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No. 95528-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL IAN BURNS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR WHATCOM COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL BURNS

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A. ISSUES BEFORE THE COURT

1. The United States Supreme Court has left it to the states to determine whether an issue concerning the Confrontation Clause may be raised for the first time on appeal. This Court has adopted RAP 2.5 to allow confrontation issues to be raised for the first time on appeal where the issue is constitutional and manifest. Is Michael Burns authorized under RAP 2.5 to raise the admission of the victim's out-of-court testimonial statements for the first time on appeal where the error is constitutional and manifest?

2. The federal and state constitutions gives a defendant the right to self-representation where the defendant is competent. Waiver of the right to counsel requires a colloquy by the trial court. Courts may not deny a defendant the right to self-representation based upon the defendant's lack of knowledge of legal principles or where the defendant's behavior is obnoxious. Was Mr. Burns's right to self-representation violated where he was otherwise competent and, although the court had concerns about his competence, it did not order an evaluation?

B. STATEMENT OF THE CASE

At one of Mr. Burns's first court appearances for charges second degree assault and felony violation of a court order for allegedly attempting to strangle Christine Jackson, moved the trial court to appoint another attorney. CP 25-27; 12/10/2015RP 17. The trial court refused to appoint new counsel for Mr. Burns. 12/10/2015RP 18-19.

At his next appearance, Mr. Burns again sought new counsel and, alternatively, to represent himself. 12/30/2015RP 7-8. The trial court refused to address his requests. 12/30/2015RP 7 ("I am not going to hear that motion today, but you can file a motion and it will be heard").

Mr. Burns repeated his request at the next hearing one week later. 1/7/2016RP 12. The court again refused to address Mr. Burns's request:

Okay. Well, I -- this is noted on for status of representation. We can go through the colloquy, but I am not going to do it right now because it takes a while. It wasn't noted for withdrawal of attorney and there was no written motion filed.

1/7/2016RP 12.

On January 13, 2016, Mr. Burns for a third time expressed his wish to represent himself:

Yeah. Yeah, I would like to go pro se for reasons other than just becoming aware of certain things. And furthermore, I just, you know, I'd rather handle my own business considering certain matters especially when I've gotten lied to, threatened, and coerced into certain things that I wasn't aware of at the time but I am aware of now. So I would like to go pro se because of those certain aspects of things so.

1/13/2016RP 2-3. This time the court engaged in the required colloquy with Mr. Burns regarding his motion to represent himself. The court advised Mr. Burns of the offenses with which he was charged and the maximum sentences for each offense. 1/13/2016RP 3-7. Mr. Burns noted he understood but still wished to represent himself:

Ma'am, I understand completely what you're talking about. I understand that there is some, I, you know, somebody could be charged and sentenced to a serious amount of time for those matters, but like I said, they do not pertain to me and I'm not going to allow this. I would like to relieve counsel of their duties so I can become pro se.

1/13/2016RP 7.

Apparently confused by Mr. Burns's response, the court again advised him of the relevant charges and maximum sentences.

1/13/2016RP 7-11. Mr. Burns repeated that he understood the difficulty he faced but nevertheless wanted to represent himself:

I completely understand everything that I'm up against, okay, Your Honor? I completely understand what is up, what sentencing may occur, all of that stuff. I completely

understand all of that and it doesn't phase [sic] me a bit. And, you know, I just, I made a mistake on asking for a public defender because I, I have a right to be represented as I see fit and the only person that's going to represent me as I see fit is me so that's why I'm here today, Your Honor.

1/13/2016RP 13.

Mr. Burns's unconventional views troubled the court but not so much that the court ordered a psychological evaluation to determine his competency. 1/13/2016RP 22.

In response to the trial court's question regarding competency, Mr. Burns's attorney indicated she had no concerns. 1/13/2016RP 16 ("Your Honor, I have not had reason to seek any evaluation or otherwise."). Counsel did note that the trial court had its own independent authority to order a competency evaluation if it determined Mr. Burns was not competent. *Id.*

The court subsequently refused to allow Mr. Burns to represent himself:

THE COURT: Counsel, I'm going to deny Mr. Burns's motion to proceed without counsel. I don't think that Mr. Burns understands the nature of the charges and the seriousness of the situation –

MR. BURNS: I have the right to waive my right –

THE COURT: Mr. Burns, you need to stop talking now so that I can say what I have –

MR. BURNS: -- and I have the right to not waive my right. And I have the right to say –

THE COURT: Mr. Burns, sit down.

