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### **ASSIGNMENTS OF ERROR**

1. Ms. Stallings's conviction was entered in violation of her state constitutional right to a jury trial.
2. The trial court erred by ordering Ms. Stallings to pay \$3305 in restitution.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person's state constitutional right to a jury trial is broader and more highly valued than her or his corresponding federal constitutional right. Here, the record does not affirmatively demonstrate that Ms. Stallings understood her right, under the state constitution, to participate in the selection of jurors, to a fair and impartial jury, to a jury of twelve, to be presumed innocent by the jury unless proven guilty beyond a reasonable doubt, and to a unanimous verdict. In the absence of such an affirmative showing, did Ms. Stallings's guilty plea violate her state constitutional right to a jury trial?
2. A restitution order may not be based on speculation or conjecture. The court's restitution order in this case was based in part on speculation and conjecture. Did the trial court err by ordering Ms. Stallings to pay \$3,505 in restitution?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Elizabeth Stallings with Theft in the First Degree and Trafficking in Stolen Property in the Second Degree. CP 17-18. They alleged that she had stolen and then sold pieces of fabricated metal from a wooded area by the local airport. RP (12/2/08) 66-192.

Ms. Stallings's attorney sought to have her waive her right to a jury trial, and submitted a written waiver that indicated: "Elizabeth Stallings ... does hereby consent to the trial of said charge by the Court, without a jury, and hereby waives his constitutional right to trial by jury." Waiver of Trial by Jury, Supp. CP. The court reviewed the document with Ms. Stallings:

THE COURT: ... Ms. Stallings, have you read the waiver of right to trial by jury?

THE DEFENDANT: Yes, I did.

THE COURT: Have you reviewed it with Mr. Feste?

THE DEFENDANT: Yes, I did.

THE COURT: Do you have any questions about the waiver?

THE DEFENDANT: No, I do not.

THE COURT: Okay, let me go over it in detail with you just to make sure you understand.

You have the constitutional right to have a trial be tried by a jury of 12 people.

THE DEFENDANT: Yes, I understand.

THE COURT: And it's a very valuable right. All the jury -- all 12 of the jurors must agree in order to find you guilty of the charges. If you waive that right then you're giving up -- you're saying the Court can decide which is only one person who will listen to the evidence. And that the judge finds that you are guilty

beyond a reasonable doubt then that's only one person deciding rather than 12.

So, by signing this you're giving up a very valuable right that you have as a defendant. You still have the right to present your testimony and present your witnesses and to argue in front of the Court as to your side of the case. But again, there will be no jury if the Court approves this waiver.

So, do you have any questions about that at all?

THE DEFENDANT: No, I do not.

THE COURT: Okay, are you signing this waiver and waiving your right to a jury freely and voluntarily?

THE DEFENDANT: Yes, I am.

THE COURT: Okay. Do you feel you've had enough time to discuss it with your attorney?

THE DEFENDANT: Yes, I do.

THE COURT: Okay, and has anybody made any threats or try to coerce you in any way to get you to sign the waiver?

THE DEFENDANT: No.

THE COURT: Okay, I will go ahead and approve the waiver then, and find it was done voluntarily and without any coercion in any way or any threats, and she certainly understands her right to have a trial by jury and she chooses to waive that.  
RP (12/1/08) 13-14.

The state had admitted a receipt found in Ms. Stallings's property for metal sold at a recycler for \$265. RP (6/11/09) 2; Exhibits 6 and 7, admitted 12/1/08, Supp. CP. Law enforcement never contacted the recycler to find out what was sold, confirm that it was sold by Ms. Stallings, or obtain any information from them at all. RP (12/2/08) 184-185. The state didn't call anyone from the recycler as a witness at trial. RP (12/2/08) 66-193.

It became clear at trial that staff at the fabricator suspected another incident of theft, calling the police prior to the incidents that involved Ms.

Stallings. RP (12/2/08) 77, 105-106. But the items missing were only inventoried one time, after Ms. Stallings was arrested. RP (12/2/08) 107, 120.

The trial judge found Ms. Stallings guilty of Theft in the Second Degree and Trafficking in the Second Degree. RP (12/3/08) 35-43. The court found that Ms. Stallings admitted that she had taken screens she thought were abandoned, that the owner valued at \$300. RP (6/11/09) 2. The court relied on the receipt, finding an aggregate value of stolen items was \$565, and thus providing the basis for the finding of second degree theft. RP (12/3/08) 37, 41.

