STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP797-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRANCE LAVONE EGERSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

To invoke the right to self-representation, a defendant must clearly and unequivocally inform the trial court of the desire to forego counsel and proceed pro se. The trial court may ignore or summarily deny an unclear or equivocal demand to go pro se. Conversely, when the defendant properly invokes the right to self-representation, the trial court must hold a *Klessig*[1] colloquy on the request. Did Defendant-Appellant Terrance Lavone Egerson clearly and unequivocally inform the court of a desire to forgo counsel and represent himself such that the court erred in not holding a *Klessig* colloquy on his requests?

The trial court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication. Wisconsin law holds that a request to proceed pro se must be clear and unequivocal. But no published Wisconsin case has squarely addressed whether context is relevant to whether a self-representation request is unequivocal. Case law from other jurisdictions holds that a self-representation request like Egerson's that immediately follows acceptance of counsel, or is reflexive and borne out of momentary frustration, is not an unequivocal request to forgo counsel and proceed pro se.

Oral argument is unnecessary because the issues are adequately addressed in the briefs.

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[1] *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

INTRODUCTION

At a hearing on his lawyer's motion to withdraw, Egerson complained about the lawyer's performance but did not ask to represent himself. When the court granted counsel's motion and announced that it would be appointing substitute counsel, Egerson did not object. When the court warned Egerson that his failure to cooperate with substitute counsel could result in his forfeiture of the right to counsel, Egerson said, "I understand."

Moments later, in response to the court's refusal to hear his claim that the State was withholding discovery, Egerson made two requests to represent himself—the first "with co-counsel," the second "with no counsel." The trial court summarily denied the former request, and said in response to the latter, "Better think about that one."

As the postconviction court properly concluded, Egerson's requests to go pro se were not clear and unequivocal, and thus the trial court did not err in denying them without a *Klessig* colloquy.

The initial request to proceed pro se was equivocal because it was mixed with a request to continue "with counsel." And the second request was equivocal because (1) Egerson had moments earlier also indicated the desire to proceed *by counsel* by accepting the appointment of substitute counsel; and (2) Egerson's request was an impulsive response to the court's refusal to hear Egerson on a pretrial issue.

Alternatively, Egerson forfeited the right to claim a denial of the right to self-representation on appeal because the trial court did not deny his motion by stating only, "Better think about that one," and Egerson made no additional effort to obtain a ruling from the court on his self-representation request.

STATEMENT OF THE CASE

In March 2015, the State charged Terrance Lavone Egerson with felony and misdemeanor counts of violating domestic-abuse-related injunctions and a felony count of stalking, all as a domestic violence repeat offender. (R. 2:1–8.) The charges resulted from Egerson's repeated efforts to contact and harass his wife, A.E., in violation of multiple no-contact orders. (R. 2:3–8.) According to the complaint, Egerson, while in jail, had other inmates make calls to A.E. (R. 2:5.) The State amended the information to charge additional counts before trial. (R. 17; 25; 26.)

In August 2015, before a motion hearing on a separate matter, Egerson's attorney, John Singleton, asked to withdraw as counsel. Attorney Singleton cited communications problems and disagreements over tactics, and asserted that continued representation of Egerson "would potentially cause ethical issues for me." (R. 59:3–9.) The court denied Attorney Singleton's request to withdraw. (R. 59:8–9.)

On October 13, 2015, Attorney Singleton filed a motion to withdraw as counsel because of an "irretrievable breakdown of the attorney-client relationship." (R. 18:1.) In the motion, Attorney Singleton asserted that Egerson "is under the belief that [Singleton] is intentionally working against his interests to get him incarcerated." (R. 18:2.) Singleton said he believed that Egerson's hostility and mistrust was "individualized and . . . not likely to transfer to successive counsel." (R. 18:3.) Singleton said that he had contacted the public defender's office, and they were willing to appoint new counsel. (R. 18:4.)

