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Supreme Court No. (to be set)
Court of Appeals No. 57297-4-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington v. Joshua Bensinger

Clark County Superior Court

Cause No. 21-1-01253-06

The Honorable Judge Jennifer Snider

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

The 'inviolate' state constitutional right to a jury trial requires courts to take special care when accepting an accused person's waiver of the right. The requirements for a waiver under the state constitution are more stringent than those required under the federal constitution.

At the very least, the accused person must be informed of 'four crucial facts.' One of these is the right to participate in jury selection. Absent advice of this right, a defendant might believe that the court would select jurors without input from the defense team.

Joshua Bensinger's purported waiver of his right to a jury trial was invalid. He was not fully informed of the nature of the right and the consequences of waiver. No one told him that he could participate in jury selection. His conviction must be reversed, and the charge remanded for a new trial.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Joshua Bensinger, the appellant below, asks the Court to review the Court of Appeals Opinion, entered on 10/3/23.[1] This case presents one issue: Was Mr. Bensinger's waiver of his state constitutional right to a jury trial invalid?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After an incident between Mr. Bensinger and his former girlfriend, the State charged him with second degree rape. CP 1. As jury selection was about to start, Mr. Bensinger's attorney announced that he planned to waive jury. RP 129.

Mr. Bensinger signed a written "Waiver of Jury Trial." CP 156. The waiver indicated that he had "the right to have a jury of 12 decide my case," and that "all 12 jurors would have to agree… before I could be found guilty." CP 156.

During a brief colloquy, the court advised Mr. Bensinger that "if you were to have a jury trial, that would be 12 people

[1] A copy of the opinion is attached.

and all 12 of them would have to agree in order to reach a verdict." RP 130. The court concluded by asking "after discussing the right to a jury trial with your attorney, you wish to waive and have this trial heard by me as a bench trial?" RP 130.

Neither the written waiver nor the oral colloquy mentioned that Mr. Bensinger would be able to participate in jury selection. CP 156; RP 130. The court accepted Mr. Bensinger's waiver, and found him guilty following a bench trial. RP 131; CP 3-5.

Mr. Bensinger had no criminal history. CP 10, 22. He was sentenced to life in prison, with a minimum term of 90 months. CP 12. He timely appealed, and the Court of Appeals affirmed. CP 180; Opinion, pp. 1, 5.

ARGUMENT

THE SUPREME COURT SHOULD GRANT REVIEW AND HOLD THAT MR. BENSINGER'S JURY WAIVER WAS INVALID UNDER THE STATE CONSTITUTION.

Mr. Bensinger was not fully informed about his state constitutional right to a jury trial and the consequences of his waiver. Neither the written waiver nor the oral colloquy notified him that the defense could play a role in jury selection, rather than leaving it up to the court.

This is a core attribute of the state constitutional right to a jury trial. Because the record doesn't show that Mr. Bensinger had a full understanding of his state constitutional right to a jury trial, the waiver was invalid.

A. Washington's broad protection of the right to a jury trial in criminal cases prohibits waiver absent a complete understanding of the right and the consequences of waiver.

Washington's constitution provides that "[t]he right of trial by jury shall remain inviolate." Wash. Const. art. I, §21. A separate provision guarantees the right to "trial by an impartial

jury." Wash. Const. art. I, §22. These provisions are more protective of the jury trial right than is the federal constitution. *State v. Clark-El*, 196 Wn.App. 614, 621, 384 P.3d 627 (2016); *cf.* U.S. Const. Amend. VI.

Gunwall[2] analysis of the expansive state constitutional protection establishes a right to be fully informed regarding (a) the nature of the jury trial right and (b) the consequences of any waiver. At a minimum, the court must advise an accused person of 'four crucial facts,' one of which is the right to participate in jury selection.

The Supreme Court has never addressed whether waiver of a broad state constitutional right might require something more than the minimum showing required for waiver of the narrower corresponding federal right. This case provides an opportunity for the court to address the issue under RAP 13.4(b)(3) and (4).

