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STATE OF WASHINGTON

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No. 40018-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jerald Hayter,

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00124-6

The Honorable Judge David L. Edwards

Appellant's Opening Brief

CORRECTED COPY

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ASSIGNMENTS OF ERROR

1. Mr. Hayter's Failure to Register conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The prosecution did not prove beyond a reasonable doubt that Mr. Hayter had a constitutionally valid predicate conviction requiring him to register as a sex offender.
3. Mr. Hayter was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
4. Defense counsel was ineffective for failing to investigate Mr. Hayter's case prior to the CrR 3.5 hearing.
5. Defense counsel was ineffective for failing to present evidence of Mr. Hayter's mental health issues at the CrR 3.5 hearing.
6. Defense counsel was ineffective for failing to present evidence of Mr. Hayter's low IQ and mild mental retardation at the CrR 3.5 hearing.
7. Defense counsel was ineffective for failing to present evidence that Mr. Hayter was heavily medicated at the time he was questioned by police.
8. The court erred by entering Finding of Fact No. 6.
9. The court erred by entering Conclusion of Law No. 2(3).
10. Defense counsel was ineffective for failing to ensure Mr. Hayter received a speedy trial.
11. Mr. Hayter's conviction was entered in violation of his state constitutional right to a jury trial.
12. The trial court failed to properly determine Mr. Hayter's criminal history and offender score.
13. The trial court violated Mr. Hayter's constitutional right to remain silent by forcing him to acknowledge criminal history.

14. The trial court erred by sentencing Mr. Hayter with an offender score of nine.
15. The trial court erred by adopting Finding 2.2 of the Judgment and Sentence, which purported to list Mr. Hayter's criminal history.
16. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for Failure to Register must be predicated on a constitutionally valid prior offense. Here, the prosecutor failed to establish that Mr. Hayter's 1989 rape conviction was entered knowingly, intelligently, and voluntarily, with a full understanding of his rights. Was Mr. Hayter's Failure to Register conviction obtained in violation of his Fourteenth Amendment right to due process because it was predicated on a constitutionally invalid prior offense?
2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to investigate Mr. Hayter's case before the CrR 3.5 hearing, and did not present evidence relevant to the voluntariness of his statements. Was Mr. Hayter denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
3. Defense counsel is charged with ensuring that an accused person receives a speedy trial. Here, defense counsel failed to diligently investigate and prepare the case, and unreasonably delayed Mr. Hayter's trial. Was Mr. Hayter denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. 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 Mr. Hayter understood his right, under the state constitution, to participate in the selection of jurors, to a fair and impartial jury, and to be presumed innocent by the jury unless proven guilty beyond a reasonable doubt. In the absence of such an affirmative showing, did Mr. Hayter's conviction violate his state constitutional right to a jury trial?

5. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing. In this case, the trial court required Mr. Hayter to acknowledge prior convictions alleged by the prosecutor. Did the trial court violate Mr. Hayter's Fifth Amendment right to remain silent?

6. Under the Fourteenth Amendment's due process clause, the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jerald Hayter, Jr. was homeless in Grays Harbor County. RP (11/5/09) 66. He stayed at the Union Gospel Mission, and planned to enter their men's program. RP (11/5/09) 28, 67-68. This program consisted of a yearlong residency, including work and education, for men with "life-controlling problems". RP (11/5/09) 24, 31. He gave the Mission as his address when he registered his residence with local law enforcement in February of 2009. RP (4/20/09) 8; RP (11/5/09) 35, 40, 68.

Mr. Hayter suffered from a painful infection that required surgery, and also had been diagnosed with anxiety, agoraphobia, panic disorder, and cellulitis. RP (11/5/09) 54-55, 60-61, 81. In February and March of 2009, he was taking medication that could impair his judgment, concentration, and energy level, and which could cause nausea, sleepiness, dizziness, and extreme fatigue. RP (11/5/09) 55, 57, 60-61. Mr. Hayter was also mildly mentally retarded, with an IQ of 70, and could not read beyond a third grade level. RP (11/5/09) 78-79.

