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STATE OF WASHINGTON

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NO. _____

Court of Appeals No. 55217-1

55218-0

57282-2

57283-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GLEN SEBASTIAN BURNS

Petitioner.

BY RONALD K. CARPENTER
CLERK

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PARTY SEEKING REVIEW..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED 5

THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION DENYING MR. BURNS' MOTION TO REPRESENT HIMSELF BECAUSE THE COURT OF APPEALS COMMITTED PROBABLE ERROR THAT LIMITS HIS FREEDOM TO CONTROL HIS APPEAL AND BECAUSE THE LOWER APPELLATE COURTS NEED GUIDANCE IN INTERPRETTING THE STATE CONSTITUTIONAL RIGHTS INVOLVED..... 5

1. The Court of Appeals committed probable error which violated Mr. Burns' state constitutional right to self-representation 5

a. *Mr. Burns seeks to exercise his state constitutional right to represent himself on appeal* 6

b. *Given his showing of good cause, Mr. Burns' motion to represent himself is not untimely* 9

c. *The Court of Appeals decision forces Mr. Burns to continue with unwanted appointed counsel and thus prohibits him from controlling his own case* 11

d. *This case fits the criteria of RAP 13.5(b)(2)* 12

2. This Court should accept review to provide guidance to the lower appellate courts 12

3. Mr. Burns' motion to represent himself should be granted.....	15
F. CONCLUSION	17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>City of Seattle v. Klein</u> , ___ Wn.2d ___, 166 P.3d 1149, 2007 Wash.LEXIS 702 (2007)	7
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	9
<u>State v. Hardung</u> , 161 Wash. 379, 297 Pac. 167 (1931)	6
<u>State v. McDonald</u> , 143 Wn.2d 506, 22 P.3d 791 (2001)	12
<u>State v. Sweet</u> , 90 Wn.2d 282, 286, 581 P.2d 579 (1978)	7

Washington Court of Appeals Decisions

<u>State v. Fritz</u> , 21 Wn.App. 354, 585 P.2d 173 (1978)	10, 15
<u>State v. Silva</u> , 107 Wn.App. 605, 27 P.3d 663 (2001)	6

United States Supreme Court Decisions

<u>Faretta v. California</u> , 422 U.S. 806, 95 S.Ct. 2525, 5 L.Ed.2d 562 (1975)	6, 11, 15
<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S.Ct. 792, L.Ed.2d 799 (1963)	6
<u>Martinez v. Court of Appeal of California, Fourth Appellate Division</u> , 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). ..	6, 11, 15
<u>United States v. Gonzalez-Lopez</u> , ___ U.S. ___, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)	11

Other State Cases

Costello v. State, 240 Ga.App. 87, 522 S.E.2d 572 (1999) 8
Ex Parte Scuder, 789 So.2d 837 (Ala. 2001)..... 8
People v. Stephens, 71 Mich.App. 33, 246 N.W.2d 429 (1976) 8
State v. Mendez, 923 So.2d 189, 193 (La.App. 2006)..... 8

United States Constitution

U.S. Const. amend. 6 6, 11, 15
U.S. Const. amend. 14 6

Washington Constitution

Wash. Const. art. 1, § 22..... 1, 3, 6-7

Other State Constitutions

Ariz. Const. art. 1, § 22..... 7
La. Const. art. I, § 19..... 7
Mich. Const. art. 1, § 20 8
N. Mex. Const. art. IV, § 2 (as amended 1965) 7
Neb. Const. art. I, § 23 8
Utah Const. art. 1, § 12 7

Court Rules

RAP 13.5 1, 5, 12
RAP 18.3 1, 9, 10

Other Authorities

American Bar Association Standards for Criminal Justice:
Prosecution and Defense Function (3rd ed. 1993) 11

Erica J. Hashimoto, "Defending the Right of Self-Representation:
An Empirical Look at the Pro Se Felony Defendant,"
85 N.C.L. Rev. 423 (2007) 16

James Lobsenz, "A Constitutional Right to Appeal: Guarding
Against Unacceptable Risks of Erroneous Conviction,"
8 U. Puget Sound L. Rev. 375 (1985) 7

John F. Decker, "The Sixth Amendment Right to Shoot Oneself
in the Foot: An Assessment of the Guarantee of Self-
Representation Twenty Years after Faretta," 6 Seton Hall
Const.L.J. 483, 598 (1996) 15

A. IDENTITY OF PARTY SEEKING REVIEW

Glen Sebastian Burns, appellant and defendant below, through his attorneys, Elaine L. Winters and Jason B. Saunders, seeks discretionary review under RAP 13.5 of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Burns seeks review of the Court of Appeals Order Denying Motion to Proceed Pro Se dated October 8, 2007. A copy of the one-page order is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Article 1, section 22 of the Washington Constitution guarantees the accused the right to either appear through counsel or to represent himself and, unlike the federal constitution, also guarantees the right to appeal. Does the Washington Constitution provide the right to self-representation on appeal?

2. What limits may the appellate court constitutionally place on a defendant's constitutional right to self-representation on appeal?

3. If the Washington Constitution does not provide the right to self-representation in the appellate courts, what factors govern the appellate court's use of its discretion under RAP 18.3(a) to deny

the request of a defendant in a criminal case to represent himself on appeal?

4. Does the Court of Appeals decision denying Mr. Burns' motion to proceed pro se and permit his court-appointed counsel to withdraw violate his constitutional right to equal protection because indigent civil litigants are permitted to represent themselves in Washington appellate courts?

D. STATEMENT OF THE CASE

Glen Sebastian Burns is appealing convictions for three counts of aggravated murder in the first degree. The Washington Appellate Project was appointed to represent Mr. Burns on appeal, and his Amended Opening Brief of Appellant was filed on July 30, 2007. The State's response brief is currently due on December 14, 2007, but in its motion for extension of time the State predicted the response brief would probably not be filed until February 2008 due to the length of the record and number of issues raised by the two appellants.¹ Commissioner's Notation Ruling dated October 19, 2007; Motion for Extension of Time to File Respondent's Brief dated October 11, 2007 (attached as Appendix H).

¹ Mr. Burns' appeal is consolidated with that of co-defendant Atif Rafay. Mr. Rafay has not sought to represent himself.

On August 20, 2007, Mr. Burns filed a motion requesting permission for his attorneys to withdraw so he could represent himself. Appellant Burns' Motion to Proceed Pro Se and Allow Counsel to Withdraw (attached as Appendix B). Mr. Burns argued he had a constitutional right to represent himself based upon article 1, section 22 of the Washington Constitution. Appendix B at 3-7. He also pointed out that his right to equal protection of the laws would be violated if he were not permitted to discharge his court-appointed attorneys while other litigants were permitted to represent themselves in the appellate courts. Id. at 7-8. Accompanying Mr. Burns' motion was his signed declaration explaining his waiver of counsel was knowing, intelligent and voluntary. Declaration in Support of Motion to Proceed Pro Se on Appeal dated August 7, 2007 (attached as Appendix C).

Court of Appeals Commissioner James Verellen granted Mr. Burns' motion on August 28, 2007. Commissioner's Notation Ruling (attached as Appendix D). Shortly thereafter, the State filed a response to the motion to proceed pro se, which was treated as a motion for reconsideration of the commissioner's ruling pursuant to RAP17.4(c)(2). State's Response to Burns's Motion to Proceed Pro Se and Allow Counsel to Withdraw dated September 6, 2007

(attached as Appendix E). The commissioner withdrew his ruling and referred Mr. Burns' motion to a panel of three judges for consideration without oral argument. Commissioner's Notation Ruling dated September 10, 2007 (attached as Appendix F). Mr. Burns quickly file a reply to the State's response. Appellant Burns' Reply Concerning Motion to Appear Pro Se, dated September 13, 2007 (attached as Appendix G).

A three-judge panel of the Court of Appeals denied Mr. Burns' motion on October 8, 2007. Appendix A. Like Commissioner Verellen's initial ruling granting Mr. Burns' motion, the Court of Appeals did not explain the basis for the ruling. Appendix A, D. Mr. Burns now seeks discretionary review of the Court of Appeals decision.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION DENYING MR. BURNS' MOTION TO REPRESENT HIMSELF BECAUSE THE COURT OF APPEALS COMMITTED PROBABLE ERROR THAT LIMITS HIS FREEDOM TO CONTROL HIS APPEAL AND BECAUSE THE LOWER APPELLATE COURTS NEED GUIDANCE IN INTERPRETTING THE STATE CONSTITUTIONAL RIGHTS INVOLVED

1. The Court of Appeals committed probable error which violated Mr. Burns' state constitutional right to self-representation. This Court may accept discretionary review of a Court of Appeals interlocutory decision if the Court of Appeals has committed probable error which substantially limits the freedom of a party to act. RAP 13.5(b)(2). It is of course difficult to discern the Court of Appeals analysis of this issue given the one-sentence ruling. Given the Washington Constitution's specific guarantee of the right to appeal and the right to represent oneself in criminal cases, however, the denial of Mr. Burns' motion to discharge counsel and represent himself was probable error which substantially limits his freedom to conduct his own appeal and forces Mr. Burns to be represented by unwanted counsel. This Court should accept review.

a. Mr. Burns seeks to exercise his state constitutional right to represent himself on appeal. A criminal defendant in Washington has the right under both the federal and state constitutions to represent himself at trial or be represented by counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); State v. Hardung, 161 Wash. 379, 383, 297 Pac. 167 (1931); State v. Silva, 107 Wn.App. 605, 617-19, 27 P.3d 663 (2001) (noting state constitutional provision more explicit and provides pro se defendant with greater access to legal materials than is granted by federal constitution). The Sixth Amendment to the United States Constitution does not provide a right to appeal, and thus the United States Supreme Court concluded the Amendment did not apply to appellate proceedings or provide a right to self-representation on appeal. Martinez v. Court of Appeal of California, Fourth Appellate Division, 528 U.S. 152, 159-61, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000).