The court held a hearing on the motion to withdraw on October 26, 2015. (R. 60:1, A-App. 301.) Attorney Singleton argued in favor of withdrawal, and ADA Heitman said that he would not oppose counsel's motion. (R. 60:2–7, A-App. 302–07.) When the court requested Egerson's input

on the motion, Egerson responded with complaints about Singleton's performance and said nothing about wanting to represent himself:

> THE DEFENDANT: Your Honor, I just basically feel that the representation that Mr. Singleton has been giving me has been totally deficient. You know, he's—he hasn't consulted with me in reference to trial preparation if we're going to trial. He hasn't sat down and talked to me in reference to trial strategy or our witness list that we've sat down and prepared. There has been a total breakdown as far as communication is concerned.

(R. 60:8, A-App. 308.)

Egerson then denied calling the victim, a claim for which the court had little patience:

> THE DEFENDANT: I'm not willing to take a plea from Mr. Heitman at all based on the history that he has involved in this case, and I have not called the victim in this case.
>
> THE COURT: Right. So you want me to believe it's just coincidence that someone from the same part of the jail as you happened to make three phone calls to [A.E.]? That's what you're–I'm not asking you to respond, relax. That's what you're expecting this court to believe right now?

(R. 60:8, A-App. 308.)

The court then announced that it would grant Attorney Singleton's withdrawal motion, but told Egerson that he was losing "a very good lawyer" who had "impressed" the court:

> THE COURT: Okay. Mr. Egerson, I'm going to let you withdraw. I'm going to let Mr. Singleton withdraw. But you know that, Mr. Egerson, you may get a lawyer that will come close to being as good as Mr. Singleton, but you won't get one who's better. That's a fact. He's a very good lawyer. I'm very impressed, in the short time I've been back on the bench, with Mr. Singleton's abilities in a number of

> cases. In fact, he's been more than good, especially on constitutional level issues.

(R. 60:8–9, A-App. 308–09.)

Egerson then (oddly) interjected, "I've been impressed." (R. 60:9, A-App. 309.) Growing more impatient, the court ordered Egerson to stop talking: "[N]o, apparently you haven't been [impressed with Singleton], Mr. Egerson, since you—no, Mr. Egerson, you're done talking this morning." (R. 60:9, A-App. 309.)

The court then restated its decision to order the appointment of new counsel. But the court warned Egerson that, if he failed to get along with his new lawyer, he could end up forfeiting the right to counsel:

> THE COURT: I'm going to let you have another lawyer. You think you know so much more about trial strategy and how to prepare a case and how to get ready for trial, we'll see how you do with your next lawyer. But here's the thing, Mr. Egerson. You're heading down a slope, based on this record, where you're going to find yourself . . . in a position where a court says you're waiving your right to counsel. And you're going to be representing yourself, which would be the biggest mistake of your life.

(R. 60:9, A-App. 309.) In response, Egerson said, "I understand." (R. 60:9, A-App. 309.)

ADA Heitman then asked the court to set a date on which Attorney Singleton could turn over the discovery to the new attorney. (R. 60:10, A-App. 310.) Attorney Singleton said that he planned to copy his file and send the copy to the public defender's office, and the court said, "That's fine." (R. 60:10, A-App. 310.)

At this point, Egerson spoke up and alleged that the State was withholding discovery. (R. 60:10, A-App. 310.) When the court cut him off and said that he was not counsel of record, Egerson said, "Well, you know what, Your Honor,

let me represent myself and have co-counsel then." (R. 60:10, A-App. 310.) The court responded, "No," and Egerson complained about ADA Heitman. (R. 60:11, A-App. 311.) Egerson then said, "Let me represent myself and have no counsel." (R. 60:11, A-App. 311.) The court responded, "Better think about that one." (R. 60:11, A-App. 311.) Egerson then said that he was "sick" of ADA Heitman and "tired" of him "charging me with hard charges," and the court adjourned the proceedings. (R. 60:11, A-App. 311.)