MR. BURNS: -- I want to not have this woman as my counsel any longer, okay?

THE COURT: *Mr. Burns, is not in my view competent to represent himself and so I'm going to deny Mr. Burns's motion to proceed without representation.* I'll leave it to counsel to consider the competency concerns that I've raised here at this hearing but obviously I will rely on counsel's assessment as to those competency issues.

1/13/2016RP 22 (emphasis added).

During Mr. Burns's jury trial, Ms. Jackson did not testify.

Instead, her neighbor and a police officer repeated her out-of-court allegations. Carol Donovan, Christine Jackson's neighbor, testified about hearing noises outside her door, opening the door, and seeing Ms.

Jackson climbing the stairs with Mr. Burns close behind. 6/14/2016RP

253. Over Mr. Burns's hearsay objection, the court allowed Ms.

Donovan to testify that:

I asked what happened and she [Ms. Jackson] said that she had gotten into a fight, they were in the bedroom. He choked her, she blacked out, she came to, she kicked him and she ran out of there and that's when I saw her on the stairway.

6/14/2016RP 260. Over Mr. Burns's hearsay objection, the court admitted Ms. Jackson's statements as excited utterances. 6/14/2016RP 254, 260.¹

Officer Kent Poortinga, the responding police officer, during redirect questioning, was allowed to testify extensively about Ms. Jackson's statements to him about what had allegedly transpired inside her apartment between herself and Mr. Burns. 6/14/2016RP 299-301.

At the conclusion of the jury trial, Mr. Burns was convicted as charged. CP 85, 87-88; 6/16/2016RP 510-11.

In an unpublished decision, the Court of Appeals ruled Mr. Burns was barred from raising his Confrontation Clause claim for the first time on appeal, relying on its decision in *State v. O'Cain*, 169 Wn.App. 228, 279 P.3d 926 (2012). Slip Op. at 12-13. The Court also ruled the trial court did not violate Mr. Burns's right to represent himself, inexplicably ruling the court did not deny his request because

¹ ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

of competency, but because of its concerns regarding Mr. Burns's ability to knowingly and voluntarily waive his right. Slip op. at 11-12.²

C. ARGUMENT

1. The violation of Mr. Burns's right to confrontation is a manifest error affecting a constitutional right that may be raised for the first time on appeal under RAP 2.5.

a. *Admitting testimonial hearsay statements violates the Confrontation Clause.*

The Sixth Amendment to the United States Constitution guarantees an accused person the right to confront adverse witnesses. U.S. Const. Amends. VI. "The Confrontation Clause . . . is binding, and we may not disregard it at our convenience." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325, 129 S.Ct. 2527, 174 L Ed. 2d 314 (2009). The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

² Before the Court of Appeals, Mr. Burns also argued his convictions for felony violation of a court order and second degree assault were the same criminal conduct for sentencing purposes. The Court rejected the argument and this Court did not accept review of that issue.

A statement is testimonial if made to establish or prove some fact or if a reasonable person in the declarant’s position would anticipate that his or her statement would be used against the accused in investigating or prosecuting a crime. *Crawford*, 541 U.S. at 51-52; *State v. Hart*, 195 Wn.App. 449, 459, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017).

b. *The violation of the Confrontation Clause is a manifest error affecting a constitutional right under RAP 2.5(a)(3).*

Under RAP 2.5(a)(3), an “appellate court may refuse to review any claim of error which was not raised in the trial court,” but there are exceptions to this general rule.³ One exception is that “a party may raise ... manifest error affecting a constitutional right” for the first time on appeal. *Id.* This exception recognizes that “[c]onstitutional errors are treated specially because they often result in serious injustice to the accused.” *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988).