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

To determine "whether our state constitution offers greater jury trial rights within a particular context," courts must examine "the state of the law at the time of adoption of the constitution." *State v. Williams-Walker*, 167 Wn.2d 889, 913-914, 225 P.3d 913 (2010). This requires analysis of six "nonexclusive neutral criteria." *Gunwall*, 106 Wn.2d at 58.

The first *Gunwall* factor requires examination of the text of the state constitutional provision. *Id.*, at 61. The plain language "provides the most fundamental guidance." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989), *amended*, 780 P.2d 260 (Wash. 1989). The constitutional provision describes as 'inviolate' the right to a jury trial; this language "connotes deserving of the highest protection." *Id.*

The provision's clear and direct language "indicates a strong protection of the jury trial right." *State v. Smith*, 150 Wn.2d 135, 150, 75 P.3d 934 (2003) (*Smith* I). The importance of the jury right in criminal cases is further emphasized by the existence of a separate section providing that "the accused shall

have the right…[to] trial by an impartial jury." Wash. Const. art. I, §22.

By describing the right as "inviolate," the framers adopted language prohibiting waiver based only on a superficial understanding of the right and its consequences. Under *Gunwall*, the text of Wash. Const. art. I, §21 an §22 weighs in favor of requiring full comprehension of the right and the consequences of waiver.

The second *Gunwall* factor also supports robust requirements for a valid waiver. This factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. *Gunwall*, 106 Wn.2d at 61.

The provision declaring the jury trial right 'inviolate' "has no federal counterpart." *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). This amounts to "an expression by the framers that the state right to a jury trial is broader than the federal right." *Id.*, at 14 (citing *City of Pasco* v. *Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). In *Mace*, the Supreme

Court found the state constitutional provision broad enough to guarantee a jury trial for offenses deemed too insignificant to warrant a jury trial under the federal constitution. *Id.* The strength and breadth of the state jury trial right suggests that waiver of the right requires more than is required for waiver of the narrower federal right.

The third *Gunwall* factor requires courts to examine state constitutional and common law history. The state constitution preserves the jury trial right "as it existed at common law in the territory at the time of its adoption." *Mace*, 98 Wn.2d at 96.

Even before adoption of the state constitution in 1889, the U.S. Supreme Court had ruled that "every reasonable presumption should be indulged against [a] waiver" of the fundamental right to a jury trial. *Hodges v. Easton*, 106 U.S. 408 at 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882).

During the decade prior to the adoption of the state constitution, it was believed that a defendant could *never* waive

the right to a jury trial: "This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous." *United States v. Taylor*, 11 F. 470 at 471 (C.C.Kan. 1882); *see also United States v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (*Smith* II).

In Washington, an accused person's ability to waive jury was not conclusively established until 1952. *State v. Lane*, 40 Wn.2d 734, 736, 246 P.2d 474 (1952). Other states have maintained the prohibition against waiver until very recently. *See, e.g., State v. Bunch*, 196 N.C. App. 438, 440, 675 S.E.2d 103 (2009), *aff'd*, 363 N.C. 841, 689 S.E.2d 866 (2010). In *Bunch*, the North Carolina Court of Appeals reaffirmed this longstanding rule: "Unlike the right to a jury trial established by the Sixth Amendment of the U.S. Constitution, the right to a

jury trial pursuant to [the North Carolina constitution] cannot be waived."[3]

This background suggest that the drafters of the Constitution would have opposed casual waiver of this crucial right.

The fourth *Gunwall* factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims."' *Grant County Fire Prot. Dist, No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62). Courts must consider any "[p]reviously established bodies of state law, including statutory law." *Gunwall*, 106 Wn.2d at 61.

By statute, where an accused person "is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court." RCW 10.01.060.

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[3] North Carolina's constitution was amended in 2014 to permit waiver. 2013 North Carolina Laws S.L. 2013-300 (S.B. 399).

