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STATE OF WASHINGTON

NO. 80865-1

2001 NOV 30 P 3-22

BY RONALD R. CARPENTER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GLEN SEBASTIAN BURNS,

Petitioner.

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**ANSWER TO MOTION FOR DISCRETIONARY REVIEW**

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**A. ISSUES PRESENTED**

1. Whether petitioner Glen Sebastian Burns has failed to establish grounds under RAP 13.5(b)(2) for the Washington Supreme Court to take discretionary review of an interlocutory decision by the Court of Appeals.

2. Whether Burns has failed to show that the Court of Appeals committed probable error when it denied his motion to proceed pro se on appeal.

3. Whether Burns has failed to show that the Court of Appeals has substantially limited his freedom to act when it denied his motion to proceed pro se on appeal.

**B. RELEVANT FACTS**

On the night of July 12, 1994, Tariq Rafay, his wife Sultana Rafay and their daughter Basma Rafay were bludgeoned to death in their home in Bellevue. The sole surviving Rafay family member, Atif Rafay, and his friend Glen Sebastian Burns claimed to have discovered the bodies after returning home from a night out. A few days later, Burns and Rafay left for Canada and then refused to cooperate with the police investigating the murder.

During an undercover operation conducted by the Royal Canadian Mounted Police, Burns and Rafay confessed to committing the murders. On July 31, 1995, after the State charged Burns and Rafay with three counts of aggravated murder in the first degree, they were arrested in Canada. CP 1-3. Burns and Rafay fought extradition and were ultimately returned to Washington in 2001.

Burns has been represented by numerous attorneys on these charges. His original attorneys, Neil Fox and Theresa Olson, withdrew after Burns was discovered having sexual contact with Olson in the King County Jail. Attorneys Jeff Robinson, Song Richardson and Amanda Lee were then appointed and represented Burns through a seven-month trial. On May 26, 2004, a jury found Burns and Rafay guilty as charged. CP 3175-80.

Sentencing was delayed for many months because Burns moved for a new trial, claiming ineffective assistance of counsel. The court appointed new counsel for Burns, William Jacquette. CP 3195. Dissatisfied with Jacquette, Burns subsequently moved to represent himself on the motion, which the trial court ultimately denied. CP 3198-3202. During the hearing on Burns's motion to proceed pro se, the trial court inquired whether Burns intended to

represent himself on appeal, and Burns responded that he intended to ask the court to appoint appellate counsel. 156RP 20-21.

At the sentencing hearing on October 22, 2004, a new privately retained lawyer appeared, representing Burns. 157RP 1-6. Observing that Burns was able to hire counsel, the trial court indicated that it would be disinclined to appoint publicly funded appellate counsel for Burns. 157RP 89. Nonetheless, after Burns filed his notice of appeal, he moved for appointment of an appellate attorney to represent him at public expense. See Appendix A to State's Response to Burns's Motion to Proceed Pro Se and Allow Counsel to Withdraw ("State's Response") dated September 5, 2007.<sup>1</sup> Despite the court's earlier warning, it granted this motion. CP 3373.

In November of 2004, attorneys from the Washington Appellate Project were assigned to represent Burns. Burns's appeal was then consolidated with the appeal of his co-defendant Rafay.

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<sup>1</sup> The pleadings filed in the Court of Appeals concerning Burns's motion to proceed pro se are attached to his Motion for Discretionary Review.

Due to the enormous record on appeal,<sup>2</sup> appellate counsel for both Burns and Rafay obtained numerous extensions of time to file their opening briefs. In the various motions for extension, Burns's attorneys indicated that they had met and consulted with Burns about the appeal, provided portions of the record to him and shared drafts of the brief.<sup>3</sup> Finally, nearly three years after his sentencing, on July 13, 2007, Burns's attorneys filed a 191-page opening brief on his behalf.

Burns's appellate attorneys subsequently reported that shortly after the filing of his opening brief, Burns informed them that he wished to represent himself on appeal. Burns's Motion to Proceed Pro Se and Allow Counsel to Withdraw dated August 20, 2007 ("Burns's Pro Se Motion") at 2. Burns's appellate counsel subsequently filed a motion on his behalf. In the motion, Burns did not articulate why he wished to proceed pro se. The sole basis for the motion was Burns's claim that he has a constitutional right to represent himself on appeal.

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<sup>2</sup> The transcripts amount to approximately 25,000 pages.

<sup>3</sup> See Motion for Extension of Time to File Opening Brief dated July 6, 2007 at 3; Motion for Extension of Time to File Opening Brief dated June 7, 2007 at 3; Motion for Extension of Time to File Opening Brief dated May 14, 2007 at 3; Motion for Extension of Time to File Opening Brief dated August 31, 2006 at 2.