In March of 2009, Mr. Hayter asked his sister to give him a ride so that he could see his ailing grandson. RP (11/5/09) 63. After getting Mr. Hayter to her apartment in Raymond, the car broke down and Mr. Hayter

was stranded at his sister's for a few days. RP (11/5/09) 64. While he stayed with friends over the next several days, he still considered the Mission his residence and still intended to enter their program. RP (11/5/09) 68-71, 74.

An officer went to an apartment on an unrelated call on March 14, 2009, and noted that Mr. Hayter was sleeping on a mattress. RP (11/5/09) 39, 43. Mr. Hayter was arrested there on March 19, 2009 and charged with Failure to Register. RP (11/5/09) 40; CP 1-3.

The court held a hearing pursuant to CrR 3.5 in April of 2009. Officer Kelley testified that he had contacted Mr. Hayter on March 18, 2009 at an apartment, and had spoken with him. RP (4/20/09) 6-9. Mr. Hayter told him that he was registered at the Mission, and that he believed that he had ten days to change his address after a move. RP (4/20/09) 8. The officer called the sex offense registrar, who told him that Mr. Hayter had either 48 or 72 hours to register a change. RP (4/20/09) 9-11. The court denied the suppression motion, ruling that the officer's contact with Mr. Hayter was not custodial interrogation.¹ RP (4/20/09) 16. The court set a trial date of August 4, 2009. Notice of Trial Date filed 4/22/09, Supp. CP.

¹ The court ruled orally and did not enter written findings for this hearing.

On July 21, defense counsel moved for a continuance so that he could complete his investigation. RP (7/21/09) 1-3. The court granted counsel's oral motion and trial was set for September 15, 2009. Order for Continuance of Trial Date filed 7/21/09, Supp. CP.

The state moved to continue the trial at a hearing on August 20, 2009, due to witness unavailability. RP (8/20/09) 4. Mr. Hayter's attorney told the court that he needed additional time to prepare for trial since his client had been on medication that could impact his ability to form intent. RP (8/20/09) 9. At this same hearing, the court accepted a Jury Trial Waiver from Mr. Hayter. Waiver of Trial by Jury by Defendant, Supp. CP. The court reviewed the waiver with Mr. Hayter:

THE COURT: Mr. Hayter, I have been handed a document entitled waiver of trial by jury. It's dated today; is that your signature on this document?

THE DEFENDANT: Yes, it is.

THE COURT: Did you read it?

THE DEFENDANT: Yes.

THE COURT: Do you understand what it says?

THE DEFENDANT: Yeah.

THE COURT: Is it your intention as you stand here now, to waive your right to a trial by jury in this case?

THE DEFENDANT: Yes, I am.

THE COURT: Do you understand that you have a right under the constitution of the United States and the State of Washington to have your guilt or innocence determined by a jury of 12 citizens?

THE DEFENDANT: Yes.

THE COURT: And if you waive that right, your guilt will be determined by a judge sitting without a jury; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And at a jury trial, the prosecuting attorney must convince all 12 of the jurors of your guilt beyond a reasonable doubt. In a jury trial the state must -- rather, if you waive your right to a jury then the State only needs to convince one person, the judge, of your guilt; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And did you have an opportunity to discuss this issue of a trial by jury or a trial without a jury with Mr. Farra?

THE DEFENDANT: Yes, I have.

THE COURT: Did you have any questions that he didn't answer to your satisfaction?

THE DEFENDANT: No, sir.

THE COURT: Do you have any questions you wish to ask me about this process?

THE DEFENDANT: No. THE COURT: Okay. I am going to ask you one more time, just in case; do you now wish to have your guilt determined by a judge sitting without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: And you wish to waive your right to a jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: I will accept the waiver of trial by jury for filing. Your case will be scheduled for a nonjury trial, Mr. Hayter. RP (8/20/09) 4-6.

On September 18, 2009, Mr. Hayter told the court that he had asked his attorney to investigate a mental defense and his attorney had not done so. RP (9/18/09) 11-12. He made other complaints about his attorney; however, the court took no action. RP (9/18/09) 12-13. Defense counsel noted that Mr. Hayter's desire for an evaluation was valid and that he was consulting with an expert. RP (9/18/09) 14-15.