“[I]t is an established principle of law that constitutional claims may be heard for the first time on appeal.” *State v. McCullum*, 98 Wn.2d 484, 487, 656 P.2d 1064 (1983). RAP 2.5(a)(3) is a

³ For an excellent historical analysis of the underpinnings of RAP 2.5(a)(3), see former Judge Quinn-Brintnall’s concurring opinion in *State v. Bertrand*, 165 Wn.App. 393, 406-14, 267 P.2d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012) (Quinn-Brintnall, J., concurring).

discretionary rule explaining the Court’s gatekeeping function, for claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Determining whether the issue is manifest for the purposes of RAP 2.5(a), is not the same issue as whether the error was harmless.

To elaborate on the distinction between a manifest error and a harmless error, a manifest error is “so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wn.2d at 100, 217 P.3d 756. It is the defendant’s burden to identify this type of error, but it is not the defendant’s burden to also show the error was harmful. Once the error is addressed on its merits, the State bears the burden to prove the error was harmless under the *Chapman* standard.

State v. Gordon, 172 Wn.2d 671, 676 n.2, 260 P.3d 884 (2011).

This Court in *State v. Kronich*, ruled that an error under the Confrontation Clause may be raised for the first time on appeal under RAP 2.5(a)(3) as a manifest error affecting a constitutional right. 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007), *overruled on other grounds* by *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).⁴ The claim in

⁴ *Jaspar* overruled *Kronich*’s holding that a DOL affidavit was not testimonial and its admission did not violate the Confrontation Clause based on changes in the legal landscape defining testimonial statements. 174 Wn.2d at 116;

Kronich involved the admission of a Department of Licensing certification at his trial, which was unquestionably constitutional in nature under the Confrontation Clause. *Id.* The claim of error was deemed manifest because, had Mr. Kronich successfully raised his Confrontation Clause challenge at trial, the DOL certification would have been excluded. In other words, there was an error that clearly had “practical and identifiable consequences in the trial of the case.” *Id.* at 901, quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). This Court decided that the error was subject to review despite Mr. Kronich’s failure to preserve the issue at trial. RAP 2.5(a)(3). *Kronich*, 160 Wn.2d at 901.

Kronich demonstrates that, under RAP 2.5, the issue raised by Mr. Burns was constitutional and manifest. The Court of Appeals incorrectly ruled that Mr. Burns had waived his right to raise the issue by failing to mention the Confrontation Clause at trial.

Kronich, 160 Wn.2d at 903. *Jasper* did not address RAP 2.5(a)(3) and did not overrule this aspect of *Kronich* silently. See *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) (Court will not overrule binding precedent *sub silentio*).

c. *The State cannot show that Kronich is incorrect and harmful, thus it should not be overruled.*

Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997), quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991). This Court requires “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The Court may also abandon its precedent “when [its] legal underpinnings ... have changed or disappeared altogether.” *W.G. Clark Constr. Co. v. Pac. Nw. Reg’l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). Neither of these circumstances are applicable here.

The State cannot show *Kronich* is incorrect or harmful as it is consistent with prior cases of this Court allowing manifest constitutional issues to be raised for the first time on appeal. In addition, *Kronich* correctly analyzes RAP 2.5 in allowing issues raised for the first time on appeal as a constitutional manifest issue. Consistent

with long-standing precedent, this Court should reaffirm *Kronich* as it applies to RAP 2.5.

d. *The decision in O’Cain ignored this Court’s right to create state procedural rules.*

The Court of Appeals relied on its decision in *State v. O’Cain*, in ruling Mr. Burns could not raise the Confrontation Clause error for the first time on appeal. Slip Op. at 12-13.

In *O’Cain*, the Court construed United States Supreme Court precedent to dictate that a failure to assert the right to confrontation at or before trial results in the right being forfeited. *O’Cain*, 169 Wn.App. at 248. The *O’Cain* Court asserted that if the rule were otherwise, the trial judge would be placed in the untenable position of intervening on the defendant’s behalf to secure a defendant’s confrontation rights when there may be a strategic decision not to invoke them. *Id.* at 243-44.