Approximately one week after Burns's motion was filed and before receiving a response from the State, Commissioner James Verellen initially granted Burns's motion. After the State filed its response opposing Burns's motion, Commissioner Verellen withdrew his original ruling and referred the matter to a panel of three judges. On October 8, 2007, the Court of Appeals unanimously denied Burns's motion.

In the meantime, Burns, pro se, obtained an extension of time to file a Statement of Additional Grounds for Review until January 16, 2008.

Burns has now filed a motion for discretionary review with this Court.

**C. ARGUMENT**

**1. BURNS HAS FAILED TO SHOW THAT THE COURT OF APPEALS COMMITTED PROBABLE ERROR JUSTIFYING DISCRETIONARY REVIEW UNDER RAP 13.5(b)(2).**

Burns claims that the Court of Appeals committed probable error and substantially limited his freedom to act when it denied his motion to proceed pro se. This claim is not well-taken. Given that Burns waited to make his motion until nearly three years into his

appeal and after his 191-page opening brief had been filed,<sup>4</sup> the Court of Appeals acted well within its discretion in denying his motion. Nor has Burns's freedom to act been substantially limited, as he retains the right to file a pro se Statement of Additional Grounds for Review. This Court should deny the motion for discretionary review.

a. The Court Of Appeals Properly Denied Burns's Request To Represent Himself On Appeal.

The Court of Appeals did not commit probable error. As the Washington Supreme Court has recognized, Burns's ability to file a pro se statement of additional grounds for review satisfies any possible right he has to self-representation on appeal. Moreover, there is no Washington authority that supports Burns's claim that he has a *constitutional* right to represent himself on appeal. Finally, even assuming Burns had a right to represent himself pro se, the Court of Appeals had the authority to deny the motion given its untimeliness.

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<sup>4</sup> Burns's opening brief also incorporated by reference the additional issues raised by his co-defendant Rafay's 188-page brief.

Burns claims that he has a constitutional right to represent himself on appeal under Const. art. 1, § 22. However, no Washington case has recognized that a criminal defendant has a state constitutional right to represent himself on appeal. In State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001), the only Washington case where this issue has been discussed, the Supreme Court declined to resolve the issue, but held that the defendant's ability to raise issues in pro se briefing satisfied any possible right:

Procedurally, although we denied McDonald's motion for self-representation, we allowed McDonald to raise separate issues in pro se briefing. This is also true procedurally for the Court of Appeals. **Therefore, McDonald was not denied any right to proceed pro se.**

McDonald, 143 Wn.2d at 511 n.3 (emphasis added); see also Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152, 164, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (state rules governing appeals seem to protect the ability of indigent litigants to make *pro se* filings).

Here, Burns has the right under RAP 10.10 to file a Statement of Additional Grounds for Review and has indicated that he intends to do so. This is sufficient to protect any right that he may have to represent himself in this appeal.<sup>5</sup>

Before the Court of Appeals, Burns argued that an examination of the Gunwall<sup>6</sup> factors established that he has a state constitutional right to represent himself on appeal. In response, the State provided a full analysis of the six Gunwall factors; they do not support the notion that a state constitutional right to proceed pro se on appeal exists. See State's Response at 6-13. There is no significant history in Washington of criminal defendants representing themselves on appeal. In fact, with respect to the right to proceed pro se at trial, Washington courts have followed federal caselaw and not developed a separate state law

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<sup>5</sup> Burns points out that RAP 10.10 was amended after McDonald. The amendments made a number of changes to the previous procedures concerning pro se supplemental briefs. However, for purposes of McDonald, the basic right remains the same: the defendant is entitled to a copy of the record and may file a statement of up to 50 pages "to identify **and discuss** those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel." RAP 10.10 (emphasis added). While the defendant is not required to put the statement in brief format, he may do so. See Drafters' Comment to RAP 10.10.

<sup>6</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

jurisprudence.<sup>7</sup> The federal courts do not recognize a right to proceed pro se on appeal. See Martinez, 528 U.S. at 163.

Accordingly, there is scant support for Burns's claim that he has a state constitutional right to self-representation on appeal.

In any event, this case does not squarely present the issue of whether a defendant has a state constitutional right to proceed on appeal because, even assuming such a right exists, the Court of Appeals had the discretion to deny Burns's motion as untimely. Even in the context of a criminal trial, where the defendant's right to represent himself is established, the court has the discretion to deny a motion to proceed pro se when it is untimely. State v. Garcia, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979) ("If the request is made shortly before or as the trial is to begin, the existence of the right depends on the facts with a measure of discretion in the trial court."); State v. Modica, 136 Wn. App. 434, 443, 149 P.3d 446, (2006) (same).