The state sought restitution in the amount of \$60,000, which was the amount the metal fabricating company indicated that had been lost over the course of over a month, including more than one incident. RP (6/11/09) 4-18. Ms. Stallings contested the amount, and the court held an evidentiary hearing. RP (6/11/09) 1-25.

In its ruling, the court referred to the receipts, to Ms. Stallings's admission about taking the screens, concluding that these amounts justified the \$565 amount at trial. Memorandum Opinion, filed 6/18/09, Supp. CP. The court wrote:

Unfortunately, that recycler in Tacoma was never contacted by the investigating officers, nor by the victim, so that no attempt has been made to determine if additional stainless steel

components were sold there by the defendant during the relevant time period. Likewise, it is not possible to determine exactly what she sold to the recycler to determine the amount of the actual loss to the victim.

The matter of who is guilty of the thefts of an estimated \$60,000 in stainless steel materials from FKC is further confused by the fact that other similar thefts had occurred involving materials from a different part of the FKC complex during the same period of time, which are apparently not connected to the defendant, and the fact that the storage yard where the thefts in question occurred was very poorly secured, and easily accessible from a busy city street. The remarkably lax security provided by the victim makes it probably that FKC suffered multiple thefts by more than one thief.

It is clear to the Court that Ms. Stallings stole more from FKC than the State was able to prove with the "beyond a reasonable doubt" standard. It is equally clear that to saddle her with the theft of \$60,000 worth of material claimed would require impermissible speculation, since proof by a preponderance of the evidence is simply not there. And it seems unlikely that this large quantity of heavy material could be removed by a single middle-aged woman in a period of a month or so.

Therefore, it is the determination of the Court, based upon a preponderance of the evidence, that Ms. Stallings stole at least the \$265 worth of materials sold to a recycler in Tacoma, and at least two armloads of stainless steel screens which she was observed taking by the neighbors. The court estimates that she would be able to carry at least ten such screens in an armload, and the replacement costs of those screens, according to the uncontroverted testimony of Mr. Campbell, is \$152 each. The theft of 20 screens at this replacement cost yields restitution of \$3,040, which when added to the \$265, yields total restitution of \$3,305, and that is the determination of the Court.

Memorandum Opinion, filed 6/18/09, page 3 and 4, Supp. CP.

Ms. Stallings filed a Notice of Appeal regarding her Judgment and Sentence, and later filed another one for the restitution order. CP 5, 24.

Those appeals have been consolidated.

## ARGUMENT

### **I. MS. STALLINGS’S CONVICTIONS WERE ENTERED IN VIOLATION OF HER STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.**

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...”

As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right.<sup>1</sup> See, e.g., *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Because the right is broader and more highly valued under the state constitution, a waiver of the state constitutional right must be examined more carefully than a waiver of the corresponding federal right.<sup>2</sup>

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<sup>1</sup> The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. 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).

<sup>2</sup> Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419, 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois* 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In the absence of a valid waiver of the federal right, a criminal defendant’s conviction following a bench trial must be reversed. *Treat, supra*.

- A. Waiver of the state constitutional right to a jury trial requires affirmative evidence that the accused possessed a complete understanding of the right.

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). Under *Gunwall*, waiver of the state constitutional right to a jury trial is valid only if the record shows that the defendant is fully aware of the meaning of the state constitutional right. This includes (among other things) an understanding of the right to participate in the selection of jurors, the right to a fair and impartial jury, the right to a jury of twelve, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.

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).

Furthermore, the provision allows the legislature to authorize waivers in civil cases, but does not mention waiver in criminal cases. This suggests that the jury right in criminal cases must be stringently protected. 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 in this case, and suggests that any waiver must be stringently examined.

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 . . . .” and limits the legislature’s ability to authorize waiver of the right 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. 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.

Thus, differences in the language between the state and Federal Constitutions also favor an independent application of the State Constitution in this case. Waiver of the state constitutional right to a jury trial requires more than a waiver of the corresponding federal right.

### 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, Washington “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) (“Smith I”).

In 1889, when the state constitution was adopted, there was a nearly universal understanding that the right to a jury trial in felony cases could not be waived. *See e.g., State v. Lockwood*, 43 Wis. 403, 405 (1877) (“The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived”); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A defendant “may waive any... right except that of trial by jury in a felony case”); *United States v. Taylor*, 11 F. 470, 471 (C.C.Kan. 1882) (“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. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (“The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused

to waive a trial by jury, and have never consented to try the facts by the court...”)

