

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38582-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Glen Livermore
Appellant.

Grays Harbor County Superior Court Cause No. 07-1-543-1

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Livermore's conviction violated his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.
2. The trial judge's improper comments during *voir dire* chilled the venire's responses to questions about bias.
3. Juror misconduct denied Mr. Livermore his right to a fair trial.
4. The trial judge erred by denying Mr. Livermore's motion for a new trial after the Juror McLean revealed her connection to the prosecuting attorney.
5. The trial judge erred by denying Mr. Livermore's motion for a new trial after Juror McLean disclosed that she had injected her connection to the prosecuting attorney into the jury's deliberations.
6. The prosecutor committed misconduct and denied Mr. Livermore his right to a fair trial by an impartial jury by failing to disclose her connection to Juror McLean.
7. The trial judge violated Mr. Livermore's state constitutional right to a jury trial by refusing to excuse Juror No. 25 for cause.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guaranty an accused person the right to a fair trial by an impartial jury, and *voir dire* is intended to help secure that right. In this case, the trial judge refused to excuse biased jurors unless they had a reason for their bias. Did the trial judge's improper comments chill juror responses regarding bias, and thereby deny Mr. Livermore his constitutional right to a fair trial by an impartial jury?

2. When a juror withholds information during *voir dire* and then injects that information into jury deliberations, the misconduct is presumed to have prejudiced the accused person's Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. In this case, a juror withheld information about her relationship with the prosecuting attorney, and injected that information into the jury's deliberations. Did the juror misconduct violate Mr. Livermore's constitutional right to a fair trial by an impartial jury?
3. A prosecutor commits misconduct by failing to reveal information about a juror's potential bias. In this case, the prosecutor failed to reveal that she knew one of the jurors through their children's school and childcare arrangements, and the juror sat on the jury. Did the prosecutor's misconduct violate Mr. Livermore's constitutional right to a fair trial by an impartial jury?
4. The state constitutional right to a jury trial is violated when an accused person is forced to exhaust peremptory challenges to remove a biased juror, after the trial judge erroneously denies a challenge for cause. In this case, the trial judge erroneously denied a challenge for cause, and Mr. Livermore was forced to exhaust his peremptory challenges removing the biased juror. Did the trial judge violate Mr. Livermore's state constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Glen Livermore with three counts of Rape of a Child in the First Degree and three counts of Child Molestation in the first Degree.¹ CP 1-5. The prosecution alleged two aggravating factors for each offense: an ongoing pattern of abuse, and misuse of a position of trust. CP 1-5. The case proceeded to trial. The jury was unable to reach a verdict, and the court declared a mistrial. Clerk's Minutes July 1, 2008, Supp. CP.

At the second trial, the judge didn't swear in the potential jurors prior to jury selection. RP (9/23/08 – jury selection) 88, 136. The court began *voir dire* by asking general questions of the jury panel. RP (9/23/08 – jury selection) 88-99. Juror Number 39 (Juror McLean) raised her hand when asked if anyone knew the judge, the attorneys, or court staff. RP (9/23/08 – jury selection) 90. During her first round of *voir dire*, the prosecutor asked several jurors who'd responded to this question who they knew and how it might affect them, but did not inquire of McLean. RP (9/23/08 – jury selection) 99-111.

¹ Counts two and seven, charging Rape of a Child in the Third Degree and Child Molestation in the Third Degree were apparently not submitted to the jury at Mr. Livermore's second trial. *See* Judgment and Sentence, CP 6-20.

Defense counsel focused his inquiry on people who had indicated that the nature of the charges might impact their ability to be fair. RP (9/23/08 – jury selection) 112-133, 137-146.

THE COURT: Okay. Let me give you a - a little of my thinking on the case like this. I - I heard you saying you felt it would be difficult to serve on this particular jury because of the nature of the charges. And I think a case like this, when the nature of the charges are difficult for everyone and - just like, you know, we've had cases where there's a murder for instance and everyone that serves on a jury in a murder case struggles with what happened. And obviously no one's for murder and no one's for a sexual assault, you know. So everyone generally - if it happened and these are allegations which have been denied and are at issue, I think the key is can you set aside the emotion part of it, which is difficult for everyone, and judge the case on the testimony and the facts? Because, you know, jurors are going to have to hear this case. Or is it some special reason why you think - you know, you told - told counsel I believe that you felt - you had granddaughters I think and that sort of thing, but I think everyone has granddaughters or sisters or wives or, you know, important females in their life. Is it a general concern or is it more specific than that?