Washington's Constitution, however, provides the express right to represent defend oneself at trial and the express right to appeal. Wash. Const. Art. 1 § 22; City of Seattle v. Klein, ___ Wn.2d

____, 166 P.3d 1149, 2007 Wash.LEXIS 702 (2007); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Article I, § 22 provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify on his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .

Thus, the right to appeal is personal to the defendant, not his attorney.

Washington was the first state to include a right to appeal in its constitution. James Lobsenz, "A Constitutional Right to Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction, 8 U. Puget Sound L. Rev. 375, 376 (1985). Three of the eight states that entered the Union after Washington include a right to appeal in the rights granted to criminal defendants. Ariz. Const. art. 1, § 22; N. Mex. Const. art. IV, § 2 (as amended 1965); Utah Const. art. 1, § 12. In addition, three other states amended their constitutions to include a specific guarantee of the right to appeal. Lobsenz, 8 U. Puget Sound L. Rev. at 376; La. Const. art. I, § 19; Mich. Const.

art. 1, § 20; Neb. Const. art. I, § 23. Mr. Burns' counsel has been unable to locate a decision in any of the jurisdictions with a specific right to appeal in criminal cases that holds a criminal defendant does not have the state constitutional right to self-representation in the appellate courts. Moreover, Alabama has found that a right to self-representation on appeal based upon state statutes guaranteeing the right to appeal and the right to counsel.² Ex Parte Scuder, 789 So.2d 837 (Ala. 2001). Georgia, Louisiana, and Michigan have both found their state constitutions guarantee the right to represent oneself on appeal.³ Costello v. State, 240 Ga.App. 87, 522 S.E.2d 572 (1999); State v. Mendez, 923 So.2d 189, 193 (La.App. 2006); People v. Stephens, 71 Mich.App. 33, 246 N.W.2d 429, 432 (1976).

² The Alabama statutes, Ala Code 1975 §§ 12-22-130 and 15-12-22, provide "A person convicted of a criminal offense . . . may appeal from the judgment of conviction to the appropriate criminal court" and for appointment of counsel for indigent defendants desiring to appeal who indigent when "the defendant expresses the desire for assistance of counsel."

³ Georgia Constitution art. 1, § 1, par. XII of the reads, "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of the state."

Louisiana Const. art. 1, § 13, provides in pertinent part, "at each of stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."

Michigan Const. 1963, art. 1, § 13 reads. "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own person or by an attorney."

Both parties provided the Court of Appeals with a Gunwall analysis to guide the court's determination of this state constitutional issue, and Mr. Burns demonstrated why Washington's specific constitutional right to appeal includes the right to proceed either in person or through counsel.⁴ Appendix B at 4-7; Appendix E at 6-13; Appendix G at 5-11. Given the Washington Constitution's specific guarantee to the criminal defendant of a right to appeal and a right to counsel or self-representation, the Court of Appeals order denying Mr. Burns' motion is probable error.

b. Given his showing of good cause, Mr. Burns' motion to represent himself is not untimely. Given the lack of reasoning in the Court of Appeals order, it is also possible that the Court of Appeals denied Mr. Burns' motion as untimely, as argued by the State. Appendix E at 13-17. If so, such a decision also constitutes probable error. RAP 18.3(a)(1) provides counsel in a criminal case may only withdraw upon a showing of good cause. Mr. Burns' desire to represent himself and guide his own case is good cause, especially since Mr. Burns has a state constitutional right to self-representation.

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Admittedly, RAP 18.3 provides the appellate court will not normally permit counsel in a criminal case to withdraw after the opening brief is filed. RAP 18.3(a)(1). The rule contemplates motions by attorneys who wish to withdraw from representing their clients, not clients who wish to proceed without their attorneys. Mr. Burns' motion was made before the State's response brief was filed and significantly before his case will be heard in the appellate court. The timing of Mr. Burns' motion was thus the equivalent of a motion made in the trial court significantly before the trial date. See State v. Fritz, 21 Wn.App. 354, 360-63, 585 P.2d 173 (1978).

Moreover, there is nothing in the record to support the State's suggestion that Mr. Burns' motion is motivated by a desire to delay the proceedings. Given that Mr. Burns has been convicted and is serving his sentence, there is no tactical advantage to him to delay his appeal or slow the appellate process down more than is already dictated by the size of the record and number of issues presented. The Court of Appeals thus should have granted the motion given the good cause shown by Mr. Burns' desire to exercise his constitutional right to represent himself.

c. The Court of Appeals decision forces Mr. Burns to continue with unwanted appointed counsel and thus prohibits him from controlling his own case. The constitutional right to self-representation is based in part upon this country's long-standing respect for individual autonomy. Martinez, 528 U.S. at 160, citing Faretta, 422 U.S. at 834. Forcing Mr. Burns to continue with appellate counsel he does not want undermines his individual autonomy, just as forcing a pro se litigant to accept a trial attorney offends the state and federal constitutions' respect for individual rights. See Faretta, 422 U.S. at 832-33; United States v. Gonzalez-Lopez, ___ U.S. ___, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of Sixth Amendment guarantee of counsel of choice not subject to harmless error analysis).

“Appellate counsel has the ultimate authority to decide which arguments to make on appeal.” American Bar Association Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-8.3(d) (3rd ed. 1993). Appellate counsel also crafts the arguments and, with some exceptions, decides how to perfect the record and what motions to bring.⁵ As a result of the Court of

⁵ The appellant, however, controls whether to voluntarily withdraw an appeal and whether to seek review in a higher court. RAP 18.2; ABA Standards for Criminal Justice: Defense Function, Standard 4-8.3(e).

Appeals decision, Mr. Burns cannot control his appeal, as appellate counsel will control how the case will proceed. The Court of Appeals decision limits Mr. Burns' freedom to act as his own attorney in this matter and control his own appeal.

d. This case fits the criteria of RAP 13.5(b)(2). The Court of Appeals ruling denying Mr. Burns' motion to proceed pro se is probable error because it ignores the inclusion of a state constitutional right to appeal as well as the right to defend oneself with or without counsel in Article 1, section 22. If the Court of Appeals decision is based upon the timing of Mr. Burns' motion, it is still probable error as there is nothing in the record to demonstrate an intent to delay the proceedings. Finally, the Court of Appeals decision limits Mr. Burns' freedom and his ability to control his case. This Court should grant review.

2. This Court should accept review to provide guidance to the lower appellate courts. There is no case or clear rule in this state for addressing the request of a litigant in a criminal appeal to represent himself. In State v. McDonald, this Court did not address the appellant's constitutional right to proceed pro se on appeal in light of his victory on the substantive issue before the Court. State v. McDonald, 143 Wn.2d 506, 510-11, 22 P.3d 791 (2001). This

Court's footnote thus is dicta, but it can also be interpreted as a holding that McDonald's opportunity to file a pro se briefing was a constitutional substitute for self-representation in the appellate courts.⁶ McDonald, 143 Wn.2d at 511 n.3. Mr. Burns' case aptly demonstrates the lack of guidance on this issue, as his motion was initially granted by a court commissioner and then denied by a panel of judges. Appendix A, D.

The Washington Appellate Project is a non-profit corporation that contacts with the Washington Office of Public Defense to represent indigent appellants as appointed by the appellate courts. Historically, the Washington Appellate Project handled half of the court-appointed cases in Division One of the Court of Appeals, and in recent years we have begun handling cases in other divisions as well.

Several years ago, the Washington Appellate Project was appointed by Division One to represent an appellant in a criminal case who asserted he wanted to represent himself on appeal. An earlier motion prepared by his prior appellate counsel was denied

⁶ Shortly after McDonald, the Rules of Appellate Procedure were amended to eliminate the right to a criminal defendant's right to file a pro se supplemental brief and substitute the opportunity to file a Statement of Additional Grounds. RAP 10.10. The drafter's comments indicate the purpose of the Statement of Additional Grounds is to permit the appellant to identify issues, not brief them. Drafter's Comments to RAP 10.10

by a court commissioner. This office prepared a motion arguing the client had a state constitutional right to self-representation; the motion was granted by a different court commissioner, and our office withdrew from the case. State v. Devine Allah, Court of Appeals No. 45639-3-I. In the following years, two other clients of the Washington Appellate Project asked for our assistance in representing themselves in the appellate court. Our attorneys helped these clients file motions utilizing the same state constitutional analysis, and both motions were granted. State v. Joel Robinson, Court of Appeals No. 49256-0-I, and State v. Shane Watson, Court of Appeals No. 55788-2-I.⁷ Mr. Burns' case is the first case in our experience where a motion for self-representation that we prepared for a client was denied. Since then, the Court of Appeals has denied requests made by two clients to proceed pro se, one based only on the federal constitution.⁸ State v. Ron Waterman, Court of Appeals No. 59418-4-I; State v. Albert Karkunov, Court of Appeals No. 58951-2-I.

⁷ Mr. Watson had the opposite result when he filed pro se requests to represent himself in an earlier case, State v. Shane Watson, Court of Appeals No. 43794-1-I, 2000 Wash.App. LEXIS 497 (2000).

⁸ Mr. Waterman's request was based only on the federal constitution. Mr. Karkunov's motion was made after the briefing was complete.