This reference to counsel reflects "a legislative concern" regarding jury waivers, and "establish[es] one measure to insure, that waiver of a jury trial in a non-capital criminal case be intelligently exercised." *State v. Adams*, 3 Wn.App. 849, 852, 479 P.2d 148 (1970).

Similarly, under the Superior Court Criminal Rules, "[c]ases required to be tried by jury shall be so tried unless the defendant files a *written* waiver of a jury trial." CrR 6.1(a) (emphasis added). This preference for a written waiver evidences a recognition that the jury right is too important to be casually waived.

Pre-existing state law suggests that courts should ensure that the accused person has a complete understanding of the jury right before accepting the defendant's waiver of that right.

The fifth *Gunwall* factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, "because the Federal Constitution is a grant of power from the states, while the State Constitution

represents a limitation of the State's power." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). This structural difference supports application of a state standard for waiver that is more protective than the federal standard.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. This factor weighs in favor of an independent examination of the right. This is so because "[t]here is no need for national uniformity on this issue." *Schaaf*, 109 Wn.2d at 16. State courts addressing state constitutional rights may take an independent approach "on procedural matters such as harmless error, retroactivity, *and waiver of rights*." Robert F. Williams, The Law of American State Constitutions, p. 186 (2009) (emphasis added).

Similar constitutional rights are "plainly of state interest and local concern." *State v. Silva*, 107 Wn. App. 605, 621, 27 P.3d 663 (2001). These include the right to self-representation, the right to be free from double jeopardy, the State's interest in law enforcement, and Washington citizens' right to privacy. *Id.*

These are analogous to the right at issue here. Accordingly, factor six favors an interpretation of Wash. Const. art. I, §21 that requires a complete understanding of the jury trial right before a waiver is accepted.

***Gunwall* summary.** All six *Gunwall* factors establish that a defendant seeking to waive jury must be fully informed regarding the nature of the jury trial right and the consequences of waiver. Failure to fully advise a defendant will invalidate any purported waiver.

In this case, the record does not show that Mr. Bensinger had a complete understanding of the right. His waiver was invalid.

B. The requirements for waiver of a state constitutional right are integral to the scope of that right.

The scope of a state constitutional right necessarily includes the requirements for waiver of that right. In past decisions—as in this case—the Court of Appeals has

erroneously concluded that the scope of the right does not govern the requirements for a valid waiver.

Here, the court adhered to those prior decisions. Opinion, pp. 3-4. The court noted its past refusal to conduct a *Gunwall* analysis of the issue or to require notification of "any particular fact" to support a valid waiver. Opinion, pp 3-4.

These prior Court of Appeals decisions are incorrect and harmful and must be overturned. The Supreme Court should grant review and address the issue. RAP 13.4(b)(3) and (4).

In 2006, after acknowledging that the state constitutional right to a jury trial "is more expansive than the federal right," the Court of Appeals concluded that "it does not automatically follow that additional safeguards are required before a more expansive right may be waived." *State v. Pierce*, 134 Wn.App. 763, 773, 142 P.3d 610 (2006). According to the *Pierce* court, *Gunwall* is not the appropriate vehicle for examining the requirements of a waiver: "*Gunwall* addresses the extent of a right and not how the right in question may be waived." *Id.*

This brief conclusion, provided without authority, is the foundation for this court's numerous decisions rejecting the argument made here. *See, e.g., State v. Benitez*, 175 Wn.App. 116, 127, 302 P.3d 877 (2013) ("Benitez has offered no persuasive authority for us to reject our analysis in *Pierce*").

The Supreme Court should overrule *Pierce* and related decisions because they are "clearly incorrect and harmful." *State v. Blake*, 197 Wn.2d 170, 203, 481 P.3d 521 (2021) (Stephens, J., concurring); *State v. Abdulle*, 174 Wn.2d 411, 415, 275 P.3d 1113 (2012).

An opinion may be incorrect when it was announced, or it may become incorrect over time. *Abdulle*, 174 Wn.2d at 416. A decision is incorrect "if it is based on an inconsistency with the court's precedent, with the State's constitution or statutes, or with public policy considerations." *State v. Scherf*, 192 Wn.2d 350, 379, 429 P.3d 776 (2018).