PROSPECTIVE JUROR: Probably more specific than it's supposed to, but a general concern. I just don't feel like I could be comfortable with sitting on a jury on this case.

THE COURT: All right. And don't think you could set aside --

PROSPECTIVE JUROR: With - well, going through the assault with my stepson and it's an assault case - an assault case, as far as I'm concerned I don't think I can be open minded enough to do the court any justice.

THE COURT: Okay. I'm going to excuse you because of what you went through with that. Because I can see where being in court and trying to deal with anything in court might be difficult because of that. All right. I'll excuse you.

RP (9/23/08 – jury selection) 112-113.

Juror 25 was another potential juror who had raised her hand when the panel was asked a general question about the ability to be fair. RP (9/23/08 – jury selection) 96. Juror 25 said that she had two small children and found the nature of the charges so disturbing that she could not promise she'd be able to keep an open mind. RP (9/23/08 – jury selection) 107-108. In response to a question from defense counsel, Juror 25 said that she could not be fair. RP (9/23/08 – jury selection) 115. Mr. Livermore challenged Juror 25 for cause, and the court denied the challenge after a brief colloquy with the juror:

THE COURT: All right. Kind of again the same questions. I mean there's probably a lot of jurors here - probably majority of the jurors that have children, maybe not small children but have children. Is it something that you just don't think you can set aside and listen to the testimony?

PROSPECTIVE JUROR: Honestly, I don't know. I could try, but right now my opinion is that I couldn't.

THE COURT: Is it the emotional part of just listening to the testimony or --

PROSPECTIVE JUROR: Yes.

THE COURT: -- in judging the truth or falsity of testimony?

PROSPECTIVE JUROR: I - I think listening to the testimony.

THE COURT: All right. So I'm not hearing it's bias one way or the other. You're willing to keep an open mind and listen to the testimony?

PROSPECTIVE JUROR: Yes.

THE COURT: Okay. How - you know, I'm exploring this because I'm sure everyone here has certain - a certain feeling of, you know, just the allegations in this case or something that they may not want to listen to, you - whether they're true or not. So I hesitate to excuse people just for that because it seems like

everybody can raise their hands and say, I don't want to hear this case either. And I - and I - I could probably - you know, if I asked for jurors that really want to serve on this type of a case they probably wouldn't get any hands. So that's what I'm trying to decide, is it something - I don't want to pry in private matters. Is there something that would really affect you more so than the average juror?

PROSPECTIVE JUROR: No.

THE COURT: Okay. I'm not going to excuse her for cause.

RP (9/23/08 – jury selection) 116-117.

Later during Mr. Livermore's questioning of the panel, the judge realized that he had forgotten to swear in the potential jurors before asking questions. RP (9/23/08 – jury selection) 136. He swore them in, then asked:

THE COURT: ...[H]as anybody given me any - or any of the attorneys or me, any false answers? All right. Nobody raised their hand, so I assume everything you told me has been a truth. I appreciate that. We should have given you that oath beforehand, but I wanted to make sure that I did it now.

RP (9/23/08 – jury selection) 136-137.

Defense counsel was in the middle of questioning a prospective juror about the privilege against self-incrimination when the judge interrupted to let him know that his time was up:

MR. KUPKA: Would you be able to follow that instruction as to the law if Mr. Livermore chooses not to testify?

PROSPECTIVE JUROR: Yeah.

MR. KUPKA: Okay.

MR. KUPKA: Without picking on you anymore, is there –

THE COURT: All right. Time's up on the voir dire.

RP (9/23/08 – jury selection) 162.

Mr. Livermore used one of his peremptory challenges to remove Juror 25, and used all of his allotted challenges removing other jurors. Jury Roll Call, Jury Panel, Supp. CP. His peremptory challenges were used up before the jury was complete. Jury Roll Call, Jury Panel, Supp. CP.