None of the Court of Appeals rulings resulted in a published decision explaining the basis for the court's ruling, nor was a basis mentioned in the court's orders, whether granted or denied. We are thus unable to provide our clients with informed advice as to their constitutional rights or their chances of success in seeking to represent themselves. The lack of standards leads to a possible waste of judicial resources when we file motions that will be denied based upon criteria we are unaware of, and it places an unnecessary strain on our attorney-client relationships in cases where the client may be dissatisfied with our representation.

3. Mr. Burns' motion to represent himself should be granted.

Courts and commentators have been skeptical of the advantages of self-representation. See Faretta, 422 U.S. 852 (Blackmun, J., dissenting, noting adage that person who represents himself has fool for client); Martinez, 528 U.S. at 161 (noting no party argued pro se representation is "wise, desirable or efficient"); Fritz, 21 Wn.App. at 358; John F. Decker, "The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after Faretta," 6 Seton Hall Const.L.J. 483, 598 (1996). A recent empirical study, however, shows felony defendants who represent themselves at the trial

court level are usually not fools, but rather people who are dissatisfied with the quality of their court-appointed attorneys or who wish to mount ideological defenses. Erica J. Hashimoto, "Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant," 85 N.C.L. Rev. 423 (2007).

This study shows pro se defendants go to trial in higher numbers than defendants represented by counsel, and, at the state court level, they have a higher acquittal rate than their represented counterparts. Hashimoto, 85 N.C.L. Rev. at 428-29. Nor does the study support the conclusion pro se defendants are predominately suffering from mental illness. Id. at 428. The commentator concludes that the right to self-representation serves a vital role in protecting the rights of criminal defendants:

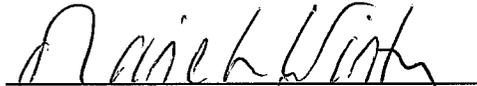
The right of self-representation in practice protects the interests of defendants in presenting their cases as effectively as possible. Indeed, for indigent defendants who have been appointed unskilled or inept counsel, and for defendants seeking to assert ideological defenses, the right of self-representation stands as the bulwark protecting the defendant from an unfair trial. In short, the data undermine the prevailing view of pro se felony defendants and suggest instead that the right to self-representation in fact serves a vital role in protecting the rights of criminal defendants.

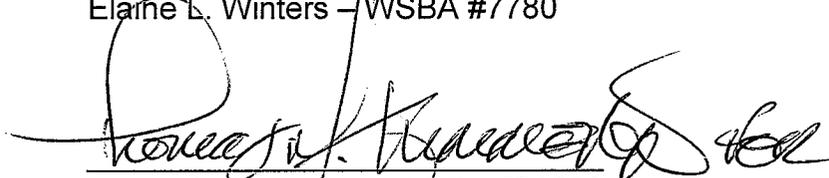
Id. at 487.

F. CONCLUSION

For the reasons stated above as well as in his pleadings in the Court of Appeals, Glen Sebastian Burns requests this Court accept discretionary review of the Court of Appeals decision denying his motion to represent himself and discharge his appellate court.

Respectfully submitted this 7th day of November 2007.


Elaine L. Winters – WSBA #7780


Jason B. Saunders – WSBA #24963
Washington Appellate Project
Attorneys for Appellant Burns

APPENDIX A

**COURT OF APPEALS ORDER
DENYING MOTION TO PROCEED PRO SE**

October 8, 2007

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RECEIVED

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 GLEN SEBASTIAN BURNS,)
)
 Appellant.)

No. 55217-1-1

OCT - 8 2007

Washington Appellate Project

ORDER DENYING
MOTION TO PROCEED PRO SE

Petitioner Glen Sebastian Burns has filed a motion to proceed pro se and to allow his appointed counsel to withdraw. We have considered the motion and have determined that his motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to proceed pro se and to allow appointed counsel to withdraw is denied.

Done this 8th day of October, 2007.

Sheldon, ACT

Evans, J

Columan, J

2007 OCT - 8 PM 4: 28
FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

APPENDIX B

**APPELLANT BURNS' MOTION TO PROCEED PRO SE AND
ALLOW COUNSEL TO WITHDRAW**

August 20, 2007

COPY

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

COURT OF APPEALS
DIVISION ONE

AUG 20 2007

STATE OF WASHINGTON,	)	No. 55217-1-I
Respondent,)	
	)	APPELLANT BURNS'
v.	)	MOTION TO PROCEED
	)	PRO SE AND ALLOW
GLEN SEBASTIAN BURNS	)	COUNSEL WITHDRAW
Appellant.)	
_____)	

A. IDENTITY OF MOVING PARTY

Appellant Glen Sebastian Burns moves this Court for the relief designated below.

B. STATEMENT OF RELIEF SOUGHT

Mr. Burns requests the Washington Appellate Project, appointed counsel on appeal, be permitted to withdraw as counsel for appellant pursuant to RAP 18.3(a)(1), in order to allow Mr. Burns to exercise his constitutional right to represent himself on appeal pursuant to Article I, § 22 of the Washington Constitution.

C. GROUND FOR RELIEF SOUGHT

1. Mr. Burns is appealing his convictions for three counts of aggravated murder in the first degree. His case is consolidated in this Court with the appeal of co-defendant Atif Rafay. Mr. Burns is

incarcerated at the Department of Corrections and currently housed in the Washington State Penitentiary.

2. The Washington Appellate Project was appointed by this Court to represent Mr. Burns on appeal. Elaine Winters and Jason Saunders are currently representing Mr. Burns. They filed his opening brief on July 13, 2007, and an amended opening brief on July 30, 2007.

3. Shortly thereafter, Mr. Burns informed appellate counsel that he wished to represent himself on appeal.

4. Counsel advised Mr. Burns orally and in writing that he will be expected to comply with the procedural rules and requirements set forth in the Rules of Appellate Procedure.

5. Counsel also advised Mr. Burns he will be without the assistance of counsel in any form.

6. Mr. Burns understands he has the right to be represented by an attorney on appeal pursuant to the Fourteenth Amendment and Article I, § 22 of the Washington Constitution. Mr. Burns also understands he has an independent right under Article I, § 22 to represent defend himself at trial and on appeal.

C. ARGUMENT WHY RELIEF SHOULD BE GRANTED

1. The right to represent oneself on appeal is guaranteed by the Washington Constitution. The Sixth Amendment does not extend to appellate court proceedings and thus does not provide a right to represent oneself on appeal. Martinez v. Court of Appeal of California, Fourth Appellate Division, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). The Martinez Court left it to the appellate court's discretion whether to permit an appellant to appear pro se. Martinez, 528 U.S. at 163. Additionally, the holding does not preclude a state from recognizing a right to proceed pro se on appeal under an independent state constitution. Id.

Washington's Constitution provides the express right to represent defend oneself at trial and on appeal. Wash. Const. Art. 1 § 22. Article I, § 22 provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify on his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .

Pursuant to State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), review of Washington constitutional provisions requires the examination six factors: 1) the textual language of the state constitution; 2) significant differences in the texts of parallel provisions of federal and state constitutions; 3) state constitutional and common law history; 4) preexisting state law; 5) differences between the structure between the federal and state constitutions; 6) matters of particular state interest or local concern.

The first two Gunwall factors require an examination of the textual language of the Washington constitution and any significant differences in the texts of parallel provisions of federal and state constitutions. Article 1, § 22 explicitly sets forth both the right to appeal and to self-representation. In contrast, neither of these rights is expressly provided for in the Sixth Amendment. Instead, these rights exist by implication. See State v. Schoel, 54 Wn.2d 388, 392, 341 P.2d 481 (1959); State v. Silva, 107 Wn.App. 605, 618, 27 P.3d 663 (2001).

The importance of the constitutional rights specifically listed in the Washington Constitution was noted by the Court in Schoel, when

it found an appellant in this state did not waive his right to be free from double jeopardy by filing an appeal.

The doctrine that a person who avails himself of his constitutional right to appeal must of necessity waive another constitutional right, the defense of former jeopardy, renders illusory one of the rights of guaranteed by constitution. . . . If a defendant in a Federal court, where appellate review is a privilege, does not waive his constitutional defense of former jeopardy by availing himself of that privilege . . . much less does a defendant waive his defense when he takes an appeal to the supreme court of this state, where the constitution grants him not a mere privilege but a right to have his trial reviewed.

Schoel, 54 Wn.2d at 392-93. (Emphasis in original). Silva, too, recognized that an implied right is subject to reinterpretation and limitation, while an expressly provided right is not. 107 Wn.App. at 618-19, citing Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (finding right to self representation from historical evidence, structure of the Sixth Amendment and “respect for the individual which is the lifeblood of the law”). The rights to appeal and to do so oneself are expressly provided for in Washington and must be given the utmost respect.

The third and fourth Gunwall factors require the court to look to state constitutional and common law history as well as preexisting state law. Washington is historically unique in this regard because it

was the first state to constitutionally guarantee the right to appeal. See Lobsenz, "A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction," 8 U. Puget Sound L.Rev. 375, 376 (1985).

The express provisions of the Washington Constitution warrant the recognition of a right of self representation both at trial and on appeal which predates Faretta. See State v. Bird, 31 Wn.2d 777, 198 P.2d 978 (1948) (deciding death penalty case with pro se appellant without addressing issue); State v. Hardung, 161 Wash. 379, 383, 297 P. 167 (1931) (defendant may waive right to counsel for purposes of jury verdict); State v. Woodall, 5 Wn.App. 901, 903, 491 P.2d 680 (1971) (defendant may conduct his entire defense without counsel, if he so chooses).