O’Cain premised its forfeiture rule on the United States Supreme Court’s decision in *Melendez-Diaz*, which recognized that states may adopt procedural rules governing Confrontation Clause challenges:

The right to confrontation may, of course, be waived, including by failure to object to the offending evidence;

and States may adopt procedural rules governing the exercise of such objections.

Melendez-Diaz, 557 U.S. at 314 n.3. *O’Cain* essentially created an unwritten exception to RAP 2.5(a)(3) for Confrontation Clause claims based upon this footnote. *O’Cain* held that an appellate court violates United States Supreme Court precedent by considering a Sixth Amendment Confrontation Clause challenge for the first time on appeal, and that the Court’s decision in *Kronich* was overruled in this respect. *O’Cain*, 169 Wn.App. at 248.

The same division of the Court of Appeals had previously ruled:

We acknowledged in *O’Cain* that under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the States “may adopt procedural rules” governing the exercise of confrontation clause objections. *Melendez-Diaz*, 129 S.Ct. at 2534 n. 3, quoted in *O’Cain*, 279 P.3d at 930. Arguably, RAP 2.5(a) is a procedural rule by which Washington State allows defendants to raise confrontation clause objections for the first time on appeal if they can show a manifest error.

State v. Fraser, 170 Wn.App. 13, 26-27, 282 P.3d 152 (2012).⁵

The portion of *Melendez-Diaz* relied upon by the *O’Cain* Court was plainly dicta and did not undermine this Court’s previous

⁵ Regarding this Court’s rule-making authority, for example in *State v. Templeton*, this Court ruled that its procedural rule, CrRLJ 3.1, provided a greater right to counsel than the Sixth Amendment and the rule was a proper exercise of the Court’s rule-making authority. 148 Wn.2d 193, 212-18, 59 P.3d 632 (2002).

determinations that Confrontation Clause challenges may be raised for the first time on appeal. “A statement is dicta when it is not necessary to the court’s decision in a case.” *Protect the Peninsula’s Future v. City of Port Angeles*, 175 Wn.App. 201, 215, 304 P.3d 914 (2013). Further, the defendant in *Melendez-Diaz* had objected at trial, so there was no issue regarding preservation.

O’Cain is flawed in its analysis and ignores the ability of this Court to adopt state procedural rules. RAP 2.5 is an appropriate use of the Court’s rule-making authority and the Court of Appeals erred in ruling *O’Cain* foreclosed Mr. Burns from raising the Confrontation Clause issue for the first time on appeal. Since the Court of Appeals did not reach the merits of the issue, this Court should remand to the Court of Appeals to apply the correct analysis.

2. The court denied Mr. Burns’s constitutionally protected right to represent himself.

- a. *Mr. Burns had the constitutionally protected right to represent himself.*

The Sixth Amendment provides that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. In felony cases, a criminal defendant is entitled to be represented by counsel at all critical stages of the prosecution,

including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967).

The Sixth and Fourteenth Amendments to the United States Constitution allow criminal defendants to waive their right to the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Washington Constitution also guarantees the explicit right to self-representation. Art. I, sec. 22 (“In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”); *State v. Silva*, 107 Wn.App. 605, 620-21, 27 P.3d 663 (2001). Courts regard this right as “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). An improper denial of the right requires reversal regardless of whether prejudice results. *Madsen*, 168 Wn.2d at 503.

To exercise the right to self-representation, the criminal defendant must knowingly and intelligently waive the right to counsel; that waiver should include advice about the dangers and disadvantages of self-representation. *Faretta*, 422 U.S. at 835. There is no specific test for a valid waiver. *Iowa v. Tovar*, 541 U.S. 77, 87-88, 124 S.Ct. 1379,

158 L.Ed. 2d 209 (2004). A thorough colloquy on the record is the preferred method of ensuring an intelligent waiver of the right to counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984); *State v. Dougherty*, 33 Wn.App. 466, 469, 655 P.2d 1187 (1982). The colloquy should, at a minimum, consist of informing the defendant of the nature and classification of the charge and the maximum penalty upon the conviction. Moreover, the defendant must be informed that technical rules apply to the defendant's presentation of his case. *Acrey*, 103 Wn.2d at 211. Courts should engage in a presumption against waiver of the right to counsel. *State v. Lawrence*, 166 Wn.App. 378, 390, 271 P.3d 280 (2012). The defendant has the right to proceed *pro se* as a matter of law when the request is made well before trial. *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002).