When jury selection was over, Mr. Livermore moved for a mistrial based on the court's failure to properly swear in the jury. The court denied the motion. RP (9/23/08 – jury selection) 166-172. In his ruling, the judge said there was no requirement that the jury panel be sworn before inquiry. RP (9/23/08 – jury selection) 171-172.

The jury convicted Mr. Livermore and returned special verdicts finding the state had established the aggravating factors. RP (9/23/08) 114-224; RP (9/24/08) 3-47.

On September 29, 2008, with sentencing pending, the judge sent a letter to the attorneys, indicating that the presiding juror, McLean, may have provided childcare for the prosecutor on the case, Katherine Svoboda. Letter dated 9/29/08, Supp. CP.

Defense counsel noted a hearing for a new trial. Notice of Hearing, Supp. CP. At the hearing, McLean testified that she knew Svoboda because they both used the same daycare for their children, starting in 2004 and lasting for about a year and a half. RP (11/3/08) 234-235. She said they talked, and that at least a couple of times, McLean

brought Svoboda's child to her (McLean's) home after daycare. On those occasions, Svoboda picked her child up at McLean's home. RP (11/3/08) 236-237, 239.

McLean testified that she did not remember being paid or otherwise compensated for the care, until Svoboda reminded her that Svoboda had given her some wine. RP (11/3/08) 239. McLean also said that she didn't think she'd been paid, but that Svoboda maintained that she had given her \$10 or \$15 for the care.² RP (11/3/08) 240, 236-237. When asked if she'd mentioned her connection to Svoboda to other jurors, McLean testified that the subject could have come up during deliberations. RP (11/3/08) 244. Then she acknowledged that she *did* mention that she'd cared for Svoboda's child while the jury was deliberating, likely during a break. RP (11/3/08) 244-245. McLean said that she couldn't remember every word that was spoken about the topic and couldn't remember why she brought it up, but maintained that her relationship with Svoboda did not affect her deliberations. RP (11/3/08) 245-248, 252.

² Svoboda's declaration indicates that she gave McLean a gift worth \$10-15. Declaration of K. Svoboda, Supp. CP

Mr. Livermore argued that both McLean and the prosecutor should have disclosed the relationship.³ RP (11/3/08) 254-257. The court denied the motion, ruling that there was no actual bias or misconduct involved. RP (11/3/08) 261-264.

After denying the motion for a new trial, the court sentenced Mr. Livermore to three consecutive terms of 160 months. CP 6-20. Mr. Livermore timely appealed. CP 21-22.

ARGUMENT

I. MR. LIVERMORE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...” U.S. Const. Amend. VI.⁴ The Sixth Amendment guarantee applies to state criminal trials through the Fourteenth Amendment. *Turner v. Murray*, 476 U.S. 28, 36 n. 9, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). “In essence, the right to jury trial

³ Defense counsel reminded the judge that he the court had limited his time for *voir dire* during jury selection. The judge responded that defense counsel should have asked for additional time. RP (11/3/08) 256.

⁴ Similarly, Article I, Section 22 of the Washington Constitution provides: “In criminal prosecutions the accused shall have the right to... have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed...” Wash. Const. Article I, Section 22.

guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961). The bias or prejudice of even a single juror violates the right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). The Washington Supreme Court has said that “[n]ot only should there be a fair trial, but there should be no lingering doubt about it.” *State v. Parnell*, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), *overruled in part on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Voir dire protects the right to an impartial jury by exposing possible biases. *State v. Johnson*, 137 Wn.App. 862, 868-869, 155 P.3d 183 (2007) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)). Truthful answers by prospective jurors are necessary for this process to serve its purpose. *Johnson*, at 868-870.

A. The trial judge’s improper comments chilled the jury venire’s responses to questions about bias.

A judge’s comments during jury selection may chill responses to proper questions, “cut[ting] off the vital flow of information from venire to court.” *U.S. v. Rowe*, 106 F.3d 1226, 1230 (5th Cir. 1997). An accused person need not show specific prejudice when the court’s comments “cut off meaningful responses to critical questions.” *Rowe*, at 1230.

In this case, the judge gave the impression jurors should not disclose bias unless they had a good reason for it. First, the judge excused a juror who expressed bias arising from the nature of the accusation only after ascertaining that he'd been through an assault trial that might impact his ability to be fair. RP (9/23/08 – jury selection) 112-113. Second, the judge made clear that jurors would not be excused for bias unless there was “something that would really affect [that juror] more so than the average juror.” RP (9/23/08 – jury selection) 116-117.