The exchange summarized above is presented here in full:

> THE DEFENDANT: There is a lot of discovery that I received in my first cases, which if you're going to show a course of conduct on the stalking charge, there's discovery that the state hasn't turned over to --
>
> THE COURT: Mr. Egerson, you're not the lawyer of record in this case. I'm not interested in --
>
> THE DEFENDANT: Well, you know what, Your Honor, let me represent myself and have co-counsel then.
>
> THE COURT: No.
>
> THE DEFENDANT: It seems like every time I try to do something that's benefiting me, every time there's a problem he -- he's -- I've been having a problem with Nick Heitman ever since, I've been charged with 24 counts, man.
>
> THE COURT: Mr. Egerson --
>
> THE DEFENDANT: Let me represent myself and have no counsel.
>
> THE COURT: Better think about that one.
>
> THE DEFENDANT: I'm sick of him, man. I'm tired of Mr. Heitman charging me with hard charges. He's just continuing to charge me. I'm doing six years for bail jumping.

THE CLERK: November 6th.

THE COURT: November 6th for new counsel.

(R. 60:10–11, A-App. 310–11.)

New counsel Gary Rosenthal was appointed and appeared at the November 6, 2015, proceeding on behalf of Egerson. (R. 61.) Egerson made no further mention of representing himself.

Following the trial held April 4–6, 2016, a jury found Egerson guilty of five counts of knowingly violating a domestic abuse order and one count of stalking, all as a repeat domestic abuse offender. (R. 36:1, A-App. 102.) The court imposed a total sentence of 12 years' initial confinement and 11 years' extended supervision, to be served concurrently with an existing sentence. (R: 36:2, A-App. 101.)

Egerson, by counsel, filed a motion for postconviction relief alleging that the trial court denied his right to represent himself. (R. 41:1.) In the motion, Egerson argued that he had made a clear and unequivocal self-representation request at the October 25, 2015, motion hearing, and that the remedy for the court's erroneous denial of this request was a new trial. (R. 41:7, 12–13.)

In a response opposing the motion, the State argued that Egerson's request was not clear and unequivocal, and thus the trial court's denial of the request did not violate his right to self-representation. (R. 44:6–10.) Egerson's first statement—"let me represent myself and have co-counsel"—was equivocal because it requested both self-representation and representation by counsel. (R. 44:6.) Egerson's second statement was also equivocal when viewed in context. (R. 44:6–8.) Egerson, the State noted, had just accepted the appointment of substitute counsel at the hearing, and Egerson's request to go pro se was a reflexive response to the court's refusal to hear his arguments on a discovery issue. (R. 44:7–8.) The request could thus reasonably be viewed as a

frustrated plea to be heard on this pretrial issue, and not a request to represent himself at trial. (R. 44:8.)

The postconviction court denied Egerson's motion in a written decision and order, relying in part on *State v. Darby*, 2009 WI App 50, 317 Wis. 2d 478, 766 N.W.2d 770. (R. 46:3, A-App. 203.) In *Darby*, 317 Wis. 2d 478, ¶ 25, the postconviction court explained, a defendant's implied suggestions about representing himself were determined to be insufficient to invoke the right to self-representation. (R. 46:3, A-App. 203.) Acknowledging that Egerson's statements were "somewhat clearer" than Darby's, the court concluded that the statements were nonetheless "qualified, *not* unequivocal, and were made in the context of the discussion being had with the court at the time about his ability (or inability) to obtain the discovery in his case . . . ." (R. 46:3, A-App. 203.) The court continued: "The defendant was merely expressing dissatisfaction with his lawyer and trying to remedy what he believed his lawyer was not doing for him. . . . The fact that Egerson accepted new counsel and never requested to represent himself again supports the court's findings in this regard." (R. 46:3, A-App. 203.)

Egerson's statements, the court concluded, "were not sufficiently clear and unequivocal to . . . trigger[] [the court's] duty to make findings that the defendant knowingly, intelligently and voluntarily waived his right to counsel and that he was competent to represent himself at trial." (R. 46:3, A-App. 203.)

Egerson appeals.

STANDARD OF REVIEW

Whether a defendant's request to represent him- or herself is a clear and unequivocal invocation of the right to self-representation is a question of law subject to de novo review. *See Darby*, 317 Wis. 2d 478, ¶¶ 24–25.

ARGUMENT

Egerson did not clearly and unequivocally invoke the right to counsel, and thus the trial court was not required to conduct a *Klessig* colloquy and did not deny Egerson's right to self-representation.