As to the final two Gunwall factors, the differences between the structure of the federal and state constitutions and the fact that conduct of the trials are matters of particular state interest and local concern further illustrate the state constitutional right of self representation in Washington. Silva, 107 Wn.App. at 621-22. The Washington Constitution places all of the rights with regard to the conduct of trial in the same provision, from notice of the charge

through appeal of the conviction, and begins the entire litany with the right to defend in person or through counsel. The structure of the Washington provision thus illustrates the interrelationship between the right to self-representation and the right to appeal. State v. Foster, 84 Wash. 58, 62, 146 Pac. 169 (1915) (“The constitution guarantees the right of appeal. That guaranty includes every incident and every privilege attending [sic] the right.”).

State and local governments are responsible for supervising the conduct of criminal proceedings, and the express provisions of Washington’s Constitution providing the right to appeal and the right to self-representation should be given full effect.

Compelling an unwilling defendant to accept appointed counsel on appeal is contrary to the essence of Washington law and practice. Mr. Burns has made it clear that he wishes to represent himself on appeal. Article I, § 22 permits him to do so, and requires this Court permit appointed counsel to withdraw.

2. Equal protection concerns require Mr. Burns be permitted to proceed without his court-appointed attorneys. In addition to the issue of self-representation, Mr. Burns’ case presents a strong claim of an equal protection violation if he is not permitted to represent himself. A

non-indigent defendant on appeal would certainly have the right to decline to retain counsel on appeal and be left to represent himself. Because he is indigent, Mr. Burns would be denied a similar right, solely as a result of poverty.

Disparate treatment of criminal defendants on the basis of indigency violates the Equal Protection Clause and Due Process Clauses of the Fourteenth Amendment. Bearden v. Georgia, 461 U.S. 660, 671-72, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) (incarceration should not be imposed on an indigent individual solely because of that person's inability to pay fines and costs); Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (unconstitutional for state to add time to maximum prison term solely because the defendant involuntarily failed to pay fine or costs); Tate v. Short, 401 U.S. 395, 398, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) (jailing the defendant for involuntary failure to pay fines on non-jail offenses unconstitutionally imprisons "solely because of ... indigency"). To deny Mr. Burns a right enjoyed by a non-indigent appellant would violate his right to be treated equally under the law.

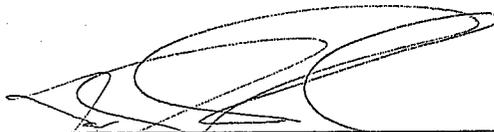
D. CONCLUSION

Glen Sebastian Burns has voluntarily elected to waive his right to counsel on appeal and to appear pro se. This Court should grant his motion and permit appellate counsel to withdraw.

Respectfully submitted this 20th day of August 2007.



Elaine L Winters – WSBA #7780



Jason B. Saunders – WSBA #24963
Washington Appellate Project
Attorneys for Appellant Burns

APPENDIX C

**DECLARATION IN SUPPORT OF MOTION
TO PROCEED PRO SE ON APPEAL**

**Filed August 20, 2007
Signed August 8, 2007**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

COURT OF APPEALS
DIVISION ONE
AUG 20 2007

STATE OF WASHINGTON,
Respondent,

v.

GLEN SEBASTIAN BURNS,
Appellant.

)
)
)
)
)
)
)

No. 55217-1-1

DECLARATION
IN SUPPORT OF
MOTION TO PROCEED
PRO SE ON APPEAL

I am the appellant in the above-captioned case. I am appealing my October 22, 2004, King County Superior Court Judgment and Sentence for three counts of aggravated murder in the first degree.

I am currently represented by court-appointed counsel, Elaine Winters and Jason Saunders of the Washington Appellate Project.

I want to waive my right to counsel and represent myself on appeal.

I have talked with my attorneys about my appeal and my request to proceed pro se. I understand if I represent myself on appeal I will be held to the standards of an attorney and expected to follow the Rules of Appellate Procedure, including but not limited to time deadlines, requirements as to the form of briefs and

motions, and service on other parties. I understand that if I represent myself I may be precluded from arguing that appellate counsel was ineffective.

My attorneys have also informed me that because I am in custody, this Court may or may not make arrangements for me to appear in person or by telephone to present oral argument.

I understand that I have the constitutional right to counsel on appeal. I wish to waive that right and represent myself.



GLEN SEBASTIAN BURNS

August 7, 2007

DATE

APPENDIX D

**COMMISSIONER'S NOTATION RULING GRANTING
MR. BURNS' MOTION TO REPRESENT HIMSELF ON APPEAL**

August 28, 2007

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

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August 28, 2007

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CASE #: 55217-1-I
STATE OF WASHINGTON, RES. VS ATIF RAFAY, APP.

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on August 27, 2007, regarding appellant Burns' motion to proceed pro se and allow counsel withdraw:

Page 2 of 2
55217-1-I, State v. Atif Rafay
August 28, 2007

Glen Sebastian Burns' request to represent himself on appeal and counsel are permitted to withdraw, provided that his appeal shall proceed on the existing amended opening brief, unless Burns files a second amended opening brief by September 28, 2007. No additional extensions should be anticipated.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

khn

APPENDIX E

**STATE'S RESPONSE TO BURNS'S MOTION
TO PROCEED PRO SE AND ALLOW COUNSEL TO WITHDRAW**

September 5, 2007

COPY

NO. 55217-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RECEIVED

STATE OF WASHINGTON,

SEP - 6 2007

Respondent,

Washington Appellate Project

v.

GLEN SEBASTIAN BURNS,
and ATIF RAFAY,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

**STATE'S RESPONSE TO BURNS'S MOTION TO PROCEED
PRO SE AND ALLOW COUNSEL TO WITHDRAW**

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF RESPONDING PARTY</u>	1
B. <u>RELIEF REQUESTED</u>	1
C. <u>RELEVANT FACTS</u>	1
D. <u>ARGUMENT</u>	4
1. THE COURT SHOULD DENY BURNS'S MOTION TO PROCEED PRO SE	4
a. There Is No Federal Constitutional Right To Self-Representation On Appeal	5
b. There Is No State Constitutional Right To Self-Representation On Appeal	6
c. Burns's Request To Represent Himself On Appeal Should Be Denied As Untimely	13
d. The Opportunity To File A Statement Of Additional Grounds For Review Effectuates Any Right To Self- Representation On Appeal.....	17
e. Burns's Equal Protection Claim Is Meritless.....	19
E. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 5, 11, 12

Martinez v. Court of Appeal of California,
Fourth Appellate District, 528 U.S. 152,
120 S. Ct. 684, 145 L. Ed. 2d 597 (2000)..... 5, 6, 8, 9, 15, 18

Washington State:

Malyon v. Pierce County, 131 Wn.2d 779,
935 P.2d 1272 (1997)..... 13

Richmond v. Thompson, 130 Wn.2d 368,
922 P.2d 1343 (1996)..... 13

State v. Bird, 31 Wn.2d 777,
198 P.2d 978 (1948)..... 10

State v. Bolar, 118 Wn. App. 490,
78 P.3d 1012 (2003), review denied,
151 Wn.2d 1027 (2004)..... 14, 15

State v. Breedlove, 79 Wn. App. 101,
900 P.2d 586 (1995)..... 7

State v. DeWeese, 117 Wn.2d 369,
816 P.2d 1 (1991)..... 12

State v. Fritz, 21 Wn. App. 354,
585 P.2d 173 (1978)..... 15

State v. Gunwall, 106 Wn.2d 54,
720 P.2d 808 (1986)..... 6, 7, 9, 13

State v. Hahn, 106 Wn.2d 885,
726 P.2d 25 (1986)..... 12

<u>State v. Kolocotronis</u> , 73 Wn.2d 92, 436 P.2d 774 (1968).....	11
<u>State v. Luvenc</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	12
<u>State v. McDonald</u> , 143 Wn.2d 506, 22 P.3d 791 (2001).....	6, 10, 18
<u>State v. Modica</u> , 136 Wn. App. 434, 149 P.3d 446 (2006).....	15
<u>State v. Silva</u> , 107 Wn. App. 605, 27 P.3d 663 (2001).....	10, 12
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	12

Other Jurisdictions:

<u>People v. Jackson</u> , 362 Ill. App. 3d 1196, 841 N.E.2d 1098 (2006).....	16
--	----

Constitutional Provisions

Washington State:

Const. art. 1, § 22.....	6, 7, 10
--------------------------	----------

Other Jurisdictions:

Oregon Const. art. I, § 11.....	10
---------------------------------	----

Rules and Regulations

Washington State:

RAP 10.10..... 4, 17, 18, 19
RAP 17.4..... 3
RAP 18.3..... 14, 20

Other Authorities

Robert F. Utter and Hugh D. Spitzer,
The Washington State Constitution:
A Reference Guide (Greenwood Press 2002)..... 10

A. IDENTITY OF RESPONDING PARTY

The State of Washington is the respondent in this appeal.

B. RELIEF REQUESTED

The Court should deny appellant Glen Sebastian Burns's motion to proceed pro se and allow counsel to withdraw.

C. RELEVANT FACTS

On July 31, 1995, the State charged defendants Glen Sebastian Burns and Atif Rafay with three counts of aggravated murder in the first degree. CP 1-3. After lengthy extradition proceedings, and a seven-month trial, a jury found Burns and Rafay guilty as charged on May 26, 2004. CP 3175-80.