The case was tried to the bench on November 5, 2009. RP (8/20/09) 4-6. Mark Bailey, the men's director at the Union Gospel Mission, confirmed that Mr. Hayter resided at the Mission in February of 2009, until March 1, 2009. RP (11/5/09) 25-26. The state also introduced three documents as Exhibits: a Judgment and Sentence showing a 1989 conviction for Rape in the Second Degree, a registration notice, and a registration form. Exhibits 3, 4, 5, Supp. CP.

Mr. Hayter presented a diminished capacity defense. RP (11/5/09) 52-87. Physician's Assistant Scott Haga stated that he saw Mr. Hayter in February and March of 2009 for anxiety, agoraphobia and cellulitis, and that he prescribed oxycontin, citatopram and alprazolam. RP (11/5/09) 54. He said that these medications could impact judgment, concentration, and energy levels. RP (11/5/09) 55. Dr. Trowbridge testified that Mr. Hayter was mildly mentally retarded, and cannot really read. RP (11/5/09) 78-79. He opined that Mr. Hayter's ability to knowingly fail to register was diminished by his mild mental retardation, his inability to read, and by the medications he was taking. RP (11/5/09) 83.

The judge found Mr. Hayter guilty as charged. RP (11/5/09) 96.

At sentencing, the state filed a Statement of Prosecuting Attorney, which alleged seven prior felony convictions, including the 1989 rape charge that formed the basis for the registration requirement. Statement of

Prosecuting Attorney, Supp. CP. The prosecutor then asked the court to have Mr. Hayter acknowledge his alleged criminal history:

[PROSECUTOR]: ...I filed a statement of prosecutor listing what the State believes to be Mr. Hayter's criminal history, and ask that he is acknowledging that as his history.

THE COURT: [Counsel], have you and your client reviewed the criminal history set for on Page 2 of the statement of prosecuting attorney?

[DEFENSE COUNSEL]: I did give a copy to Mr. Hayter. I did not review it, and he is shaking, yes, he things that is the number of points he has.

THE COURT: Mr. Hayter, do you believe that this correctly sets forth your criminal history?

THE DEFENDANT: Yes, sir.

RP (11/16/09) 2.

The court found that Mr. Hayter's criminal history included all seven prior convictions, calculated his offender score as 9, and sentenced Mr. Hayter to 57 months, the top of the standard range. RP (11/16/09) 5; CP 7-17. Mr. Hayter timely appealed. CP 18.

ARGUMENT

I. MR. HAYTER'S FAILURE TO REGISTER CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE CHARGED CRIME.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009). A

manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant’s] rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).²

A conviction based on insufficient evidence raises a manifest error affecting a constitutional right, which may be argued for the first time on review. RAP 2.5(a)(3); *State v. Colquitt*, 133 Wn. App. 789, 795-796, 137 P.3d 892 (2006). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Id.*

² The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

- B. Due process requires the state to prove the elements of the charged crime beyond a reasonable doubt.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *Id.*

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. *Id.* On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough

to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

C. A conviction for Failure to Register requires proof of a constitutionally valid predicate conviction.

Under RCW 9A.44.130, convicted sex offenders are required to register with the sheriff in their county of residence. RCW 9A.44.130(1). Failure to register is a Class C felony (unless the predicate offense is other than a felony). RCW 9A.44.130(11).

A charge of Failure to Register may not be based on a constitutionally invalid predicate conviction. *See, e.g., State v. Summers*, 120 Wn.2d 801, 846 P.2d 490 (1993); *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980). The validity of the predicate conviction is an essential element, which the state must prove beyond a reasonable doubt. *State v. Lopez*, 107 Wn.App. 270, 276, 27 P.3d 237 (2001).

Where an accused person disputes the constitutional validity of the predicate conviction at trial, the burden is on the prosecution to prove beyond a reasonable doubt that the conviction was constitutionally

obtained. *Swindell*, at 199. Although the accused person “bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction,”³ this does not mean the error cannot be raised for the first time on review. Instead, as with all constitutional errors, if the error is apparent in the record, it may be raised for the first time on appeal as a manifest error affecting a constitutional right, pursuant to RAP 2.5(a)(3).