***Pierce* is incorrect.** The *Pierce* decision is inconsistent with Supreme Court precedent recognizing the broad

protections our state constitution affords the right to a jury trial. *See, e.g., Mace*, 98 Wn.2d at 97. It is also incorrect because it is inconsistent with the constitution itself, which declares the right to a jury trial "inviolate" and which guarantees the right to "trial by an impartial jury." Wash. Const. art. I, §21; Wash. Const. art. I, §22.

Furthermore, it is inconsistent with public policy, in that it allows citizens to waive their "inviolate" right to a jury trial without a full understanding of the protections afforded by that right. Waiver of a critical right should not rest on anything less than a complete understanding.

The *Pierce* decision lacks a solid underpinning. The court did not perform a *Gunwall* analysis. It made no effort to examine the state constitution to determine how the framers would have viewed waiver of the "inviolate" right to trial by an impartial jury.

The court appeared to believe that its conclusion was self-evident. This is false. A state constitutional provision can

impose requirements for waiver that are stricter than those required for relinquishment of the corresponding federal right. *See* Williams, p. 186.

For example, in Washington, mere acquiescence does not waive the right to refuse a warrantless police entry under Wash. Const. art. I, §7. *State v. Schultz*, 170 Wn.2d 746, 757, 248 P.3d 484 (2011). By contrast, under the federal constitution consent can be inferred from acquiescence. *United States v. Griffin*, 530 F.2d 739, 743 (7th Cir. 1976).

Similarly, under the state constitution, police seeking permission to enter a home for a warrantless search must advise suspects of the right to refuse consent, to revoke consent, or to limit the scope of consent. *State v. Ferrier*, 136 Wn.2d 103, 109, 960 P.2d 927, 929 (1998). Failure to do so may invalidate waiver of the rights secured by Wash. Const. art. I, §7. *Id.*

By contrast, under the Fourth Amendment, police may obtain a waiver without advising the suspect of the right to

refuse consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Washington's "additional safeguards"[4] against waiver flow directly from the "more expansive right"[5] protected by Wash. Const. art. I, §7. The requirements for waiver are intimately tied to the breadth of the right secured by the state constitutional provision.

Other states impose their own requirements for waiver of state constitutional rights. The "[s]tandards for valid waiver of state constitutional rights vary from jurisdiction to jurisdiction." Andrew L. Faber, *Change of Venue in Criminal Cases: The Defendant's Right to Specify the County of Transfer*, 26 Stan. L. Rev. 131, 146 (1973).

As in Washington, New Jersey requires the prosecution to show that waiver of the warrant requirement rests on "knowledge of the right to refuse consent." *State v. Johnson*, 68

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[4] *Pierce*, 134 Wn.App. at 773.

[5] *Pierce*, 134 Wn.App. at 773.

N.J. 349, 354, 346 A.2d 66 (1975). Furthermore, in New Jersey, police "must have a reasonable and articulable suspicion of criminal wrongdoing" before even seeking such a waiver. *State v. Carty*, 170 N.J. 632, 635, 790 A.2d 903, 905, *modified*, 174 N.J. 351, 806 A.2d 798 (2002). Neither rule applies under the Fourth Amendment.

Numerous jurisdictions impose their own conditions on waiver of other state constitutional rights. These conditions go beyond the requirements for waiver under federal law. They are "additional safeguards"[6] derived from the expansive scope of the state constitutional right under consideration.