A. To invoke the right to self-representation, a defendant must clearly and unequivocally inform the court of the desire to proceed pro se.

The Sixth Amendment to the federal constitution and article I, section 7 of the Wisconsin Constitution guarantee a state criminal defendant in Wisconsin both the right to counsel and the right to self-representation at trial. *See Faretta v. California* 422 U.S. 806, 819–21 (1975) (the right to self-representation "is . . . necessarily implied by the structure of the [Sixth] Amendment"); *State v. Klessig*, 211 Wis. 2d 194, 201–03, 564 N.W.2d 716 (1997). The right to counsel is "[s]o important . . . that nonwaiver is presumed," *Pickens v. State*, 96 Wis. 2d 549, 555, 292 N.W.2d 601 (1980), *abrogated on other grounds by Klessig*, 211 Wis. 2d at 206, and automatically attaches in Wisconsin after adversary judicial proceedings have been initiated by the filing of a criminal complaint or the issuance of an arrest warrant. *State v. Harris*, 199 Wis. 2d 227, 235 n.3, 544 N.W.2d 545 (1996). By contrast, a criminal defendant who "desires to proceed pro se . . . must so indicate" to the court. *Laster v. State*, 60 Wis. 2d 525, 539, 211 N.W.2d 13 (1973).

In *Faretta*, the Supreme Court observed that "*weeks before trial*, [the defendant] *clearly and unequivocally* declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835 (emphasis added). Based on this language in *Faretta*, state and federal courts have uniformly held that to invoke the right to self-representation, the defendant must *clearly and unequivocally* inform the trial court, in a *timely* manner, of the desire to

forego counsel and proceed pro se at trial.[2] A court has no duty to ask clarifying questions of a defendant who "makes an ambiguous, equivocal statement that could potentially be construed as indicating a desire for self-representation." *Duncan v. Schwartz*, 337 Fed. Appx. 587, 593 (7th Cir. 2009).

In *Darby*, this Court recognized that the requirement that a request for self-representation be clear and unequivocal to invoke the right applies to defendants intending to proceed pro se in the Wisconsin courts. 317 Wis. 2d 478, ¶ 24. "[W]hile a defendant has the right to counsel and the right to self-representation, a defendant does not have any right to make a trial court guess what the choice may be." *State v. Haste*, 175 Wis. 2d 1, 32, 500 N.W.2d 678 (Ct. App. 1993), *abrogated on other grounds by State v. Klessig*, 199 Wis. 2d 397, 404, 544 N.W.2d 605 (Ct. App. 1996).

The requirement of a clear and unequivocal request "prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation." *Darby*, 317 Wis. 2d 478, ¶ 20 (quoting *Adams v. Carroll*,

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[2] *See, e.g., Johnson v. Alaska*, 188 P.3d 700, 704–05 (Alaska Ct. App. 2008) (request must be "clear and unequivocal"); *State v. Hanson*, 674 P.2d 850, 854 (Ariz. Ct. App. 1983) (request must be "unequivocal"); *State v. Carter*, 513 A.2d 47, 50 (Conn. 1986) (request must be "clear and unequivocal;" collecting cases); *Dixon v. State*, 437 N.E.2d 1318, 1321 (Ind. 1982) (request must be "clear and unequivocal" and made "within a reasonable time prior to the first day of trial"); *State v. Stinson*, 424 A.2d 327, 332 (Me. 1981) (request "must be stated unequivocally"); *State v. Hutchins*, 279 S.3d 788, 799, 800 (N.C. 1981) (request must be "an affirmative statement" and "an express indication"); *State v. Garcia*, 600 P.2d 1010, 1015 (Wash. 1979) (request must be "unequivocal" and "made within a reasonable time before trial"); *United States v. Oakey*, 853 F.2d 551, 553 (7th Cir. 1988) (request must be "timely" and "unequivocal"); *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996) (request must be made "clearly and unequivocally"); *Sandoval v. Calderon*, 241 F.3d 765, 774 (9th Cir. 2001) (request cannot be "untimely" or "equivocal").