In this case, the facts introduced at trial establish that Mr. Hayter’s 1989 conviction was constitutionally invalid. Accordingly, his challenge to the sufficiency of the evidence may be raised for the first time on review as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

D. Mr. Hayter’s 1989 guilty plea was entered in violation of his Fourteenth Amendment right to due process.

Due process requires an affirmative showing that an accused person’s guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996). A plea of guilty “is an admission of criminal conduct as well as the waiver of the right to trial.” *Finch v. Vaughn*, 67 F.3d 909, 914 (11th Cir. 1995) (citing *Brady v. United*

³ *State v. Reed*, 84 Wn.App. 379, 384-385, 928 P.2d 469 (1997) (citing *Summers* at 812).

States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). A waiver of constitutional rights must be knowing, intelligent, and voluntary, “with sufficient awareness of the relevant circumstances and likely consequences.” *Vaughn*, at 914 (quoting *Brady*, at 748). This includes knowledge of all direct consequences of the plea. *State v. A.N.J.*, 168 Wn.2d 91, 113, 225 P.3d 956 (2010); *see also Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (defense counsel ineffective for giving inaccurate information regarding immigration consequences of guilty plea.)

In this case, the record is insufficient to prove beyond a reasonable doubt the constitutional validity of Mr. Hayter’s 1989 conviction. First, the plea form does not include notification of the community placement term that followed conviction. Exhibit 2, Supp. CP. A guilty plea is involuntary if it is entered without knowledge of the term of supervision to be imposed. *See Isadore, supra*.

Second, the plea form incorrectly advised Mr. Hayter that he was “presumed innocent *until* the charge(s) is (are) proven beyond a reasonable doubt...” Exhibit 2, Supp. CP. In fact, under the Fourteenth Amendment’s due process clause, an accused person is presumed innocent *unless* the charge is proven beyond a reasonable doubt. *In re Winship, supra*.

Third, the plea form included a warning that the trial court could impose an exceptional sentence following conviction; however, such a procedure has since been held unconstitutional. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Accordingly, the warning contained in the plea form is inaccurate.

The evidence raises a colorable fact-specific argument that Mr. Hayter's 1989 conviction was unconstitutional. In the absence of evidence establishing the validity of the predicate conviction beyond a reasonable doubt, the guilty verdict in this case cannot stand. *Swindell, supra*. Mr. Hayter's conviction for Failure to Register must be reversed and the case dismissed with prejudice. *Id.*

II. MR. HAYTER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Mr. Hayter was constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984)); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Mr. Hayter was prejudiced by his attorney's deficient performance at the CrR 3.5 suppression hearing.

Constitutionally adequate assistance requires, at a minimum, that defense counsel "conduct a reasonable investigation." *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Without doing so, counsel cannot make informed decisions about how best to represent the client. *Brett*, at 873. The degree and extent of investigation required will vary depending upon the issues and facts presented by each case. *A.N.J.*, at 111. Under the American Bar Association standards (quoted with approval in *A.N.J.*, at 111), "Defense counsel should conduct a prompt investigation of the

circumstances of the case and explore all avenues leading to facts relevant to the merits of the case...” ABA, *Standards for Criminal Justice, Prosecution Function and Defense Function*, 4-41(a) (3rd Edition, 1993). Furthermore, “depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.” *A.N.J.*, at 112; *accord Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006).

A defense attorney’s failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). In this case, defense counsel sought to exclude Mr. Hayter’s statements, but did not investigate Mr. Hayter’s case prior to the CrR 3.5 hearing, and thus failed to provide evidence bearing on the circumstances under which Mr. Hayter’s statements were made.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth

Amendment.⁴ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The privilege against self-incrimination absolutely precludes use of any involuntary statement against an accused in a criminal trial, for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). This restriction is “equally applicable to a drug-induced statement.” *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)).

