistrate. His inability to focus on a single issue without getting sidetracked into collateral matters is a clear indication he will not be able to address proper points on appeal. He could not describe what points he would brief on appeal, if any. I never said I could not describe the - I said I had not decided which points I would brief.

On a number of occasions the appellant became argumentative with the judicial officer. Throughout the hearing, when objections were sustained, he continued to argue for a different outcome. While his persistence may be appropriate in a different Being firm in the face of unfair judicial conduct is not being argumentative - it is being the zealous advocate required by the constitution

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forum, his conduct showed that he could not accept the authority of the court, even when given a clear directive. The reason for my persistance in face of being held to perfect form while proceeding pro se is because of the following AK cases

He does not understand legal strategy, legal argument, and basic legal principles and procedures. For example, he said during the hearing that he did not understand that he could make objections, or that he could be a witness for himself at a hearing that was brought by his own motion. He claimed he could read the entire book of court rules in a matter of days and understand it well enough to proceed without assistance of counsel. He was confused by the distinction between direct examination and cross examination, and could not distinguish important procedural differences between the two. He does not know when to proceed with a direct appeal or post conviction relief. He thought the hearing on whether he was competent to represent himself was a post conviction relief proceeding. I did not think the hearing was a post conviction relief proceeding — I told the court I intended to file an application for post conviction relief if I Any legal argument he furthers in the Court of Appeals is highly likely not to be presented coherently.

To complicate matters further, his lack of legal understanding combined with his efforts to learn sufficient substantive and procedural law to enable himself to proceed without assistance of counsel, has given him a distorted impression of which rules apply to a given situation. Frequently he would take a statement from a case or the rules out of context and try to apply it to a wholly inapplicable situation. For example, appellant recited a portion from Criminal Rule 35.1 (f) (1), which reads: "in considering a *pro se* application the court shall consider substance and disregard defects of form," but without considering the remainder of the sentence indicating the burden of proof

When I am allowed to proceed pro se. My basic argument at this juncture had to do with the court denying me my right plainly stated in AK Rule 35.1, to file for post conviction relief where my underlying conviction is filed.

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and persuasion, he argued for the far broader principle that in any post conviction proceeding (including, in his mind, his direct appeal), form is totally unimportant and that only substance mattered. He stated that form "falls away." In another words, he is prepared to construe a part of a sentence outside of its context to enable him to represent himself in the Court of Appeals without being subject to the normal procedural requirements. This can only lead to a chaotic presentation which will be entirely disruptive to the legal process. As another example, under subsection (g) of the same rule, he understood that the "court may receive proof by affidavits, depositions, oral testimony, or other evidence." Because he was confused by the distinction between post conviction relief and an appeal, he sought affidavits from approximately twenty or more persons, including opposing counsel. At least one of the affidavits he sought contained a list of 200 questions he wanted answered. He has inappropriately filed a number of motions in the Court of Appeals for 1) evidence and discovery, and 2) to compel a witness to testify on his behalf. He does not understand enough of the legal process to effectively present a coherent appeal.

The defendant is too emotionally involved in his case to represent himself, even at a minimal level. He admitted that he is extremely angry and he got emotional several times during the hearing. The criminal case against him has unquestionably affected his emotional state and it is clear that it is a paramount issue in his life. Whatever the reasons for this may be, his emotional involvement prohibits him from sometimes acting in his own best interest. As indicated above, even when directed to do

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something or to not do something, he will persist because he is unable to control his emotions. But it also affects his reasoning. Because the case is so important to him, he is willing to bend the rules or not follow the rules to follow a particular course he believes is going to be more effective. The hazard posed by this disorganized course of action is that he will pull from the civil rules, rather than from the appellate rules, when he thinks it will give him an advantage or an argument that he wouldn't otherwise have. He has filed motions while represented, even when told not to do so. He cites cases out of context when he feels the point he wants to establish can be found in that case, even when it is not. He does not appreciate the order in the law the rules are designed to maintain.

Unfortunately, because the defendant will rationalize or justify inappropriate conduct, he will put matters before the court that should never be there. For example, in his Motion for Reconsideration of Stay of Guide License Suspension Pending Appeal he filed in the Court of Appeals, identified as Exhibit 8 in the August 15th hearing, he discussed a confidential proceeding he knew he was not to disclose. In his Motion to Proceed *Pro Se*, identified as Exhibit 3 in the August 15th hearing, he again revealed confidential proceedings before the Alaska Bar Association, and included a partial transcript of conversations he had had with his attorney that were secretly recorded. Moreover, he included threats, said he didn't care if the Court of Appeals threw his case out, used inappropriate, vulgar language, and believed doing so was appropriate and effective.

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Appellant's emotional involvement in this case impairs his judgment. In a motion he filed in the Court of Appeals titled Motion for Stay of Forfeiture, Judgment of Restitution and Licenses Suspension Pending Appeal, he attached an appraisal of the airplane forfeited by the judgment of conviction. The appraisal indicates the forfeited airplane has a value of $11, 290. However, he testified at the August 15th hearing that the appraisal was "ridiculously low" and that he knew it was not the "true value." He testified that there was some missing documentation which caused the appraisal to be substantially distorted. Nonetheless, he filed the document with the Court of Appeals knowing it to be extremely inaccurate and misleading. While this may be one significant example, the length of the hearing was at least in part attributed to cross of examination of the defendant and attempts to get him to be forthcoming in his testimony. The court must be able to rely on veracity and trustworthiness of a litigant standing before it. Put in letter from appraiser of place where he states value would rise,

Throughout the hearing appellant was unable to focus his arguments on the issues properly before the court. He was unable to coherently present his case, he refused to follow the directions of the court, and he demonstrated his inability to understand the mechanics of the law necessary to coherently further his case.

IV. Conclusion

Based on the forgoing, it is respectfully submitted that the appellant should not be allowed to represent himself.

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DATED September 18th, 2006 at Anchorage, Alaska.

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Roger B. Rom
Assistant Attorney General
Alaska Bar No. 9011128

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