For example, in New York, the right to counsel "indelibly attache[s]" when charges are filed. *People v. Settles*, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978). Even if unrepresented, an accused person cannot waive the right

[6] *Pierce*, 134 Wn.App. at 773.

to counsel in the absence of an attorney.[7] *Id.; People v. Samuels*, 49 N.Y.2d 218, 222, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980). The federal constitution does not restrict waiver of the right in this way. *Patterson v. Illinois*, 487 U.S. 285, 298-299, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

New York also prohibits *any* waiver of counsel after a request for counsel during custodial interrogation. *People v. Cunningham*, 49 N.Y.2d 203, 210, 400 N.E.2d 360, 364, 424 N.Y.S.2d 421 (1980). By contrast, under federal law, a request for counsel does not bar further interrogation if the suspect initiates contact or if there has been a break in custody. *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

[7] Similar rules apply in New Jersey and Hawaii. *State v. Sanchez*, 129 N.J. 261, 609 A.2d 400 (1992); *State v. Liulama*, 9 Haw. App. 447, 462, 845 P.2d 1194, 1204 (Haw. Ct. App. 1992).

In West Virginia, waiver of the right to remain silent and to counsel is ineffective unless police convey "the nature of the charge" under investigation. *State v. Randolph*, 179 W. Va. 546, 548, 370 S.E.2d 741 (1988). Under the federal constitution, such advice need not precede a valid waiver. *Colorado v. Spring*, 479 U.S. 564, 574, 107 S. Ct. 851, 857 L. Ed. 2d 954 (1987).

In numerous jurisdictions, "a suspect in custody who has no knowledge that an attorney is waiting to offer assistance cannot knowingly, intelligently, and voluntarily waive the right to counsel." *State v. Stephenson*, 878 S.W.2d 530, 546 (Tenn. 1994), *abrogated on other grounds by State v. Saylor*, 117 S.W.3d 239 (Tenn. 2003) (collecting cases); *see also People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), *abrogated on other grounds by People v. McLean*, 15 N.Y.3d 117, 121, 931 N.E.2d 520, 905 N.Y.S.2d 536 (2010). The opposite is true under the federal constitution. *Moran v.*

Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

In Maine, the State must establish the voluntariness of a confession by proof beyond a reasonable doubt. *State v. Thibodeau*, 496 A.2d 635, 640 (Me. 1985). Federal law requires only proof by a preponderance to show that a person has voluntarily waived their right to remain silent. *United States v. Outland*, 993 F.3d 1017, 1022 (7th Cir. 2021)

Several states have adopted special rules regarding the waiver of state constitutional rights by juvenile offenders. In some states, a juvenile cannot waive certain rights without the assistance of a parent or other responsible adult. *See In re E.T.C.*, 141 Vt. 375, 379, 449 A.2d 937 (1982); *Com. v. Smith*, 472 Pa. 492, 372 A.2d 797 (1977) (*Smith* III); *Matter of Penn*, 92 Misc. 2d 1043, 1045, 402 N.Y.S.2d 155 (N.Y. Fam. Ct. 1978).

Contrary to the *Pierce* court's claim, standards governing waiver of a state constitutional right are an inherent component

of that right. Where the state constitution provides broader protection than the federal constitution, the requirements for waiving the state constitutional right may be stricter than those applicable to federal constitutional rights. The requirements for waiver inhere in the expanded scope of the right.

As outlined above, *Gunwall* analysis shows that waiver of the "inviolate" right to a jury trial requires more than the floor set by the Supreme Court for waiver of the Sixth Amendment right.

***Pierce* is harmful**. A decision may be harmful "for a variety of reasons." *State v. Barber*, 170 Wn.2d 854, 865, 248 P.3d 494 (2011). A rule that infringes a constitutional protection is harmful. *See, e.g., State v. W.R., Jr.*, 181 Wn.2d 757, 769, 336 P.3d 1134 (2014).

Pierce is harmful because it permits a jury waiver without a complete understanding of the "inviolate" right secured by Wash. Const. art. I, §§21 and 22. A jury waiver

should not be accepted unless the accused person has a complete understanding of the right.

The Supreme Court should grant review and hold that a jury waiver is invalid under the state constitution unless the defendant is fully aware of the nature of the jury trial right and the consequences of waiver. This case presents a significant constitutional question, and an issue that is of substantial public interest. RAP 13.4(b)(3) and (4).