This presumption does not give courts *carte blanche* to deny a motion to represent oneself. Courts are limited to finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *Madsen*, 168 Wn.2d at 504-05. A court may not deny a motion for self-representation based on grounds that self-representation would be

detrimental to a defendant's ability to present his case or concerns that courtroom proceedings will be less efficient and orderly than if a defendant were represented by counsel. *Id.*

- b. *Concerns over a defendant's competency or mental health status are merely one factor in evaluating whether the waiver is knowing and intelligent.*

The trial court initially asked the lawyers whether it should order a competency evaluation for Mr. Burns. 1/13/2016RP 15-18. Neither attorney requested an evaluation and defense counsel said she had extensive conversations with Mr. Burns and held no concerns over his competency. *Id.* Without holding a competency hearing or ordering an evaluation, the court denied Mr. Burns's request to represent himself based solely upon his competency. 1/13/2016RP 22.

A trial court's "concern regarding a defendant's competency alone is insufficient; if the court doubts the defendant's competency, the necessary course is to order a competency review." *Madsen*, 168 Wn.2d at 505. A defendant's mental health status is merely *one* factor that may be considered in determining whether the waiver is knowing and intelligent. *In re Rhome*, 172 Wn.2d 654, 665, 260 P.3d 874 (2011); *State v. Hahn*, 106 Wn.2d 885, 900, 726 P.2d 25 (1986).

Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary,

unknowing, or unintelligent . . . If the trial court was concerned about Madsen's competency, it should have ordered a competency hearing.

Madsen, 168 Wn.2d at 510.

The court here made it plain as part of its denial of Mr. Burns's request to represent himself that he was not competent to represent himself. 1/13/2016RP 22. According to *Madsen*, the court's option at that point was not to deny Mr. Burns's request but to order a competency hearing.

In *Rhome*, the defendant was allowed to represent himself despite a significant mental health history and continuing questions about his competency:

Rhome's mental competency became an issue at trial. Since early childhood, Rhome has been treated for psychiatric disturbances, including several in-patient stays at psychiatric hospitals. Personal Restraint Petition (PRP), Ex. A at 2. He received multiple diagnoses during those stays, including psychotic disorder, delusional disorder, oppositional defiant disorder, mild mental retardation, obsessive-compulsive personality traits, and pervasive development disorder (Aspergers disorder). *Id.* at 4.

Id., at 656-57. Mr. Rhome repeatedly moved to represent himself prior to trial. In response:

Judge Kessler considered a renewed request from Rhome to proceed pro se. He advised Rhome of the risks of representing himself and engaged in a colloquy to

determine if Rhome understood the significance of his undertaking. Rhome's mental health issues were not specifically addressed during the colloquy. At the conclusion of the hearing, Judge Kessler granted Rhome's request to proceed pro se, and appointed standby counsel. VRP (Aug. 30, 2005) at 12.

Rhome, 172 Wn.2d at 657. This Court ruled that the trial court did not abuse its discretion to allowing Mr. Rhome to represent himself in light of the judge's colloquy with him and despite Mr. Rhome's mental health history. *Id.* at 668-69. The Court did caution that, if the court has mental health concerns, it must conduct a "searching inquiry" into the defendant's mental health status. *Id.*; see also *State v. Coley*, 180 Wn.2d 543, 561, 326 P.3d 702 (2014) (trial court properly ordered competency evaluation based on concerns about defendant's competency where defendant moved to represent himself), citing *Madsen*, 168 Wn.2d at 510 ("If the trial court was concerned with Madsen's competency, it should have ordered a competency hearing.").

Here, the court's inquiry into Mr. Burns's mental health status was limited solely to seeking the opinions of the prosecutor and defense attorneys. The court engaged in the colloquy with Mr. Burns, who clearly stated he understood the court the difficult task ahead of him, but nonetheless desired to represent himself.