Sentencing was delayed for many months after Burns moved for a new trial, claiming ineffective assistance of counsel. New counsel, William Jacquette, was appointed to represent Burns for this motion. CP 3195. Burns moved to represent himself on the motion, which the trial court ultimately denied. CP 3198-3202. On September 17, 2004, 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.

Burns was ultimately sentenced on October 22, 2004. CP 3366-72. He filed his notice of appeal on or around November 9, 2004. CP 3364-65. At the same time, Burns moved the court for appointment of an appellate attorney to represent him at public expense. CP ____ (Sub. No. 436), attached as Appendix A. The trial court granted this motion. CP 3373. Two attorneys from the Washington Appellate Project were assigned to represent Burns. Burns's appeal was consolidated with the appeal of his co-defendant Rafay.

In part because of the enormous record on appeal, appellate counsel obtained several extensions of time to file Burns's opening brief. In the various motions for extension, Burns's attorneys represented that they had been meeting and consulting with Burns about the appeal, providing portions of the record to him and sharing drafts of the brief. 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.

Finally, nearly three years after his sentencing, on July 13, 2007, Burns filed his 191-page opening brief.

More than one month later, on August 20, 2007, Burns moved to proceed pro se and allow his appellate counsel to withdraw. The sole basis for Burns's motion is his claim that he has a constitutional right to represent himself on appeal. Burns does not explain why he wishes to proceed pro se, nor does he explain why he waited nearly three years into the appeal to file the motion.

Approximately one week after Burns's motion was filed and without requesting a response from the State, Commissioner James Verellen granted the motion, "provided that his appeal shall proceed on the existing amended opening brief, unless Burns files a second amended opening brief by September 28, 2007."

In accordance with RAP 17.4(c)(2), the State now files its response to Burns's motion.¹

¹ RAP 17.4(c)(2) provides: "If the commissioner or clerk makes a summary determination granting a motion under subsection (c)(1) of this rule, and a party files and serves a timely responsive pleading after the ruling has been entered, the commissioner or clerk will treat the responsive pleading as a motion for reconsideration of the ruling."

D. ARGUMENT

1. THE COURT SHOULD DENY BURNS'S MOTION TO PROCEED PRO SE.

Nearly three years into his appeal and after his lengthy opening brief has finally been filed, Burns moves the court to allow his appellate counsel to withdraw and to represent himself on appeal. This Court should reconsider its earlier order and deny Burns's motion. First, Burns's claim that he has a constitutional right to represent himself on appeal is not supported by any relevant Washington caselaw and should be rejected. Second, even assuming Burns has a right to represent himself on appeal, this Court should deny the motion as untimely. Burns's appeal has been pending for nearly three years, he has been able to consult with his attorneys during this time, and his belated motion to proceed pro se will only further delay this appeal. Finally, to the extent such a right of self-representation exists, it is satisfied by Burns's ability to file a pro se statement of additional grounds under RAP 10.10. The Court should deny Burns's request to proceed pro se on appeal.

a. There Is No Federal Constitutional Right To Self-Representation On Appeal.

As Burns acknowledges, a criminal defendant does not have a federal constitutional right to represent himself on direct appeal of his conviction. Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). In reaching this conclusion, the Supreme Court first examined whether its holding in Faretta v. California,² that a criminal defendant has a constitutional right under the Sixth Amendment to represent himself at trial, applies in the appellate context; the Court concluded that it does not. Martinez, 528 U.S. at 159-60. In so holding, the Court noted, "[w]e are not aware of any historical consensus establishing a right of self-representation on appeal." 528 U.S. at 159.

The Court examined whether a right to self-representation on appeal could alternatively be grounded in the Due Process Clause. In concluding that it could not, the Court weighed the competing interests involved:

Even at the trial level, 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. In the appellate context, the

² 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

balance between the two competing interests surely tips in favor of the State. . . . Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in Faretta. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level.

Martinez, 528 U.S. at 162-63.

b. There Is No State Constitutional Right To Self-Representation On Appeal.

Burns claims that he has a constitutional right to represent himself on appeal under Const. art. 1, § 22. Burns cites no Washington case in which a court has recognized that a criminal defendant has a state constitutional right to represent himself on appeal. In the only case where the issue was raised, the Washington Supreme Court declined to address the issue. See State v. McDonald, 143 Wn.2d 506, 511 n.3, 22 P.3d 791 (2001) (discussed below). There is little support for Burns's argument under Washington law.

Burns nevertheless argues that an examination of the Gunwall³ factors establishes that he has a state constitutional right to represent himself on appeal. In fact, those factors do not

³ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

suggest any such right. The six Gunwall factors are: (1) textual language, (2) significant differences between the texts, (3) state constitutional and common law history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 61-62.

With respect to the first Gunwall factor, the plain language of the text does not suggest a right to self-representation on appeal.

Const. art. 1, § 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases....

The phrase “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” has been interpreted as conferring the right to self-representation. See State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). However, the text does not link the right to defend *in person* with the right to appeal. Instead, the constitutional text provides that the defendant has the rights to *appear* and *defend* in person or by

counsel. These are rights that apply at the trial stage when the defendant is physically present and defends against the criminal charges. At the appellate stage, the defendant does not have a similar right to be present. See Martinez, 528 U.S. at 163 (“a lay appellant’s rights to participate in appellate proceedings have long been limited by the well-established conclusions that he has no right to be present during appellate proceedings”). Moreover, the defendant is no longer *defending* against a charge, but has been convicted and seeks reversal.

In holding that there was no federal constitutional right to proceed *pro se* on appeal, the United States Supreme Court noted the difference between the trial and appellate stages:

The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict. We have recognized this shifting focus and noted:

“[T]here are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt....”

“By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State’s prosecutor but rather to overturn a finding of guilt made by a judge or

a jury below." Ross v. Moffitt, 417 U.S. 600, 610, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

In the words of the Faretta majority, appellate proceedings are simply not a case of "haul[ing] a person into its criminal courts." 422 U.S., at 807, 95 S.Ct. 2525.

Martinez, 528 U.S. at 162-63.

Because the constitutional text does not link the right to appeal and the right to defend in person, the first Gunwall factor does not support Burns's argument.

With respect to the second Gunwall factor, significant differences between the state and federal constitutional texts, Burns is correct that the federal constitution does not include any language concerning the right to appeal or the right to self-representation. However, as noted above, while express language is included in the Washington constitution, the two rights are not linked in that document.

The third and fourth Gunwall factors, state constitutional and common law history, and preexisting state law, provide no support for Burns's position. State constitutional history is not particularly illuminating on the issue. As this Court has noted when discussing this provision, "[s]cant accessible history exists regarding the intentions of the framers of the Washington Constitution." State v.

Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001). Const. art. 1, § 22 was borrowed from the Oregon constitution, though the precise wording is somewhat different. See Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A Reference Guide, at 35-36 (Greenwood Press 2002); see also Oregon Const. art. I, § 11. Burns cites no evidence that self-representation on appeal was even an issue at the time that the Washington constitution was adopted.

Similarly, state common law history and preexisting state law provide little support for Burns's position. To the State's knowledge, there is no significant history of criminal defendants representing themselves on appeal. Of the three cases cited by Burns, two concern self-representation at trial, and the one remaining case, State v. Bird, 31 Wn.2d 777, 198 P.2d 978 (1948), contains no discussion of the fact that the defendant apparently represented himself on appeal. The issue of whether a defendant has either a state or federal constitutional right to represent himself on appeal was discussed only very recently. See McDonald, 143 Wn.2d at 511 n.3. This common law history does not support the notion that a defendant has a constitutional right to represent himself on appeal.

There is a body of law concerning the right to proceed pro se at trial. Prior to the 1960's, few Washington cases addressed the issue. In State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968), decided several years before Faretta, the Washington Supreme Court held that the right to self-representation under the Washington constitution was no more extensive than that allowed under the federal constitution.

The right which the defendant asserts is set out in Const. art. 1, s 22 (amendment 10)... The language used in the constitutional provision is plain, direct, unqualified, unambiguous, and unequivocal. But, it is no more so than language contained in the Bill of Rights of the United States Constitution.

73 Wn.2d at 97-98.

In fact, the Washington Supreme Court took a more limited view of the right to proceed pro se at trial than would later develop under Faretta. The court suggested that the trial court should consider the defendant's ability to exercise the skill and judgment necessary to secure himself a fair trial. 73 Wn.2d at 102. After Faretta, the court clarified that such considerations were not appropriate: "While our holding in State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968), that it is the responsibility of the trial court to determine a defendant's competency intelligently to waive the

services of counsel and act as his own counsel, Kolocotronis, at 101, 436 P.2d 774, remained valid in the wake of Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), any consideration of a defendant's ability to "exercise the skill and judgment necessary to secure himself a fair trial" (Kolocotronis, 73 Wn.2d at 102, 436 P.2d 774) was rendered inappropriate by Faretta." State v. Hahn, 106 Wn.2d 885, 890, 726 P.2d 25 (1986).

Washington courts have since followed the federal caselaw, as developed under Faretta, when considering issues involving self-representation at trial; there has been no independent state constitutional basis for evaluating such claims. See, e.g., 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 Silva, 107 Wn. App. at 613-22 (holding that state constitution provided a pro se pretrial detainee with greater right of access to the court than did federal law). There is thus no state common law history or preexisting state law supporting the notion that a criminal defendant has a constitutional right to self-representation on appeal.