C. There are at least 'four crucial facts' involved in waiver of the state constitutional right to a jury trial.

To be valid, a jury waiver must be knowing, intelligent, and voluntary. *State v. Griffith*, 11 Wn.App.2d 661, 686, 455 P.3d 152 (2019). The State bears the burden of proving the validity of a waiver. *Id.* Courts "indulge every reasonable presumption against waiver of fundamental rights." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

To give meaning to the state constitutional right, Washington courts may take guidance from a federal standard that applies under certain limited circumstances.

Ordinarily, there are no special requirements for waiver of the Sixth Amendment right to a jury trial: "All that the [federal] Constitution requires is that a waiver of the right to a jury trial be knowing, voluntary, and intelligent." *United States v. Carmenate*, 544 F.3d 105, 108 (2d Cir. 2008). Courts must evaluate "all the circumstances" to ensure this basic test is met. *Id.*

This federal standard, applicable in ordinary cases, is insufficient to ensure that a Washington defendant has a complete understanding of the state constitutional right to a jury trial. Something more is required.

Federal courts *have* identified the core attributes of a jury trial and charged trial courts with performing "an in-depth

colloquy" under certain limited circumstances.[8] *United States v. Shorty*, 741 F.3d 961, 966, 971 (9th Cir. 2013).

In Washington, such an "in-depth colloquy" should be undertaken in *all* cases. The state constitutional right to a jury trial requires that defendants have (at least) an understanding of the core attributes of a jury trial.

These core attributes include "four crucial facts." *See Shorty*, 741 F.3d at 966. At a minimum, the state constitutional right to a jury trial requires that defendants be advised of these 'four crucial facts.' An accused person must be told that "(1) twelve members of the community compose a jury; (2) *the defendant may take part in jury selection*; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." *Id.* (emphasis

[8] These arise when "the record indicates a special disadvantage or disability bearing upon the defendant's understanding of the jury waiver." *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997).

added)*; see also Christensen*, 18 F.3d 822 (9th Cir. 1994), *as amended* (Apr. 4, 1994); *Duarte-Higareda*, 113 F.3d at 1003.

Waiver of our state constitutional right may require more than the "four crucial facts" outlined in *Shorty*. However, the state constitution should not be interpreted to allow waiver based on a lesser standard.

Gunwall requires Washington courts to apply a strict standard when examining waiver of the "inviolate" right to a jury trial. Waiver must rest on an understanding of *all* crucial facts; at minimum, this includes the four crucial facts identified in *Shorty*. A person who is not informed of these four crucial facts will not have a complete understanding of the jury trial right.

D. Mr. Bensinger did not make a valid waiver of his state constitutional right to a jury trial.

The record shows that Mr. Bensinger was not advised of (at least) one core attribute of the state constitutional right to a jury trial. Because of this, his waiver was invalid.

Mr. Bensinger's written "Waiver of Jury Trial" outlined only two aspects of the rights secured by Wash. Const. art. I, §§21 and 22. These were his "right to have a jury of 12 decide my case… [and] that all 12 jurors would have to agree… before I could be found guilty." Waiver of Jury Trial filed 7/11/22, Supp. CP. The court reiterated this during a brief colloquy. RP 130.

Passing reference to a third crucial fact was made during this colloquy. The court asked Mr. Bensinger if he wished "to waive and have this trial heard by me as a bench trial?"[9] RP 130.

However, the court did not conduct an "in-depth colloquy"[10] that could have ensured Mr. Bensinger understood at least the four crucial facts identified in *Shorty*. The court did not discuss with Mr. Bensinger his right to "take part in jury

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[9] The court did not explicitly tell Mr. Bensinger that "the court alone decides guilt or innocence if the defendant waives a jury trial." *Shorty*, 741 F.3d at 966.

[10] *Shorty*, 741 F.3d at 966.

selection" at all. *Shorty,* 741 F.3d at 966.

The right to help choose jurors is a critical right: a person's "life or liberty may depend upon the aid which… [they] may give to counsel… in the selection of jurors." *Lewis v. United States*, 146 U.S. 370, 373, 13 S. Ct. 136, 137, 36 L. Ed. 1011 (1892).