875 F.2d 1441, 1444 (9th Cir. 1989)). "A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position." *Id.* (quoting *Adams*, 875 F.2d at 1444.) "If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim he had been denied the right to counsel." *Id.* "The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel." *Id.*

Stated differently, "a rule requiring the defendant's request for self-representation to be unequivocal is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation." *People v. Marshall*, 931 P.2d 262, 272 (Cal. 1997).

When a defendant does clearly and unequivocally invoke the right to self-representation, the trial court must engage the defendant in a colloquy to ensure that he or she has validly waived counsel and is competent to proceed pro se. *See Klessig*, 211 Wis. 2d at 203.

The proper remedy for the trial court's failure to conduct such a colloquy is not automatic reversal and retrial, but remand for a retrospective evidentiary hearing. *Klessig*, 211 Wis. 2d at 206–07, 213–14. In some circumstances, it may be difficult to hold such a hearing into the defendant's waiver of the right to counsel and competence to go pro se. *Id.* at 213. But "[i]f the circuit court concludes that it can conduct such an inquiry, then it must hold an evidentiary hearing" on the issues to be resolved. *Id.*

B. Egerson's statements about representing himself were equivocal.

At the October 26, 2015, motion hearing, Egerson made two statements about proceeding pro se. (R. 60:10–11, A-App. 310–11.) As the postconviction court properly concluded, neither of these statements is a clear and unequivocal invocation of the right to self-representation.

The first statement—"let me represent myself and have co-counsel," (R. 60:10, A-App. 310)—is a facially equivocal request for self-representation because it is mixed with a request for counsel. And no right exists to so-called "hybrid" representation under the federal or state constitutions. *State v. Debra A.E.*, 188 Wis. 2d 111, 137–38 & n.26, 523 N.W.2d 727 (1994); *Moore v. State*, 83 Wis. 2d 285, 297–302, 265 N.W.2d 540 (1978).

The second statement—"let me represent myself and have no counsel"—references self-representation only.[3] (R. 60:11, A-App. 311.) But, as developed below, it is also not an unequivocal request for self-representation because the circumstances support a reasonable inference that the request did not reflect a clear choice to forgo counsel and proceed pro se for the duration of the proceedings.

Egerson's statements about self-representation immediately followed the court's announcement that it would grant Attorney Singleton's motion to withdraw and appoint substitute counsel. And, by all indications Egerson favored the court's appointment of substitute counsel.

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[3] For purposes of this analysis, the State assumes that the court denied this request for self-representation. In its alternative argument, see pages 19–21 below, the State maintains that the court did not deny Egerson's request, but held it in abeyance. Egerson then forfeited his self-representation claim by not raising his request again at a later proceeding.

At the October 2015 motion hearing, the parties assumed that the court would order the appointment of substitute counsel if it granted Attorney Singleton's motion—Singleton, for example, speculated about how Egerson might get along with "next counsel." (*See, e.g.*, R. 60:7, A-App. 307.) Immediately after Singleton's reference to "next counsel," the court requested Egerson's feedback on the motion, and Egerson said nothing about representing himself. (*See* R. 60:7–8, A-App. 307–08.) He merely complained about Singleton's performance. (R. 60:8, A-App. 308) ("I just basically feel that the representation that Mr. Singleton has been giving me has been totally deficient. . . .").

When the court first announced that it would be appointing substitute counsel, Egerson did speak up—but not to object to the appointment of counsel; he said that he, like the court, had been "impressed" with Singleton. (R. 60:9, A-App. 309.) When the court reiterated its decision to appoint new counsel, Egerson likewise did not object. (R. 60:9, A-App. 309.) And when the court warned Egerson that his failure to get along with substitute counsel could result in forfeiture of the right to counsel and "representing yourself, which would be the biggest mistake of your life," Egerson responded, "I understand." (R. 60:9, A-App. 309.)

The State submits that Egerson's clear acceptance of the court's appointment of substitute counsel renders equivocal his statements made *moments later* about proceeding pro se.