The judge's comments were improper. There may have been potential jurors with strong *irrational* biases, but such jurors would withhold comment about their bias in light of the judge's comments: biased jurors who believed they needed “*something* that would really affect [them], more so than the average juror” would keep quiet unless they had a specific reason for their bias.

Because the judge's comments cut off the flow of meaningful responses to critical questions, Mr. Livermore's convictions must be reversed. The case must be remanded to the trial court for a new trial.

Rowe.

B. Juror McLean's failure to disclose her relationship with the prosecutor during *voir dire* and her injection of information about that relationship into the jury room prejudiced Mr. Livermore.

Ordinarily, to obtain a new trial for juror misconduct during *voir dire*, an accused person must show that a juror failed to honestly answer a material question and that a correct response would have provided a valid basis for a challenge for cause. *Johnson*, at 868 (citing *McDonough v. Greenwood*, at 556). However, where the undisclosed information is later injected into the jury's deliberations, inquiry must be made into the prejudicial effect of the combined misconduct. *Johnson*, at 869.

In this case, had Juror McLean disclosed her connection to the prosecuting attorney, Mr. Livermore could have sought a challenge for cause on the grounds that Juror McLean had once had a strong, trusting relationship with the prosecutor, in which each watched the other's children after school. RP (11/3/08) 234-253. Furthermore, McLean served as the jury chair, and injected the undisclosed relationship into the jury's deliberations.⁵ RP (11/3/08) 234-253. By revealing her personal relationship with the prosecutor to the other jurors—including the fact that she and the prosecutor trusted each other with their children—McLean

⁵ Indeed, it is possible that Juror McLean's election as chair was influenced by her past relationship with the prosecutor. RP (11/3/08) 234-253.

may have influenced other jurors to place undue trust in the prosecutor's evidence. Defense counsel enjoyed no such advantage.

Because of Juror McLean's actions, Mr. Livermore was denied the protection *voir dire* offers to preserve jury impartiality; he was also prejudiced by the injection of the information into the jury room. *Johnson, supra*. Accordingly, Mr. Livermore's convictions must be reversed and the case remanded for a new trial. *Johnson, supra*.

C. Juror McLean's implied bias is conclusively presumed from facts established at the post-trial hearing.

Implied bias is conclusively presumed as a matter of law from the existence of certain facts, regardless of whether or not the juror believes she or he can be fair. *U.S. v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000); *see also* RCW 4.44.170(1) (made applicable through CrR 6.4). Where a juror withholds information in order to increase her or his chances of being seated on the jury, the court must draw a conclusive presumption of implied bias. *State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2001). In this case, Mr. Livermore presented facts sufficient to conclusively establish Juror McLean's implied bias under *Cho*. Specifically, McLean withheld information about her relationship with the prosecuting attorney. RP (11/3/08) 234-253.

The fact that McLean concealed the relationship gives rise to “lingering doubt” about the fairness of the proceeding. *Parnell*, at 508. The presumption of unfairness is conclusive, despite McLean’s sincere belief that the undisclosed relationship had no effect on her impartiality. *Cho*, at 329-330. Accordingly, Mr. Livermore’s convictions must be reversed and the case remanded for a new trial. *Cho, supra*.

D. By failing to disclose her connection to Juror McLean, the prosecuting attorney committed misconduct requiring reversal of Mr. Livermore’s convictions.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor’s improper actions prejudice the accused person’s right to a fair trial. *Boehning*, at 518.

A new trial may be required when a prosecutor withholds information about a juror’s past relationship with the prosecutor. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (remanding case for evidentiary hearing to determine whether prosecutor committed misconduct in failing to reveal knowledge of a juror’s possible bias) and *Williams v. Netherland*, 181 F.Supp.2d 604 (E.D.Va., 2002) (holding on remand that prosecutor committed prejudicial misconduct by withholding knowledge of juror’s possible bias).