It is well established that "an essential element of a fair trial is an impartial trier of fact—a jury capable of deciding the case based on the evidence before it." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). Jury selection is "a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning." *Id.*

Mr. Bensinger was not told that he had this critical right. A defendant in his position might well believe that the court would select the jury without input from the defense. Without knowing that the defense team could participate in jury selection, an accused person might believe there is little or no

chance of a fair jury. This may be especially true when facing a sex offense allegation.

Mr. Bensinger was not informed of his right to have the defense team participate in the selection of jurors. As a result, he did not have a full understanding of the core attributes of the right to a jury trial or the consequences of waiving that right. Absent such an understanding, his waiver was invalid under Wash. Const. art. I, §21 and §22.

Where an accused person "has not knowingly, voluntarily, and intelligently waived [the] right to a trial by jury… a court may not enter a judgment of conviction no matter how overwhelming the evidence." *United States v. Ramirez-Castillo*, 748 F.3d 205, 213 (4th Cir. 2014) (internal quotation marks and citation omitted).

Mr. Bensinger's case should not have been tried by the court acting without a jury. The Supreme Court should grant review under RAP 13.4(b)(3) and (4). Mr. Bensinger's conviction must be reversed, and the case remanded for a new

trial.

CONCLUSION

Joshua Bensinger did not make a valid waiver of his inviolate right to a jury trial. As a result of the invalid waiver, he received a life sentence (with a 90-month minimum term) even though no jury had determined his guilt. His conviction must be reversed, and the charge must be remanded for a new trial.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4872 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted October 19, 2023.

BACKLUND AND MISTRY

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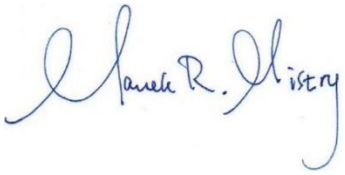

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Joshua Bensinger DOC# 433523
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on October 19, 2023.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

October 3, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA B. BENSINGER, Appellant.	No. 57297-4-II UNPUBLISHED OPINION

MAXA, P.J. – Joshua Bensinger appeals his conviction of second degree rape - domestic violence following a bench trial. Before trial began, Bensinger waived his right to a jury trial. He signed a written waiver in which he stated that he had discussed the issue with his attorney, and then orally confirmed the waiver after engaging in a brief colloquy with the trial court.

Bensinger argues that his waiver was invalid because he was not fully informed of the nature of the right to a jury trial, including that he could participate in jury selection. We hold that Bensinger's jury waiver was valid. Accordingly, we affirm his conviction.

FACTS

Background

After an incident between Bensinger and his former girlfriend, the State charged Bensinger with second degree rape - domestic violence.

Before jury selection started, Bensinger's attorney stated that he had spoken with Bensinger about his right to a jury trial and Bensinger stated that he wanted a bench trial. Both Bensinger and his attorney signed a waiver of jury trial, and the attorney stated that he had discussed the waiver form with Bensinger. The waiver stated,

> My attorney and I have discussed my right to a jury trial. I understand that I have the right to have a jury of 12 decide my case. I further understand that all 12 jurors would have to agree that the elements of the crimes(s) with which I have been charged have been proved beyond a reasonable doubt before I could be found guilty. After discussing this right with my attorney, I have decided to waive my right to a jury trial.

Clerk's Papers at 156.

The trial court then engaged in a brief colloquy with Bensinger regarding the jury waiver. The court informed Bensinger that he had a constitutional right to a jury trial, which Bensinger said he understood. The court asked if Bensinger talked with his attorney about giving up the right and whether he had plenty of time to consider this decision. Bensinger affirmatively responded to both questions.

The court asked Bensinger if he understood that if he were to have a jury, all 12 members would have to agree in order to reach a verdict. Again, Bensinger affirmatively responded that he understood. Bensinger agreed when the court asked whether he wished to waive his right to a jury trial and proceed by bench trial. Finally, Bensinger denied that he had been threatened or received any promises in order to get him to waive his right. The court then found that Bensinger "knowingly, voluntarily, and intelligently waiv[ed] his right to a jury trial." Rep. of Proceedings at 131.