An analogous situation was presented in *United States v. Brooks*, 532 F. App'x. 670, 671–72 (9th Cir. 2013). There, on the day of trial, Brooks asked to represent himself. *Id.* at 671. But following a *Faretta* colloquy, Brooks changed his mind and decided to proceed with counsel. *Id.* at 672. Then, just before the jury was to be brought in, Brooks changed his mind again and declared that he wished to represent himself. *Id.*

On its face, Brooks's request was apparently unambiguous. But it was summarily denied by the trial court, and the appellate court affirmed. *Brooks*, 532 F. App'x. at 672. Brooks's acceptance of counsel, the appellate court explained, and his request to represent himself "minutes later" showed that "Brooks equivocated and did not make an unequivocal request for self-representation." *Id.* "Brooks's inconsistent positions did not present the unequivocal request necessary to overcome this presumption and invoke his right to self-representation." *Id.*

Likewise, Egerson clearly accepted (if not explicitly chose) representation by counsel just before he asked to represent himself. Egerson's sudden request to represent himself was not unequivocal in light of his prior acceptance of the appointment of new counsel moments earlier.

Significantly, the record also shows that Egerson's request was a knee-jerk response to being denied the opportunity to argue a potential pretrial issue. For this reason as well, it was not an unequivocal request to proceed pro se at trial.

Egerson made his request in direct response to the court's refusal to hear him on a claim that the State was withholding discovery. Leading up that request, the court became impatient with Egerson and ordered him to stop talking. Egerson said that he never called the victim; the court responded "[t]hat's what you're expecting this court to believe right now?" (R. 60:8, A-App. 308.) Egerson then volunteered that he, like the court, was "impressed" with Attorney Singleton (despite just calling Singleton "totally deficient"); the court responded, "Mr. Egerson, you're done talking this morning." (R. 60:8–9, A-App. 308–09.)

Then, when Egerson tried to argue that the State was withholding discovery, the court cut him off and said that it "wasn't interested" and that Egerson "wasn't lawyer of

record." (R. 60:10, A-App. 310.) Frustrated with the court's refusal to hear him out, Egerson interrupted the court and said, "Well, you know what, Your Honor, let me represent myself . . . then." (R. 60:10, A-App. 310.)

While no published Wisconsin decision has addressed a similar request, multiple jurisdictions have held that demands for self-representation that are impulsive and borne out of frustration are not clear and unequivocal. *See Adams*, 875 F.2d at 1444 (a trial court may summarily deny a request for self-representation that is "a momentary caprice or the result of thinking out loud").

In *Jackson v. Ylst*, 921 F.2d 882, 888–89 (9th Cir. 1990), the defendant asked to represent himself after a California court denied his request for substitute counsel at sentencing. The court denied his request, and a federal appellate court upheld this decision on habeas review, concluding that Jackson's request was untimely and equivocal. *Id.* "Jackson's request," the court explained, "was an impulsive response to the trial court's denial of his request for substitute counsel." *Id.* at 888. "Jackson's emotional response when disappointed by the trial court's denial of his motion for substitute counsel did not demonstrate to a reasonable certainty that he in fact wished to represent himself." *Id.* at 889. *See also Reese v. Nix*, 942 F.2d 1276, 1281 (8th Cir. 1991) (no denial of right to self-representation where defendant's request was an expression of frustration with denial for request for substitute counsel); *People v. Hacker*, 167 A.D.2d 729, 730 (N.Y. App. Div. 1990) (same).

Similarly, the Tenth Circuit upheld a Colorado court's determination that a defendant's "impulsive" request to represent himself that was "borne of frustration with" trial delays was not an unequivocal demand for self-representation. *Love v. Raemisch*, 620 F. App'x 642, 648 (10th Cir. 2015). And the California Supreme Court noted in *Marshall* that courts have held that "a motion [for self-

representation] made out of a temporary whim, or out of annoyance or frustration, is not unequivocal—even if the defendant has said he or she seeks self-representation." *Marshall*, 931 P.2d at 271 (collecting cases). There, the California court held that a defendant's self-representation request made out of frustration with the trial court's order that defendant provide blood and bodily tissue samples was not unequivocal. *Id.* at 271, 274.