In this case, the prosecutor, Juror McLean, and (by the end of the trial) the other jurors were all aware of the relationship. RP (11/3/08) 234-253. Because of the prosecutor's failure to disclose the information, only the judge and defense counsel were ignorant of the relationship. Under these circumstances, the prosecutor committed misconduct that impacted Mr. Livermore's right to a fair trial by an unbiased jury. His convictions must be reversed and the case remanded for a new trial. *Boehning, supra*.

II. THE TRIAL JUDGE VIOLATED MR. LIVERMORE'S STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL BY DENYING HIS CHALLENGE FOR CAUSE AND FORCING MR. LIVERMORE TO EXHAUST HIS PEREMPTORY CHALLENGES.

A. Juror No. 25 should have been excused for cause.

A potential juror should be excused for actual bias whenever the juror cannot "try the case impartially and without prejudice to the substantial rights of the party challenging that juror." RCW 4.44.170(2); *City of Cheney v. Grunewald*, 55 Wn.App. 807, 780 P.2d 1332 (1989). Any doubts regarding bias must be resolved against the juror. *U.S. v. Gonzalez*, at 1113; *Cho*, at 329-330.

In this case, Juror 25 raised her hand, indicating that she "could not be fair and impartial." RP (9/23/08 – jury selection) 96. She indicated that she could not promise to "listen fairly to decide the facts..." RP (9/23/08 – jury selection) 107-108. She agreed with defense counsel that

she couldn't be "fair and impartial." RP (9/23/08 – jury selection) 115.

When the judge asked her if she could set aside her feelings and listen to the testimony, she replied "Honestly, I don't know. I could try, but right now my opinion is that I couldn't." RP (9/23/08 – jury selection) 116.

Despite this, the judge announced "I'm not hearing it's bias one way or the other," and then immediately prompted her—through a leading question—to say that she'd keep an open mind and listen to the testimony. RP (9/23/08 – jury selection) 116-117.

Under these circumstances, the judge should have excused Juror 25 for bias. *Cheney v. Grunewald, supra; Cho, supra*. The failure to excuse Juror 25 forced Mr. Livermore to use a peremptory challenge to remove her. Jury Roll Call, Jury Panel, Supp. CP.

B. The trial court's failure to excuse Juror 25 for cause violated Mr. Livermore's state constitutional right to a jury trial.

Under federal law, an accused person who is forced to exhaust peremptory challenges to cure an erroneous denial of a challenge for cause is not entitled to a new trial unless convicted by a jury that includes a biased juror. U.S. Const. Amend. VI;⁶ *State v. Fire*, 145 Wn.2d 152, 165,

⁶ The Sixth Amendment to the U.S. Constitution is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

34 P.3d 1218 (2001) (plurality) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) and *State v. Roberts*, 142 Wash.2d 471, 14 P.3d 713 (2000)).

However, as with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *See, e.g., City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

In *Fire, supra*, the Court noted that the defendant had not provided a *Gunwall* analysis. The Court reviewed its prior cases and determined that none compelled a departure from the federal standard. *Fire*, at 159-163 (plurality). The Court did not *sua sponte* undertake a *Gunwall* analysis.

Since the issue has never been examined under *Gunwall*, Mr. Livermore provides the analysis here. Applying the *Gunwall* factors to this

issue, an independent application of the state constitution requires reversal of Mr. Livermore's convictions.

1. The language of the state constitution.

The first *Gunwall* factor requires examination of the text of the State Constitutional provisions at issue. Wash. Const. Article I, Section 21 provides as follows:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the Court has noted that the language of the provision requires strict attention to the rights of individuals. In *Sofie v. Fibreboard Corp.*, the Supreme Court clarified the meaning of the term “inviolate:”

The term “inviolate” connotes deserving of the highest protection. [Webster’s Dictionary] defines “inviolate” as “free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact . . .” Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). In addition, Wash. Const. Article I, Section 22 (amend. 10) provides that

“[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” Again, the direct and mandatory language (“shall have the right”) implies a high level of protection. The existence of a separate section specifically referencing criminal prosecutions further emphasizes the importance of the right to a jury trial in criminal cases.

Thus, the language of Article I, Section 21 and Article I, Section 22 favors the independent application of the state constitution advocated by Mr. Livermore.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and State Constitutions. The Federal Sixth Amendment and Wash. Const. Article I, Section 22 are similar in that both grant the “right to . . . an impartial jury.” But Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace* found the difference

between the two constitutions significant, and determined that the State Constitution provides broader protection.⁷

Thus, differences in the language between the state and federal constitutions also favor an independent application of the state constitution in this case.