The remaining Gunwall factors shed little light on the appropriate interpretation of this constitutional provision. "The fifth factor, the differences in structure between state and federal governments, 'always favors an independent state interpretation.'" Malyon v. Pierce County, 131 Wn.2d 779, 797, 935 P.2d 1272 (1997) (quoting Richmond v. Thompson, 130 Wn.2d 368, 922 P.2d 1343, 1350 (1996)). "The sixth factor reminds us nearly everything is local in nature." Malyon, 131 Wn.2d at 798.

Accordingly, a Gunwall analysis does not support Burns's claim that he has a constitutional right to self-representation on appeal. Yet, even if this Court accepts or assumes that Burns has such a right to proceed pro se on appeal, there are several reasons for denying his motion, as set forth below.

c. Burns's Request To Represent Himself On Appeal Should Be Denied As Untimely.

Even if Burns had a right to represent himself on appeal, his motion, brought only after his attorneys have represented him for nearly three years and filed a 191-page brief on his behalf, should be denied as untimely. Even in the context of trial, where the right to represent oneself is firmly established, the court has the

discretion to deny such a request when it comes too late in the process.

RAP 18.3(a)(1) governs withdrawal of counsel after the opening brief is filed. It 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's motion does not attempt to establish good cause; he offers no reasons for seeking withdrawal of counsel, but only a bare claim that he has a constitutional right to represent himself on appeal.

Moreover, even at the trial level, where there is a clear constitutional right to self-representation, the court has considerable discretion in denying a motion to proceed pro se. State v. Bolar, 118 Wn. App. 490, 516, 78 P.3d 1012 (2003), review denied, 151 Wn.2d 1027 (2004). The level of discretion afforded the trial court depends on when the request is made:

The trial court's discretion to grant or deny a motion to proceed pro se lies along a continuum that corresponds with the timeliness of the request. If the request is made well before trial, the right exists as a matter of law. If the request is made shortly before trial, the existence of the right depends on the facts of the case with a measure of discretion reposing in the

trial court. If made during trial, the right rests largely in the informed discretion of the trial court.

State v. Modica, 136 Wn. App. 434, 443, 149 P.3d 446 (2006)

(citing State v. Fritz, 21 Wn. App. 354, 585 P.2d 173 (1978)).

In exercising discretion in this regard, the court weighs the interests at stake. "Before trial, the defendant's interest in self-representation is paramount, but as the trial draws closer and once it begins, the interest in the orderly administration of justice becomes weightier." Bolar, 118 Wn. App. at 516. See also Martinez, 528 U.S. at 162 ("Even at the trial level, 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.").

Courts encounter this issue less frequently in the appellate context, but nevertheless find it appropriate to weigh the relevant interests as a function of the time at which the request is made. For example, an appellate court in Illinois, faced with a defendant's request to represent himself in an appeal from a post-conviction proceeding, reasoned as follows:

At this time, the argument for self-representation comes too late. The attorneys have filed their briefs. To grant defendant's request to proceed *pro se* at this late date, we would have to issue a new briefing

schedule, and defendant and the State would have to draft and file new briefs. Even when defendants have a *constitutional* right to represent themselves, they must assert that right in a timely (and, we might add, effective) manner. At this point in the appellate process, judicial efficiency outweighs defendant's interest in individual autonomy, and we deny his request to proceed *pro se* in this appeal.

People v. Jackson, 362 Ill. App. 3d 1196, 1200, 841 N.E.2d 1098, 1102 (2006) (internal citations omitted).

Burns similarly makes his request too late. This appeal has been pending for nearly three years. The attorneys for both defendants in this consolidated appeal have filed their opening briefs. Burns's motion is the equivalent of a defendant seeking to proceed *pro se* after his trial is well underway. It simply comes too late.

The delay caused by granting Burns's motion to proceed *pro se* could be considerable. While Burns has not yet requested that the amended opening brief prepared by his attorneys be withdrawn, it certainly appears that, given the timing of his motion, such a request is likely to follow.⁴ Though the court provided that Burns would have only one month to file an amended opening brief,

⁴ If Burns does not intend to withdraw the brief, then 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.

it is unclear whether such a deadline is realistic. The transcript in the case is approximately 24,000 pages, and the State is unaware whether Burns has yet been provided a full copy, or whether he has finished reviewing the transcript at this point. It would appear highly likely that Burns will seek future continuances based upon the considerable record on appeal, and he will undoubtedly claim that, given the court's apparent acceptance of his constitutional right to self-representation, he must be allowed the time to fully review the record and prepare an opening brief. This will serve to delay this appeal, along with co-defendant Rafay's appeal, even further. Under these circumstances, the public's right to the orderly and efficient administration of justice, and co-defendant Rafay's right to the speedy resolution of his own appeal, outweigh any right Burns has to represent himself at this stage of these proceedings.

d. The Opportunity To File A Statement Of Additional Grounds For Review Effectuates Any Right To Self-Representation On Appeal.

Even if Burns has any right to represent himself in this appeal, that right is fully effectuated by his opportunity to raise additional issues in a Statement of Additional Grounds for Review pursuant to RAP 10.10. 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). This rule further allows Burns access to a copy of the verbatim report of proceedings at public expense. RAP 10.10(e).

The Washington Supreme Court recognized the significance of this rule in State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001). Observing that "no Washington court has examined the right to self-representation on appeal," and declining to "fully address and analyze" the issue in McDonald's case, the court nevertheless concluded that McDonald's interest in representing himself had been protected:

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, 528 U.S. at 164 (state rules governing appeals seem to protect the ability of indigent litigants to make *pro se* filings).

Burns retains the right under RAP 10.10 to file a Statement of Additional Grounds for Review. This is sufficient to protect any right that he may have to represent himself in this appeal.

e. Burns's Equal Protection Claim Is Meritless.

Burns finally argues that denial of his request to represent himself in this appeal would result in disparate treatment solely on the basis of indigency, in contravention of his rights under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. He reasons that "[a] non-indigent defendant on appeal would certainly have the right to decline to retain counsel on appeal and be left to represent himself." Appellant Burns' Motion to Proceed Pro Se at 7-8.

Burns, however, did not even attempt to "decline to retain counsel on appeal." Rather, he explicitly requested counsel on appeal at public expense. See Appendix A (Motion and Declaration for Order Authorizing the Defendant to Seek Review at Public Expense and Appointing an Attorney). The issue here is not his right to "decline to retain counsel on appeal," but his **untimely** request to discharge his counsel and represent himself. Even if Burns had retained counsel at his own expense, there would be a

presumption against counsel being allowed to withdraw at this point in the proceedings. See RAP 18.3(a)(1) ("The appellate court will not ordinarily grant permission [for counsel] to withdraw after the opening brief has been filed.").

Burns cannot show that he is being treated differently based solely on indigency. His argument based on equal protection should be rejected.

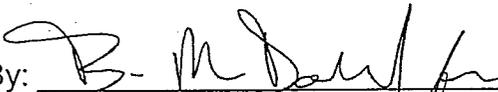
E. CONCLUSION

For all the foregoing reasons, the Court should deny Burns's motion to represent himself on appeal.

DATED this 5th day of September, 2007.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney
DANIEL T. SATTERBERG
Interim King County Prosecuting Attorney

By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney

By: 
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

APPENDIX A

SEALED FILE

FILED
KING COUNTY, WASHINGTON

NOV 10 2004

DEPARTMENT OF
JUDICIAL ADMINISTRATION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
GLEN SEBASTIAN BURNS,)
)
Defendant.)

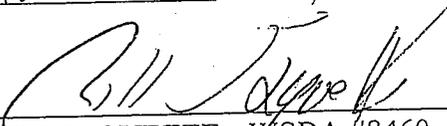
NO. 95-C-05433-8 SEA

MOTION AND DECLARATION
FOR ORDER AUTHORIZING THE
DEFENDANT TO SEEK REVIEW
AT PUBLIC EXPENSE AND
APPOINTING AN ATTORNEY

A. MOTION

COMES NOW the Defendant, by and through his attorney, and moves the Court for an order allowing the defendant to seek review at public expense and appointing an attorney. This motion is based on RAP 2.2 (a) (1) and is supported by the following Declaration.

DATED this 5 day of November, 2004.



 BILL JAQUETTE - WSBA #8460
 Attorney for Defendant

MOTION AND DECLARATION FOR
ORDER AUTHORIZING THE DEFENDANT
TO SEEK REVIEW AT PUBLIC EXPENSE
AND APPOINTING AN ATTORNEY

SNOHOMISH COUNTY PUBLIC DEFENDER
1721 HEWITT AVENUE, SUITE 200
EVERETT, WASHINGTON 98201
(425) 339-6300

B. DECLARATION

I am the defendant in the above-entitled cause.

[X] Appeal: I was tried and convicted of the crime(s) of: Three Counts of Aggravated Murder in the First Degree before the Honorable Judge Charles W. Mertel. A judgment and sentence was entered on this matter on the 22nd day of October, 2004. I desire to appeal that conviction and the sentence imposed. I believe that the appeal has merit and is not frivolous and make the following assignments of error: ruling on pretrial motions and motions in limine; evidentiary rulings during trial; denial of two post-trial motions for a new trial presented by trial counsel; refusal to permit defendant to proceed pro se on motion for new trial based on ineffective assistance of counsel; refusal to grant continuance for motion for new trial based upon ineffective assistance of counsel; and sufficiency of the evidence.

I make the following statement as to my financial status:

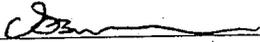
1. I am unemployed. I have no income.
2. I own or have a financial interest in the following real property: _____
nothing
3. I own or have a financial interest in the following personal property: _____
nothing
4. I have the following other assets, including bank accounts and other sources of income: _____
nothing
5. I am not married and have No children.
6. I have been sentenced to prison.