Here, Egerson had just accepted the appointment of new counsel. But he suddenly asked to represent himself after the court refused to hear his argument on a pretrial discovery issue. The transcript shows that Egerson was frustrated after being shut down by the court—both on the discovery issue and moments earlier when the court ordered him to stop talking. And so he made a spur-of the-moment request to go pro se so as to be heard on the issue at hand. Indeed, the circumstances support a reasonable inference that Egerson wanted only to represent himself on the discovery issue and not for the duration of the proceedings in his case. Egerson's request was an impulsive response to his frustration with the court's refusal to hear his motion, and thus was not an unequivocal request to proceed pro se.

Egerson argues that the trial court's denial of his self-representation request is contrary to the Seventh Circuit's decision in *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016), which he presents as controlling authority. (Egerson's Br. 12–15, 18–23.) Egerson's heavy reliance on *Imani* is misplaced.

To be clear, the Seventh Circuit's *Imani* decision is not controlling authority in Wisconsin state courts. "[F]ederal decisions are not binding on state courts in Wisconsin. [The Wisconsin courts] are bound only by the United States Supreme Court on questions of federal law." *State v. King*, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996) (citation omitted). In fact, the Wisconsin Supreme Court's decision in

State v. Imani, 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40—the one the Seventh Circuit criticized in *Imani v. Pollard* in ordering Imani a new trial—is still binding on Wisconsin courts, and will remain so until or unless the Wisconsin Supreme Court disavows its *Imani* decision.

That said, the State does not argue that the differences between the Wisconsin Supreme Court and Seventh Circuit decisions in *Imani* matter to the outcome of this case. *Imani* simply has little application here. As developed below, the supreme court's decision in *Imani* did not address whether Imani's request to go pro se was sufficient to invoke the right to self-representation; the parties assumed that it was. *See Imani*, 326 Wis. 2d 179. And the Seventh Circuit's decision—which addressed the reasonableness of the supreme court's conclusions that Imani's waiver of counsel was invalid and that Imani was not competent to represent himself—does not conflict with the cases discussed earlier holding that a trial court may deny as equivocal an impulsive or reactive demand for self-representation.

In *Imani*, the defendant, dissatisfied with his attorney's performance, asked to represent himself after the court denied a defense motion to suppress evidence. *Imani*, 326 Wis. 2d 179, ¶¶ 7–8. Imani criticized his lawyer's performance at the suppression hearing and complained that the lawyer had not yet fully investigated the circumstances of the State's analysis of fingerprint evidence. *Id.* ¶ 8. Imani then said that, "having been through this with about three lawyers" he thought he could best represent himself at trial. *Id.* "[A]in't nobody going to represent myself better than me. I've been dealing with this case for over a year now and I'm pretty sure I got a fuller defense prepared that I've been preparing myself, you know, with the help of my lawyers, you know. . . ." *Id.*

The trial court then engaged Imani in an abbreviated *Klessig* colloquy, treating Imani's statement as an

unequivocal statement of the right to self-representation. *Imani*, 326 Wis. 2d 179, ¶¶ 9–10. In the trial court and on appeal, the State never raised the threshold issue of whether Imani's statement was sufficient to invoke the right to self-representation, and thus this issue was not litigated in *Imani*. *See Imani*, 326 Wis. 2d 179.

As framed by the Wisconsin Supreme Court, the issues in *Imani* were whether Imani had validly waived his right to counsel, and whether Imani was competent to represent himself. *Imani*, 326 Wis. 2d 179, ¶ 3. The Wisconsin Supreme Court answered both of these questions no, and thus upheld the trial court's order denying Imani's request to go pro se. *Id.* The court said that Imani's waiver was invalid in part because his request was "flippant" and "episodic driven" and thus inconsistent with a knowing, intelligent, and voluntary waiver of counsel. *Id.* ¶¶ 27–28. And Imani was not competent to represent himself because, essentially, he had only a tenth grade education. *Id.* ¶ 38.

Reviewing the *Imani* decision in federal habeas, the Seventh Circuit held that, once Imani properly invoked his right to self-representation, the state courts could not deny the request on grounds it was "foolish" or "rash." *Imani*, 826 F.3d at 945. Because Imani's request was assumed to be unequivocal in the state (and federal) courts, the federal appellate court did not address whether, on the threshold inquiry of whether a self-representation request is unequivocal, a trial court may summarily deny the request on grounds it is impulsive or borne out of frustration. *See Imani*, 826 F.3d 939. The Seventh Circuit's *Imani* decision is thus not inconsistent with the many cases from other jurisdictions holding that an impulsive or reactive request may be equivocal, and thus fail to invoke the right to self-representation. And this decision is therefore of little assistance to Egerson.