This tradition was rooted in the common law:

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327. This right of trial by jury in all capital cases -- and at common law a century and a half ago all felonies were capital -- was justly regarded as the great safe-guard of personal liberty. Says Mr. Blackstone: "The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 Black. Com. 349. The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court.

Not only have we, in general terms, adopted the common law as a system, but by the express provisions of our Constitution and statutes the mode of trial in criminal cases known to that system is specifically adopted and preserved. By the clauses of the Constitution above cited, the common law right to a trial by jury in criminal cases is guaranteed and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded.

A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily

follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

*Harris v. People*, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by People ex rel. Swanson v. Fisher*, 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in “the soundest conception of public policy.” *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

*Carman*, at 131.

The prohibition against jury waivers was also viewed as a natural limitation on an accused person’s power to shape the proceedings. For example, in *Territory v. Ah Wah*, 4 Mont. 149, 168-173 (1881), the Montana Supreme Court considered the question of whether or not a defendant could waive a twelve-person jury:

Can a defendant, on his own motion, change the tribunal and secure to himself a trial before a jury not authorized by and unknown to the law?... Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the

prosecution or the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled... By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration... “[T]he prisoner’s consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law... The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and a defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence... Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him.”...

“...[W]e think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority, which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger in limine, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction.”

*Territory v. Ah Wah*, at 168-173 (citations omitted). Despite the prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing “[t]he defendant and prosecuting attorney with the assent of

the court [to] submit the trial to the court, except in capital cases.” Laws of Washington, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution: the framers did not include language permitting the legislature to provide for waivers in criminal cases.<sup>3</sup>

Prior to the adoption of the State Constitution in 1889, the U.S. Supreme Court had ruled that (even in a civil case) “every reasonable presumption should be indulged against [a] waiver” of the fundamental right to a jury trial. *Hodges v. Easton*, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882). Even by 1900 there was still disagreement in Washington on whether or not a defendant could waive her or his right to a jury trial. See *State v. Ellis*, 22 Wn. 129, 60 P. 136 (1900), *overruled in part by State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952).

These authorities suggest that the drafters of the Constitution would have been loathe to permit a casual waiver of this important right.

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<sup>3</sup> Instead, they adopted the language of Article I, Section 21, which allowed the legislature to permit waiver only in civil cases. Furthermore, the 1854 statute was implicitly repealed by the adoption of Wash. Const. Article I, Section 21, because the statute was repugnant to that provision of the constitution: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature...” Wash. Const. Article XXVII, Section 2.

Thus, common law and state constitutional history favor the interpretation urged by Ms. Stallings.

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).

As noted previously, the Territorial Legislature provided for jury waivers in noncapital criminal cases. Laws of Washington, Chapter 23, Section 249 (1854-1862). A similar statute (RCW 10.01.060) remains in effect, and is echoed in CrR 6.1. None of these authorities outline the requirements for such a waiver.

In *State v. Karsunky*, 197 Wn. 87, 84 P.2d 390 (1938) held that waivers of the jury trial right were statutorily prohibited in felony cases. In *State v. McCaw*, 198 Wn. 345, 88 P.2d 444 (1939), the Court held that this statutory prohibition also extended to misdemeanors. Subsequently, the Court held that a defendant could waive the right to a jury trial by pleading guilty. *Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945). Finally, in 1966, the Supreme Court upheld a defendant’s waiver of his right to a jury trial (based on a 1951 statute authorizing such waivers). In

so doing, the Court noted that “Constitutional guarantees are subject to waiver by an accused if he knowingly, intentionally, and voluntarily waives them.” *State v. Forza*, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966).

Analysis of the fourth *Gunwall* factor is consistent with the common law and state constitutional history: the right to a jury trial in Washington is highly valued, and waiver of that right has not been permitted until relatively recently. Accordingly, waivers of the state constitutional right must be treated with great care.

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 contemplating a waiver of rights guaranteed by Wash. Const. Article I, Section 21 and 22 is a matter of State concern; there is no

need for national uniformity on the issue. *See Smith* (“Smith I”), at 152.

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

7. Conclusion: all six *Gunwall* factors favor Ms. Stallings’s interpretation of the state constitutional right to a jury trial, and impose a heavy burden when the state seeks to show a waiver.