3. Common law and state constitutional history.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

No Washington territorial cases address the situation presented here. The majority of other jurisdictions did not require reversal where an accused person was forced by an erroneous ruling to exhaust peremptory challenges. *See, e.g., State v. Winter*, 72 Iowa 627 (1887); *Ochs v. People*, 25 Ill.App. 379 (1887). *But see Hartnett v. State*, 42 Ohio St. 568 (1885) (reversal required when court erroneously denies challenge for cause and

⁷ The court held that under the Washington Constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited protections available under the Federal Constitution. *Pasco v. Mace*, at 99-100.

forces defendant to exhaust peremptory challenges). Accordingly, the third *Gunwall* factor does not support Mr. Livermore's argument.

4. Pre-existing state law.

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*, at 62).

Pre-existing state law favors an independent application of the state constitutional right to a jury trial. After statehood and the adoption of the constitution, a long line of Washington cases departed from the rule developed in other states. This line of Washington cases held (or, in some cases, noted in *dicta*) that the erroneous denial of a challenge for cause was not cured when an accused person was forced to exhaust peremptory challenges in removing the challenged juror. *See, e.g., State v. Moody*, 7 Wash. 395, 35 P. 132 (1893); *State v. Rutten*, 13 Wash. 203, 43 P. 30 (1895); *State v. Stentz*, 30 Wash. 134, 70 P. 241 (1902); *State v. Muller*, 114 Wash. 660, 195 P. 1047 (1921); *McMahon v. Carlisle-Pennell*

Lumber Co., 135 Wash. 27, 236 P. 797 (1925); *State v. Patterson*, 183 Wash. 239, 48 P.2d 193 (1935); *Parnell*, *supra*.⁸

As this long line of cases demonstrate, pre-existing state law favors the interpretation urged by Mr. Livermore.

5. Differences in structure between the federal and state constitutions.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional 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*, at 180.

6. Matters of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The protection afforded a criminal defendant through peremptory challenges is a matter of state concern; there is no need for national uniformity on the issue. *Gunwall*

⁸ As the Court noted in *Fire*, these cases did not themselves rest on an independent application of the state constitution. *Fire*, at 163-165 (plurality).

factor number six thus also points to an independent application of the State Constitutional provision in this case.

7. Conclusion: five of the six *Gunwall* factors favor Mr. Livermore's interpretation of the state constitutional right to a jury trial, and require reversal of his convictions.

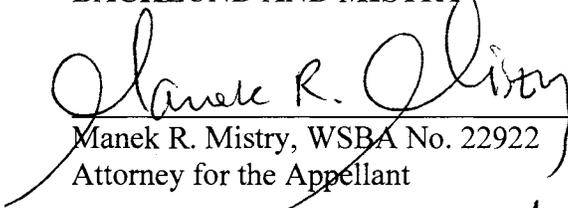
Other than *Gunwall* factor 3 (common law and state constitutional history), the *Gunwall* factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. Each factor establishes that our state constitution provides greater protection to criminal defendants than does the federal constitution. Article I, Sections 21 and 22 require reversal when the erroneous denial of a challenge for cause forces an accused person to exhaust peremptory challenges. Mr. Livermore's conviction must be reversed and the case remanded for a new trial.

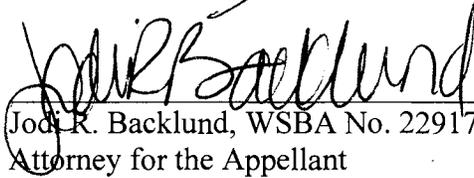
CONCLUSION

For the foregoing reasons, Mr. Livermore's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on August 5, 2009

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to

Glen Livermore, DOC #241349
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and to:

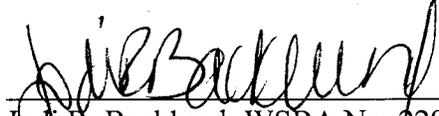
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 5, 2009.

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 August 5, 2009.



Jodi R. Backlund, WSBA No. 22917
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