For the foregoing reasons I request the court to authorize me to seek review at public expense including, but not limited to all filing fees, attorney's fees and preparation of briefs, and preparation of a verbatim report of the trial and of the sentencing hearing together with necessary clerk's papers.

I further request that Bill Jaquette be allowed to withdraw as counsel effective upon the appointment of new counsel by the appellate court clerk.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Seattle, Washington, this 10 day of November, 2007



GLEN SEBASTIAN BURNS
Defendant

MOTION AND DECLARATION FOR
ORDER AUTHORIZING THE DEFENDANT
TO SEEK REVIEW AT PUBLIC EXPENSE
AND APPOINTING AN ATTORNEY

SNOHOMISH COUNTY PUBLIC DEFENDER
1721 HEWITT AVENUE, SUITE 200
EVERETT, WASHINGTON 98201
(425) 339-6300

APPENDIX F

**COMMISSIONER'S NOTATION RULING
WITHDRAWING AUGUST 27, 2007, RULING AND
REFERING BURNS' MOTION TO PROCEED PRO SE
TO PANEL OF THREE JUDGES**

September 10, 2007

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
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September 10, 2007

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Glen Sebastian Burns - DOC #876360
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Walla Walla, WA. 99362

CASE #: 55217-1-1
STATE OF WASHINGTON, RES. VS ATIF RAFAY, APP.

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on September 10, 2007, regarding appellant's appointed counsel's motion to withdraw:

In my August 27, 2007 ruling, I allowed appointed counsel on appeal to withdraw and granted Mr. Burns request to represent himself on appeal, provided that unless he filed a new appellant's brief by September 28, 2007, the appeal would go forward based on the existing amended appellant's brief. On September 5, 2007, the State filed a response in opposition to Burns' motion. As provided in RAP 17.4, the State's response is treated as a request for reconsideration.

Page 2 of 2
55217-1-I, State of Washington v. Atif Rafay
September 10, 2007

In light of the arguments submitted by the State, I withdraw my August 27, 2007 ruling and refer Burns' motion to proceed pro se to a panel of three judges for consideration without oral argument. The motion will be circulated to a panel of three judges this week. The State is granted an extension to file its brief on the merits of the appeal until the pending motion is resolved.

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

khn

APPENDIX G

**APPELLANT BURNS' REPLY
CONCERNING MOTION TO APPEAR PRO SE**

September 13, 2007

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,)	
Respondent,	)	No. 55217-1-I
)	
v.	)	APPELLANT BURNS'
	)	REPLY CONCERNING
GLEN SEBASTIAN BURNS	)	MOTION TO APPEAR
Appellant.	)	<u>PRO SE</u>
_____)	

A. MOTION BEFORE COURT

On August 20, 2007, appellant Glen Sebastian Burns moved this Court to grant him permission to represent himself and to permit appellate counsel to withdraw. Commissioner James Verellen granted the motion on August 27, 2007. Notation Ruling. The respondent State of Washington filed a response on September 5, 2007. On September 10, the court commissioner withdrew his ruling and referred the motion to a panel of judges to be considered this week. Notation Ruling.

Mr. Burns now files this reply as authorized by RAP 17.4(e).

B. ARGUMENT IN REPLY

1. MR. BURNS' MOTION IS TIMELY

The State argues Mr. Burns' motion to proceed pro se on appeal should be denied because it is untimely. The State's argument, however, is based upon a misrepresentation of the status of the case

and conjecture about Mr. Burns' possible motive to delay the proceedings.

Mr. Burns filed his motion to represent himself only three weeks after his attorneys filed the Amended Brief of Appellant on July 30, 2007. From the perspective of the appellant's attorney, much of the heavy lifting in this case has already been accomplished – the record is perfected and the opening brief has been filed. This is an ideal time for Mr. Burns to step into representation, as he will not be faced with problems that have caused problems for other pro se appellants -- perfecting the record or developing the issues that had caused problems for other. See State v. Mode, 55 Wn.2d 706, 349 P.2d 727 (1960) (pro se appellant's brief described as unintelligible and useless); In re Hendrix v. Rhay, 56 Wn.2d 420, 353 P.2d 878 (1960) (holding trial court must provide pro se appellant with counsel in order to provide appellate court with statement of facts needed to exercise right to appeal).

This Court may permit counsel in a criminal appeal to withdraw upon a showing of good cause. RAP 18.3(a)(1). The State asserts Mr. Burns has not demonstrated good cause. The good cause asserted by Mr. Burns, however, is his desire to represent himself. He need not allege problems or criticize his current counsel in order to exercise his right to proceed pro se.

The State incorrectly analogizes Mr. Burns' request to represent himself on appeal shortly after the filing of the appellant's opening to a request in the trial court "after his trial is well underway." Response at 16. In State v. Bolar, for example, the defendant made daily requests to proceed pro se during the course of the trial. 118 Wn.App. 490, 515-17, 78 P.3d 1012 (2003), rev. denied, 151 Wn.2d 1027 (2004). This Court agreed with the trial court that the defendant's requests were purposefully designed to delay and disrupt the trial. 118 Wn.App. at 517. Here, in contrast, Mr. Burns' request is made before the State has filed its response brief, before Mr. Burns' reply brief is due, and long before this case will be considered by this Court.¹

The State also refers this Court to an Illinois case involving a request to proceed pro se on post-conviction petition for relief. Response at 15-16, citing People v. Jackson, 362 Ill.App.3d 1196, 841 N.E.2d 1098 (2006). In that case, however, granting the petitioner's motion would have required all of the parties to file new briefs the Jackson, 841 N.E.2d at 1200. Here, Mr. Burns is not requesting to file a new opening brief, and the State has not filed its response. The case

¹ The State has not asserted it will be ready to file its Response Brief by October 1, 2007. Given the lengthy record and the number of issues presented by Mr. Burns and Mr. Rafay, it is logical to assume the State will not file its response brief for many months.

is thus of little guidance in addressing Mr. Burns' motion to represent himself on direct appeal.

The State hypothesizes that Mr. Burns intends to delay the appellate process and file a new opening brief, but Mr. Burns has not asked to withdraw the opening brief filed by his attorneys on his behalf. In addition, the State worries that if Mr. Burns does want to file a new opening brief, he may not have the transcripts he needs to do so. Response at 17. The State has received copies of declarations showing the Washington Appellate Project served Mr. Burns with a copy of the verbatim report of proceedings during the months of in May, June and July, 2007. Declarations of Service filed May 23, June 6, July 11, and July 12, 2007. The Washington Appellate Project has also provided Mr. Burns with a copy of the superior court file in his cause number and in co-defendant Atif Rafay's cause number and copies of some exhibits. There is no factual basis for the State's concern that Mr. Burns intends to delay the appellate proceedings.

Mr. Burns' request to represent himself on appeal, although made after the filing of his opening brief, is nonetheless timely. Granting the request will not disrupt the appellate court proceedings, as Mr. Burns will be held to the same standards as an attorney practicing before this Court. This Court should not deny Mr. Burns' motion on the grounds it is not timely.

2. MR. BURNS HAS A STATE CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF ON APPEAL

Article 1, section 22 of the Washington Constitution provides a number of constitutional rights to a criminal defendant, including the right to “appear and defend in person, or by counsel” and “the right to appeal in all cases.” Article 1, section 22 demonstrates this state’s regard for the rights of the individual. This Court should find the Washington Constitution provides Mr. Burns with the right to represent himself on appeal.

Under the federal constitution, the right of self-representation is protected by the Sixth and Fourteenth Amendments at the trial court level. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). “The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.” Faretta, 422 U.S. at 820. The Sixth Amendment, however, does not provide a right to appeal, and thus does not provide the right to self-representation on appeal. Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000).

An independent examination of the Washington Constitution with the assistance of Gunwall factors, however, demonstrates a state constitutional right to represent oneself on appeal. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

The first two Gunwall factors require this Court to examine the textual language of the state constitution and differences between parallel federal provisions. The language of article 1, section 22 providing the right to “appear and defend in person, or by counsel” has been interpreted to unequivocally guarantee the right to self-representation at trial. State v. Silva, 107 Wn.App. 605, 617-18, 27 P.3d 663 (2001). In contrast, the Sixth Amendment only provides the right to self-representation by implication. Faretta, 422 U.S. at 891; Silva, 107 Wn.App. at 618. Similarly, the “right to appeal in all cases” guaranteed by the Washington Constitution is not found in the United States Constitution. Martinez, 528 U.S. at 689-90 (no right to appeal in Sixth Amendment or at common law; Washington first state to provide constitutional right to appeal in 1889).

The State argues article 1, section 22 of the Washington Constitution does not permit Mr. Burns to appeal pro se because of the structure of the provision. The State notes the words “in person, or by counsel” are not affixed directly to the “right to

appeal in all cases” language. Response at 6-9, relying upon Martinez, supra. This literal reading of the language of the state constitution should be rejected. Instead, this Court should look to the structure of the provision, which provides a group of rights to the accused and not to his attorneys.

The logic of Faretta is instructive. The Sixth Amendment does not mention a right to self-representation, yet the Faretta Court found it in the structure of the amendment, gave the right to defend directly to the accused:

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be “informed of the nature and cause of the accusation,” who must be “confronted with witnesses against him” and who must be accorded “compulsory process for obtaining witnesses in his favor.” Although not stated in the Amendment in so many words, the right to self-representation – to make one’s own defense personally – is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

Faretta, 422 U.S. at 819. Similarly, the Martinez Court distinguished Faretta and found there was no federal constitutional right to self-representation on appeal because the Sixth Amendment does not include a right to appeal. Martinez, 528 U.S. at 159-60. (“The Sixth Amendment does not include any right to appeal. . . . It necessarily follows that the

Amendment itself does not provide any basis for finding a right to self-representation on appeal.”). In the Washington Constitution, not only the right to defend in person, but also the right to appeal, is given directly to the accused.