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<sup>7</sup> See State v. Kolocotronis, 73 Wn.2d 92, 97-98, 436 P.2d 774 (1968) (holding right to self-representation under the Washington constitution was no more extensive than that allowed under the federal constitution); see also State v. Stenson, 132 Wn.2d 668, 737-42, 940 P.2d 1239 (1997); State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995); State v. DeWeese, 117 Wn.2d 369, 375-79, 816 P.2d 1 (1991); but see State v. Silva, 107 Wn. App. 605, 613-22, 27 P.3d 663 (2001) (holding that state constitution provided a pro se pretrial detainee with greater right of access to the court than did federal law).

Here, Burns only brought his motion after his appeal had been pending for nearly *three* years and after his attorneys had filed a 191-page brief on his behalf. Throughout this process, Burns's two attorneys met with him, and provided him with transcripts and drafts of the brief being prepared. By the time of his motion, Burns's case had been consolidated with Rafay's and both defendants had filed their opening briefs, adopting each other's arguments. Burns's motion was the equivalent of a defendant seeking to proceed pro se after his trial is well underway. It was too late.

RAP 18.3(a)(1) recognizes that after the opening brief has been filed, withdrawal of counsel is heavily disfavored. That rule provides that "[c]ounsel for a defendant in a criminal case may withdraw only with the permission of the appellate court on a showing of good cause. The appellate court will not ordinarily grant permission to withdraw after the opening brief has been filed." Burns has never attempted to establish good cause and never acknowledged that the Court of Appeals had some discretion in the matter. Instead, he has been silent about the reasons for his

motion and his future intentions, and has simply argued that the Court of Appeals had no choice but to grant his motion because he has a constitutional right to proceed pro se.

Given the timing of Burns's motion -- he told his attorneys to make it shortly after receiving the opening brief -- the obvious inference is that Burns was in some way displeased with the opening brief and that he intends to move to withdraw it or modify it. After the State raised this possibility, Burns replied that he had not asked to withdraw the opening brief. Appellant Burns' Reply Concerning Motion To Proceed Pro Se, dated September 13, 2007, at 4. However, left unsaid was whether Burns intends to do so in the future if he is permitted to represent himself. In fact, if Burns does not intend to withdraw the brief, it is difficult to see what pro se status would grant him beyond what he already has -- the right to file a Statement of Additional Grounds for Review.<sup>8</sup> Under these circumstances, the Court of Appeals properly denied Burns's motion.

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<sup>8</sup> Burns has acknowledged that, if allowed to proceed pro se, he may not be allowed to make oral argument. See Declaration in Support of Motion to proceed Pro Se on Appeal, dated August 7, 2007, at 2.

b. Burns's Freedom To Act Has Not Been Substantially Limited.

In order to justify interlocutory review, Burns must also establish that his freedom to act has been substantially limited. Because Burns has the right to file a Statement of Additional Grounds for Review under RAP 10.10, he cannot establish that his freedom to act has been substantially limited.

As discussed above, Burns has the right to raise additional issues on appeal in his pro se statement of additional grounds. The rule provides:

A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.

RAP 10.10(a). In McDonald, the Washington Supreme Court held that this rule essentially satisfied any possible right a defendant had to proceed pro se on appeal. 143 Wn.2d at 511 n.3.

In his motion, Burns devotes little argument to explaining how his freedom to act has been substantially limited. See Motion for Discretionary Review at 11-12. He observes generally that appellate counsel has the ultimate authority to decide what arguments to make. However, as this case currently stands, Burns

is entitled to raise new issues in his pro se statement. Unless Burns intends to withdraw the opening brief, an order granting him pro se status would offer little additional opportunity to control what arguments to make. For example, he cannot assert new issues in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."). Given the rules governing appellate procedure and the current posture of this appeal, Burns has failed to show that his freedom to act has been substantially limited by the decision of the Court of Appeals.

**2. BURNS'S CLAIM THAT GUIDANCE IS NEEDED ON THE ISSUE OF THE RIGHT TO SELF-REPRESENTATION ON APPEAL IS NOT A PROPER GROUND FOR INTERLOCUTORY REVIEW.**

Burns's motion for discretionary review also argues that the Court should grant review in order to provide guidance on the issue of the right to self-representation on appeal. Burns's appellate attorneys cite a number of cases where the issue has arisen and they suggest that differing rulings by the Court of Appeals are causing some confusion on the issue. However, the need for

guidance, absent a showing of probable error under RAP 13.5(b)(2), is not a proper ground for granting discretionary review and interrupting the proceedings in the lower court. Moreover, a review of the procedural history of the cases cited in Burns's motion reveals an obvious basis for the appellate court's rulings on the various motions to proceed pro se.