- c. *This Court should reaffirm that in Washington State, the competency standard for proceeding pro se is the same as that for standing trial.*

In *Godinez v. Moran*, the U.S. Supreme Court held that “the competency standard for pleading guilty or waiving the right to counsel is [no] higher than the competency standard for standing trial.” 509 U.S. 389, 391, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). This is because “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” *Id.* at 399 (emphasis in original). Similarly, this Court held over 20 years ago that a defendant who is competent to stand trial is competent to represent himself. *Hahn*, 106 Wn.2d at 893. Notably, this was seven years before the U.S. Supreme Court appeared to issue the same holding in *Godinez*.

The U.S. Supreme Court retreated from *Godinez* in *Indiana v. Edwards*, holding that “the [federal] Constitution permits States to insist upon representation by counsel for those competent enough to stand trial ... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” 554 U.S. 164, 177-78, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). However, the Court left it to each state to determine whether it

would retain the *Godinez* competence standard or adopt the *Edwards* standard for defendants moving to proceed pro se. *Id.* at 173-74.

This Court should hold that Washington retains the *Godinez* standard of competence for waiving the right to counsel. The *Edwards* standard is flawed in at least two ways. First, because of the “severe mental illness” requirement, the subset of defendants that states can deem competent to stand trial but incompetent to proceed *pro se* is necessarily extremely narrow. Defining and identifying that narrow class would prove unworkable. Indeed, even with only one competency standard, “competency determinations ... have proven notoriously difficult to administer.” Leading Case, *The Supreme Court, 2007 Term*, 122 Harv.L.Rev. 316, 323 (2008). “Replicating this imprecision by allowing states to create a second competency determination for would-be pro se defendants injects more ambiguity into the criminal trial process for defendants seeking to exercise their constitutional *Faretta* right.” *Id.*

Secondly, *Edwards* undercuts the core value of *Faretta*: autonomy. *Id.* at 324-25. The Washington Constitution provides greater protection for autonomy in many contexts and specifically provides greater protection of the right to self-representation than the federal

constitution. *Silva*, 107 Wn.App. at 609. Accordingly, this Court should not adopt a different standard and reaffirm that in Washington, the competency standard for proceeding *pro se* remains the same as that for standing trial.

d. *Mr. Burns's waiver of counsel was otherwise knowing and intelligent.*

The Court of Appeals ruled that the trial court did not deny Mr. Burns's request for self-representation based on his competency but because his waiver was not knowing and intelligent. Slip op. at 11-12.

A waiver of the right to counsel like the waiver of any other constitutional right must be knowing, voluntary, and intelligent. *Acrey*, 103 Wn.2d at 208-09. A valid waiver of the right to counsel requires that the defendant be made aware of the risks and disadvantages of self-representation, with an indication on the record that "he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835.

Whether there has been an intelligent waiver of counsel is an *ad hoc* determination that depends on the particular facts and circumstances of the case, including the background, experience and conduct of the defendant, which may include a history of mental illness. *Rhome*, 172 Wn.2d at 663. But any finding of the court that the

waiver is not knowing and intelligent must be based on some *identifiable fact*. *Madsen*, 168 Wn.2d at 505.

The only identifiable fact here was Mr. Burns's competency. To the extent the court did consider other factors, these too were supported by insufficient evidence to deny Mr. Burns his right to represent himself:

The findings should be simply the Court does not find that Mr. Burns is sufficiently knowledgeable about the nature of the charges against him and the legal processes that lead to trial and criminal matters for the court to believe that he is making a knowing waiver of his right to counsel.

1/13/2106RP 24. But, “[a] court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.” *Madsen* 168 Wn.2d at 510.

The trial court erred in denying Mr. Burns the right to represent himself. He is entitled to reversal of his conviction and remand for a new trial. *Madsen*, 168 Wn.2d at 503.

D. CONCLUSION

For the reasons stated, Mr. Burns asks this Court to reverse his convictions and remand for a new trial.

DATED this 19th day of September 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 95528-0
)	
MICHAEL BURNS,)	
)	
PETITIONER.)	

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