Washington’s Constitution grants a right to appeal, not a right to appeal through counsel. See Ex parte Scudder, 789 So.2d 837, 841 (Ala. 2001) (right to self-representation on appeal derived from state statutes granting right to appeal and assistance of counsel on appeal on request). Washington’s constitution provides a specific right to appeal, which “includes every incident and every privilege attending the right.” State v. Foster, 84 Wash. 58, 62, 146 Pac. 169 (1915). The language of article 1, section 22, its structure, and its significant differences from the federal constitution call for independent interpretation of the right to self-representation on appeal.

The third and fourth Gunwall factors call for review of state constitutional and common law history and pre-existing state law as available. The very existence of a right to appeal in Washington’s constitution, however, demonstrates the importance of that personal right in Washington. Washington was the first state to constitutionally guarantee the right to appeal. See James Lobsenz, “A Constitutional Right to Appeal:

Guarding Against Unacceptable Risks of Erroneous Conviction, 8 U. Puget Sound L. Rev. 375, 376 (1985). Notably, only three of the eight states that entered the Union after Washington include a right to appeal in the rights granted to criminal defendants. Ariz. Const. art. 1, § 22; N. Mex. Const. art. IV, § 2 (as amended 1965); Utah Const. art. 1, § 12. Additionally, while article 1, section 22 is modeled after Oregon's Constitution, "the right to appeal in all cases" is not included in Oregon's bill of rights. Ore. Const. art. 1, § 12; Robert Utter and Hugh D. Spitzer, The Washington Constitution: A Reference Guide at 35 (Greenwood Press 2002).

Washington's Constitution is also more specific than Oregon's concerning the right to self-representation. Oregon's Constitution provides the defendant be permitted "to be heard by himself and counsel," whereas Washington grants the right to "defend in person, or by counsel." Wash. Const. art. 1, § 22' Ore. Const. art. 1 § 12. (Emphasis added).

Clearly, the Framers of article 1, section 22 wanted to provide the citizens of Washington greater rights to self-representation and to appeal than those guaranteed by the federal constitution. Silva, 107 Wn.App. at 619, citing Robert F. Utter, "Freedom and Diversity in a Federal System:

Perspectives on State Constitutions and the Washington Declaration of Rights,” 7 U. Puget Sound L. Rev. 491, 497 (1984). The Washington Constitution is relatively unique in granting the right to appear and defend in person or through counsel and the right to appeal to criminal defendants. These rights were thus considered by the Framers of Washington’s Constitution.

The State argues that state common law concerning the right to self-representation at trial is now based upon federal law. Response at 11-12. The cases cited by the State, however, simply show that Washington courts have followed the standards developed by the federal courts for evaluating waiver of counsel. See State v. Hahn, 106 Wn.2d 885, 890, 726 P.2d 25 (1986) (Faretta standard for waiver utilized for psychotic defendant in contrast to earlier Washington case law); State v. Stenson, 132 Wn.2d 668, 737-42, 940 P.2d 1239 (1997) (equivocal waiver). The used of federal cases in reviewing waiver of counsel does not negate the effect of Washington’s separate constitutional provisions. Silva, 107 Wn.App. at 622-23 (article 1, section 22 affords pretrial detainee right to reasonable access to state-provided resources needed to prepare meaningful pro se defense).

Concerning the fifth and sixth Gunwall factors, the State argues they “shed little light” on the appropriate interpretation of article 1, section 22. Response at 13. To the contrary, the differences in structure of the state and federal constitutions supports an independent review of article 1, section 22. Silva, 107 Wn.App. at 673. Additionally, the manner in which an accused state constitutional rights to self-representation and appeal are exercised is also a matter of local, state concern. Id. at 674. Accord Martinez, 528 U.S. at 163 (holding does not preclude States from recognizing right to self-representation on appeal in own constitutions).

Article 1, section 22 specifically grants several rights to criminal defendants, including the right to appear in person or through counsel and the right to appeal. The constitution does not require a defendant to appeal through counsel, and this Court should find the Washington Constitution provides the right to appear pro se on appeal.

3. THIS COURT MAY EXCERSIZE ITS DISCRETION TO PERMIT MR. BURNS TO REPRESENT HIIMSELF

In the alternative, Mr. Burns asks this Court to exercise its discretion to permit him to represent himself at this stage of the appellate process. RAP 18.3(a)(1) grants this Court the

discretion to permit appellate counsel in a criminal case to withdraw, thus opening the door to self-representation. See Owen v. State, 269 Ind. 513, 381 N.E.2d 1235, 1238 (1978) (Indiana Supreme Court, finding discretion to hear appeal by pro se appellant and noting Indiana has traditionally permitted self-representation at the appellate court level).

Mr. Burns made a timely request to represent himself. He included an affidavit indicating he was aware he was waiving his right to counsel and would be held to the standards of an attorney. There is nothing in the record to demonstrate Mr. Burns' request is equivocal, is made for the purposes of delay, or will disrupt the appellate proceedings. This Court should grant his motion.

C. CONCLUSION

For the reasons stated above and in his Motion to Proceed Pro Se and Allow Counsel to Withdraw, Glen Sebastian Burns requests this Court grant his motion to represent himself in this case.

DATED this 13th day of September 2007.

Respectfully submitted,



Elaine L. Winters, WSBA #7780
Washington Appellate Project
Attorneys for Appellant Burns

APPENDIX H

**MOTION FOR EXTENSION OF TIME
TO FILE RESPONDENT'S BRIEF**

October 11, 2007

COPY

RECEIVED

OCT 15 2007

Washington Appellate Project

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)	
)	
Respondent,	)	NO. 55217-1-I
)	
vs.	)	MOTION FOR EXTENSION OF
	)	TIME TO FILE RESPONDENT'S
GLEN SEBASTIAN BURNS and	)	BRIEF
ATIF AHMAD RAFAY,)	
)	
Appellant.)	
)	
)	

1. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief below.

2. STATEMENT OF RELIEF SOUGHT

The State asks this Court to at this time extend the time for filing the State's response brief until December 14, 2007. As outlined below, the State will undoubtedly need additional time, but will be able to give this Court a more accurate estimate in two months.

3. FACTS RELEVANT TO MOTION

After a seven-month jury trial, appellants Glen Sebastian Burns and Atif Rafay were found guilty of three counts of aggravated murder in the first degree. They have timely appealed their convictions.

The transcript in this case is approximately 24,000 pages in length. There are approximately 4,500 pages of Clerk's Papers. The appellants' attorneys have filed briefs of close to 200 pages on behalf of their respective clients. Each appellant has personally indicated his intention to file a Statement of Additional Grounds for Review, and each has requested an extension of time to do so.

The State's brief was originally due on September 11, 2007. On August 20, 2007, appellant Burns filed a motion to proceed pro se and allow his appellate counsel to withdraw. A commissioner of this Court initially granted that motion on August 27, 2007. After the State filed its response in opposition to the motion, the commissioner withdrew his order and referred the motion to a panel of judges. The due date for the Brief of Respondent was extended until the pending motion was resolved.

By order dated October 8, 2007, this Court denied Burns's motion to proceed pro se. The State received notice of this order on October 10, 2007. The Brief of Respondent is accordingly now due.

In recognition of the importance, complexity and sheer length of this appeal, our office has assigned two experienced Senior Deputy Prosecuting Attorneys, Deborah Dwyer and Brian McDonald, to prepare the State's response. Both of us had significant other duties and responsibilities, and it took some time to clear our respective workloads once the appellants' briefs were received. To facilitate work on this appeal, many of our normal responsibilities (e.g., editing briefs, special projects) have been reassigned to other deputy prosecuting attorneys. Some things cannot be reassigned (e.g., both of us have upcoming oral arguments in important cases before this Court), but to the extent possible we are now devoting our full attention to this appeal.

We have to date read approximately half of the trial transcript. At this point, it is difficult to accurately estimate how long it will take to complete reading the record (including the voluminous Clerk's Papers), and respond to the many issues raised by the two appellants. Thus, we are initially requesting an extension of approximately two months. While we do not expect to have the State's response completed by that time, we should be able to more accurately predict the time needed to complete the State's brief. Currently, our hope is that we will be able to file our responsive brief in February of 2008.

4. GROUNDS FOR RELIEF AND ARGUMENT

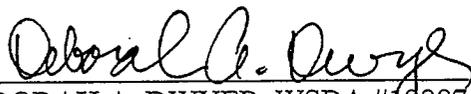
RAP 18.8(a) provides that the appellate court may enlarge the time within which an act must be done in order to serve the ends of justice. This request is based on the extraordinary nature of this appeal, as outlined above. This initial

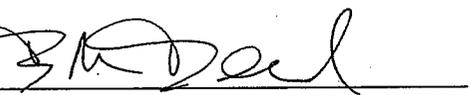
two-month extension of time requested by the State will not prejudice the appellants or significantly delay this appeal.

DATED this 11th day of October, 2007.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney
DANIEL T. SATTERBERG
Interim King County Prosecuting Attorney

By: 
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DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 55217-1-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent: **Brian McDonald - King County Prosecuting Attorney**, appellant and/or other party **David Koch - NBK, PLLC**, at the regular office or residence or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 7, 2007