For these reasons, the postconviction court properly concluded that Egerson's request to represent himself was not unequivocal, and thus the trial court properly denied it without conducting a *Klessig* colloquy.

C. Alternatively, the trial court held Egerson's request to go pro se in abeyance, and Egerson forfeited his self-representation request by failing to pursue it in later proceedings.

If this Court disagrees with the State and the postconviction court and concludes that Egerson's request was sufficient to invoke his right to self-representation, it may nonetheless affirm on alternative grounds. *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court."). As argued below, the trial court did not rule on Egerson's request to represent himself, effectively holding the motion in abeyance. Egerson then forfeited the right to make a self-representation claim by failing to seek a ruling on his request to represent himself in later proceedings.

Egerson—and, to be fair, the postconviction court—assume(d) that the trial court denied Egerson's request to represent himself. The trial court did deny Egerson's first request—"let me represent myself and have co-counsel"—with a flat "no." (R. 60:10–11, A-App. 310–11.) But, as noted, that request did not invoke the right to self-representation because it sought "hybrid" representation. *See Debra A.E.*, 188 Wis. 2d at 137–38 & n.26.

Only Egerson's second request—"let me represent myself and have no counsel"—was at least arguably sufficient

to invoke the right to self-representation.[4] (R. 60:11, A-App. 311.) But the court did not expressly deny that request. Rather, it said only, "Better think about that one." (R. 60:11, A-App. 311.) Whether the court meant this statement as a warning to Egerson or as an assertion that the court would hold the request in abeyance (practically, "You" versus "I" "better think about that one"), the court did not rule on Egerson's request to go pro se and effectively left it to be decided at a later date.

The court never did return to the request. But neither did Egerson. At the next two proceedings before trial, newly appointed counsel appeared on Egerson's behalf, and Egerson did not request a ruling on his October 2015 self-representation request, whether through counsel or by a pro se letter to the court. (R. 61:2; 62:3.) Under these circumstances, the State submits that Egerson abandoned his self-representation request, and thereby forfeited his right to argue on appeal that the court denied his right to self-representation. *Cf. State v. Cole*, 2008 WI App 178, ¶ 33, 315 Wis. 2d 75, 762 N.W.2d 711 (appellant has duty to preserve issues for review).

The State is not arguing here that a defendant must make a request to go pro se more than once to properly invoke the right. *See Imani*, 826 F.3d 939, 945 n.1 ("Nothing in *Faretta* or its progeny indicates a trial court may require a defendant to repeat his attempts to invoke his right to self-representation."). The State's position is merely that, when, as here, the court does not rule on a defendant's self-representation request, but effectively holds it in abeyance, the defendant must do *something* to ensure that the court

[4] Of course, the State believes that it was not sufficient to invoke the right for the reasons argued in the prior section.

decides the motion to be able to claim a denial of the right to self-representation on appeal.

If this Court disagrees, and concludes that Egerson both properly invoked his right to self-representation and did not forfeit any claim that he was denied the right, the proper remedy is remand for a retrospective evidentiary hearing. *See Klessig*, 211 Wis. 2d at 206–07, 213–14; *State v. Lentowski*, 212 Wis. 2d 849, 855, 569 N.W.2d 758 (Ct. App. 1997) ("[T]he remedy for a deprivation of Sixth Amendment protections 'should be tailored to the injury suffered from the constitutional violation.'"). If, on remand, the circuit court were to determine that such a hearing is feasible, the court would hold such a hearing before addressing the ultimate question of whether Egerson was denied his right to self-representation. *Klessig*, 211 Wis. 2d at 206–07, 213–14.

CONCLUSION

The order denying postconviction relief and the judgment of conviction should be affirmed.

Dated this 9th day of February, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,885 words.

Dated this 9th day of February, 2018.

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JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of February, 2018.

_____
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