All six *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. To sustain a waiver, a reviewing court must find in the record proof that the defendant fully understood the right under the state constitution—including the right to participate in selecting jurors, the right to a fair and impartial jury, the right to a jury of twelve, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.<sup>4</sup>

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<sup>4</sup> Division II has held that *Gunwall* analysis does not apply to waiver of state constitutional rights: “*Gunwall* addresses the extent of a right and not how the right in question may be waived.... The issue here is waiver. Although Washington’s constitutional right to a jury trial is more expansive than the federal right, 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, 770-773, 142 P.3d 610 (2006) (citations omitted). *Pierce* should be reconsidered. Although “it does not *automatically* follow that additional safeguards are required,” *Gunwall* provides the appropriate framework for determining when such additional safeguards are required. *Pierce*, at 773. The *Pierce* court did not articulate *any* test for determining the requisites of a valid waiver under the state constitution. Because

- B. The record does not affirmatively establish that Ms. Stallings waived her state constitutional right to a jury trial with a full understanding of the right.

Ms. Stallings's written waiver referred to being tried by the court instead of a jury. Waiver of Trial by Jury, Supp. CP. It did not make any reference to her right to participate in selecting jurors, her right to a fair and impartial jury, or her right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt. Nor did the court's colloquy with Ms. Stallings address these rights. *See* RP (12/1/08) 13-14.

In the absence of an affirmative showing that she understood these rights, Ms. Stallings's waiver is invalid under the state constitution. Her convictions must be vacated and the case remanded to the superior court for a jury trial.

## **II. THE TRIAL COURT ERRED BY IMPOSING \$3,305 IN RESTITUTION.**

Under RCW 9.94A.753(3), restitution "shall be based on easily ascertainable damages for injury to or loss of property..." A trial court's authority to order restitution is purely statutory. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992) ("Smith II"). *See also State v. Tribble*, 96 Wn.App. 662, 664, 980 P.2d 794 (1999) (where the trial court fails to

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*Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be reconsidered.

follow the provisions of the governing statute, its restitution order is void). A restitution order is reviewed for an abuse of discretion. *State v. Morse*, 45 Wn.App. 197, 199, 723 P.2d 1209 (1986). The trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This includes the application of an incorrect legal analysis or other error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

In this case, the trial court's ability to order restitution was hampered by law enforcement's failure to contact the recycler who purchased scrap metal from Ms. Stallings, and the property owner's failure to carefully inventory the missing property or segregate the amount presumably taken by Ms. Stallings. As the trial court noted, the lax security at FKC made it highly likely that numerous thefts occurred by multiple suspects unrelated to Ms. Stallings. Memorandum Opinion, filed 6/18/09, p. 3-4, Supp. CP.

Because he was unable to "easily [ascertain] damages for injury to or loss of property" caused by Ms. Stallings's crime, the trial judge was forced to speculate. See Memorandum Opinion, filed 6/18/09, Supp. CP. But a restitution order cannot be based on speculation or conjecture. *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *reversed on other*

grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

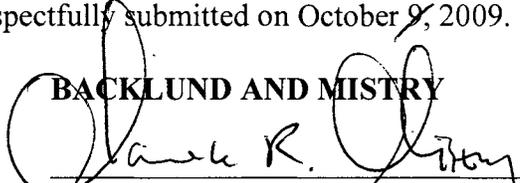
Because the trial judge was forced to speculate to determine the amount of restitution, the restitution order is invalid. The order must be vacated, and the case remanded for entry of a new restitution order. Based on the evidence presented at trial and the restitution hearing, the amount should not be greater than \$565. See Memorandum Opinion, filed 6/18/09, p. 1, Supp. CP.

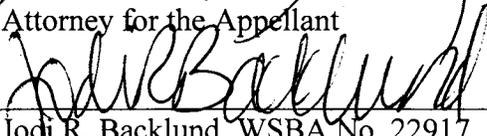
### **CONCLUSION**

For the foregoing reasons, Ms. Stallings's convictions must be reversed and the case remanded for a jury trial. In the alternative, if the convictions are not reversed, the restitution order must be vacated and the case remanded for entry of a new restitution order.

Respectfully submitted on October <sup>8</sup>9, 2009.

**BACKLUND AND MISTRY**

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

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

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CERTIFICATE OF MAILING

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

Elizabeth Stallings  
2031 W 15th St.  
Port Angeles, WA 98363

and to:

Clallam County Prosecuting Attorney  
223 E. 4th Street, Suite 11  
Port Angeles, WA 98362-0149

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

All postage prepaid, on October <sup>8</sup>/<sub>9</sub>, 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 October <sup>8</sup>/<sub>9</sub>, 2009.

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