RAP 13.5(b) provides that review will only be accepted if one of three criteria are met:

**Considerations Governing Acceptance of Review.**

Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

- (1) if the Court of Appeals has committed an obvious error which would render further proceedings useless;
- or
- (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
- (3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 13.5(b).

There is no provision allowing for discretionary review of an interlocutory decision by the Court of Appeals for a matter where guidance on an issue is needed. In contrast, when considering a

petition for review, the Supreme Court considers whether the petition poses a significant question of constitutional law or an issue of substantial interest. See RAP 13.4(b). Undoubtedly, the reason for this difference is that discretionary review of an interlocutory decision interrupts the normal flow of a case and can cause a significant delay in the pending proceedings. Here, the need for guidance to counsel and other criminal defendants is not a basis for granting discretionary review of an interlocutory decision and delaying this appeal even further. If the State prevails in this appeal and Burns's convictions are affirmed, he may always seek review from this Court on this issue.

Burns's attorneys suggest that guidance is needed because the Court of Appeals has both granted and denied motions to proceed pro se on appeal. They suggest that, until Burns's motion, the Court of Appeals generally granted motions to proceed pro se; they point out that, since Burns's motion was denied, other motions to proceed pro se have also been denied.

A review of the appellate dockets in these cases reveals an obvious basis for the court's rulings. In the cases where the motion to proceed pro se has been granted, the motion was made before

the filing of the opening brief. See State v. Allah, COA # 45639-3-1 (motion seeking pro se status filed shortly after assignment of counsel); State v. Watson, COA # 55788-2-1 (motion filed shortly after appellate counsel was assigned to represent defendant on appeal); State v. Robinson, COA # 55597-9-1<sup>9</sup> (motion filed before opening brief due). In the cases where the Court of Appeals denied the motion to proceed pro se, the appellant's brief had already been filed. See State v. Karkunov, COA # 58951-2-1 (motion to proceed pro se filed after both opening brief and State's responsive brief were filed); State v. Waterman, COA # 59418-4-1 (motion to proceed pro se filed after opening brief was filed).

The Court of Appeals' rulings in these cases appear to be consistent with RAP 18.3(a)(1) and the general caselaw governing motions to proceed pro se at trial, discussed above. It should be no surprise that the longer a criminal defendant waits to make a motion to proceed pro se, the more likely it is that the court will

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<sup>9</sup> Burns's motion lists an incorrect cause number for Robinson. The cause number listed is from State v. Sherman, and it does not appear that Sherman moved to present himself pro se on appeal. The State is aware that Joel Robinson moved to proceed pro se in the cause number listed above.

deny the motion. It is worth noting that none of these defendants waited as long as Burns has to bring his motion to proceed pro se.

**D. CONCLUSION**

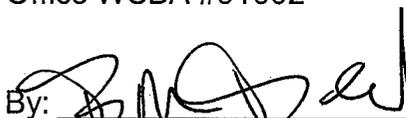
For all the foregoing reasons, Burns's motion for discretionary review should be denied.

DATED this 30<sup>th</sup> day of November, 2007.

Respectfully submitted,

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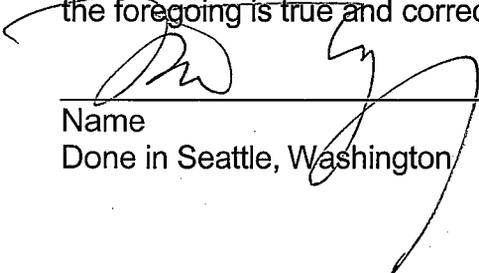
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Tower, 1511 Third Avenue, Seattle, WA 98101, and

David Koch, the attorney for the Atif Rafay, at Nielsen Broman & Koch,  
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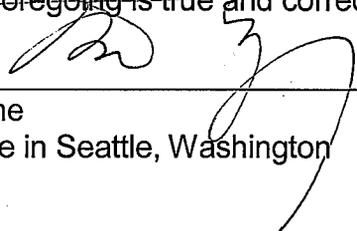
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ELAINE WINTERS and JASON SAUNDERS, the attorney for the petitioner  
Glen Sebastian Burns, at Washington Appellate Project, 701 Melbourne  
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I certify under penalty of perjury of the laws of the State of Washington that  
~~the foregoing is true and correct.~~

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

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