After a bench trial, the trial court found Bensinger guilty second degree rape – domestic violence. Bensinger appeals his conviction.

ANALYSIS

A. LEGAL PRINCIPLES

Both the Sixth Amendment of the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee a defendant's right to a jury trial. However, a

person can waive this right if the waiver is made knowingly, intelligently, and voluntarily. *State v. Castillo-Murcia*, 188 Wn. App. 539, 547, 354 P.3d 932 (2015).

Under CrR 6.1(a), a defendant who wants to waive the right to a jury trial must file a written waiver and obtain the trial court's consent. A written waiver constitutes strong evidence that a defendant's waiver is valid. *Castillo-Murcia*, 188 Wn. App. at 548. In addition, an extensive colloquy is not required. *Id.* at 548. The trial court must inform the defendant of the right to a jury trial and receive a personal expression of waiver from the defendant. *Id*. at 547. As a result, the right to jury trial is easier to waive than other constitutional rights. *Id.*

We review jury trial waivers de novo. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

B. VALIDITY OF WAIVER

Bensinger argues that his waiver of the right to a jury trial was invalid because he was not fully informed of the nature of the right to a jury trial, including that he could participate in jury selection. We disagree.

1. Bensinger's Arguments

First, Bensinger argues that we should engage in a *Gunwall*[1] analysis to determine what information the trial court must provide to the defendant before accepting a waiver of the right to a jury trial. But this court repeatedly has declined to conduct a *Gunwall* analysis regarding this issue. *E.g.*, *State v. Benitez*, 175 Wn. App. 116, 127, 302 P.3d 877 (2013); *State v. Pierce*, 134 Wn. App. 763, 773, 142 P.3d 610 (2006). This is because the scope of the right to a jury trial – which could implicate *Gunwall* – is different than the manner in which the right can be waived. *Benitez*, 175 Wn. App. at 126-27. We decline to revisit this issue.

[1] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Second, Bensinger argues that we should adopt the federal standard requiring the trial court to inform the defendant of four facts before approving a waiver of the right to jury trial: "(1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." *United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013). But Washington courts have never required a defendant to be notified of any particular fact to validate a jury trial waiver as long as the defendant makes a personal expression of waiver. *See State v. Stegall*, 124 Wn.2d 719, 728, 881 P.2d 979 (1994); *Ramirez-Dominguez*, 140 Wn. App. at 240; *Benitez*, 175 Wn. App. at 129-30; *Pierce*, 134 Wn. App. at 771. Therefore, Bensinger's argument fails.

Third, Bensinger focuses specifically on the fact that the trial court failed to inform him that he could take part in jury selection. But this court expressly rejected this argument both in *Pierce*, 134 Wn. App. at 773, and *Benitez*, 175 Wn. App. at 129. As the court stated in *Benitez*, "[W]e have not required that a defendant be apprised of every aspect of the jury trial right in order for the defendant's waiver to be valid." 175 Wn. App. at 129. And we decline Bensinger's invitation to overrule *Pierce*.

2. Waiver Analysis

Here, the only question is whether Bensinger's waiver was made knowingly, intelligently, and voluntarily. Bensinger signed a written waiver of his right to a jury trial and orally reconfirmed that he was waiving this right. He affirmatively stated that he understood the waiver and that he discussed the waiver with his attorney. He acknowledged that he had plenty of time to consider whether he wanted to waive this right. And he agreed to waive his right to a

jury trial during a brief colloquy with the trial court. Nothing in the record indicates that Bensinger's waiver was not made knowingly, intelligently, or voluntarily.

Therefore, we hold that the trial court did not err in allowing Bensinger to waive his right to a jury trial.

CONCLUSION

We affirm Bensinger's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

LEE, J.

CHE, J.

BACKLUND & MISTRY

October 19, 2023 - 1:17 PM

Transmittal Information

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