Statements obtained during a noncustodial interrogation may be inadmissible under the Fifth Amendment. See *Beckwith v. United States*, 425 U.S. 341, 347-348, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). In such circumstances, statements are evaluated under a totality-of-the-circumstances test, which takes into consideration all of the surrounding circumstances, including “the characteristics of the accused and the details of the interrogation.” *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

⁴ Similarly, Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

In this case, defense counsel did not provide the court with pertinent characteristics of the accused at the CrR 3.5 hearing. In particular, defense counsel failed to introduce evidence that Mr. Hayter suffered from anxiety, agoraphobia, and panic disorder, that he was heavily medicated at the time of the interrogation, that he had an IQ of 70 (which Dr. Trowbridge later characterized as mild mental retardation), and that he could not read. RP (11/5/09) 54-61, 76-86. This failure is not surprising, because counsel apparently did not even begin investigating the case until mid-July, nearly three months *after* the April 20th CrR 3.5 hearing, and didn't consult with a psychologist until the end of September. Order Authorizing Investigator; Motion (9/28/2009); Order Auth. Payment of Expert (9/28/2009), Supp. CP.

There was no legitimate strategic or tactical reason to proceed with the CrR 3.5 hearing without first investigating the case. The record demonstrates that counsel wished to exclude Mr. Hayter's statements; he was not pursuing a strategy that involved allowing the statements to be admitted. *See* RP (4/20/09) 15-16. A reasonable attorney would have investigated the case and consulted with an expert before the CrR 3.5 hearing. Because counsel failed to do so, his conduct fell below an objective standard of reasonableness. *Reichenbach, supra.*

Furthermore, Mr. Hayter was prejudiced by his attorney's deficient performance. Had counsel presented the appropriate testimony to the trial court, the prosecution would have been unable to sustain its heavy burden of establishing voluntariness under the totality of the circumstances.

Dickerson, supra. In the absence of Mr. Hayter's statements, there is a reasonable likelihood that the result of the trial would have differed.

Saunders, supra.

Accordingly, Mr. Hayter was denied the effective assistance of counsel. *Reichenbach.* His conviction must be reversed and his case remanded for a new trial. *Id.*

D. Defense counsel's dilatory conduct denied Mr. Hayter his right to a speedy trial.

The state and federal constitutions guarantee an accused person the right to a speedy trial. U.S. Const. Amend. VI;⁵ Wash. Const. Article I, Section 22. In Washington, CrR 3.3 requires that trial be held within 60 days of arraignment, where the accused person is in custody pending trial. CrR 3.3. Furthermore, "[t]he State cannot by its own unexcused conduct force a defendant to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a

⁵ The Sixth Amendment is applicable in state court through the Fourteenth Amendment. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).

material part of his defense.” *State v. Brooks*, 149 Wn.App. 373, 387, 203 P.3d 397 (2009).

In this case, Mr. Hayter was forced to choose between his right to a speedy trial and his right to adequately prepared counsel. The choice was required not by the prosecutor’s misconduct, but by his own attorney’s failure to prepare in a timely fashion.⁶

Defense counsel was appointed on March 20, 2009. Order Appointing Attorney, Supp. CP. Counsel did not seek the assistance of an investigator until nearly four months later, on July 16. Order Authorizing Investigator, Supp. CP. He waited another two months to seek expert assistance to investigate a diminished capacity defense. Motion (9/28/2009); Order Auth. Payment of Expert (9/28/2009), Supp. CP.

Under the circumstances, this delay was unreasonable: Mr. Hayter was charged with only one offense, based on a simple fact pattern, lacking in complexity. Mr. Hayter’s mental health could have been investigated earlier in the proceedings, and an evaluation obtained prior to the expiration of speedy trial (pursuant to Mr. Hayter’s waiver) on August 31.

⁶ The U.S. Supreme Court has held that delay caused by defense counsel does not violate the right to speedy trial. *Vermont v. Brillon*, ___ U.S. ___, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009). However, it has not determined whether or not trial counsel’s failure to secure a speedy trial can give rise to an ineffective assistance claim.

See Waiver of Speedy Trial, Supp. CP. Instead, defense counsel didn't even seek funding to consult with an expert until the end of September, nearly a month after the last allowable date for trial under Mr. Hayter's waiver. Waiver of Speedy Trial; Motion (9/28/2009), Supp. CP.

Defense counsel, when appointed to represent an indigent person, is charged with ensuring that the accused person's rights are respected. This includes enforcing the constitutional right to speedy trial, and the rights secured by CrR 3.3. But where appointed counsel unreasonably delays resolution of the case, an accused person can languish in jail awaiting trial, as Mr. Hayter was forced to do.

Defense counsel's dilatory conduct and lack of preparation denied Mr. Hayter the effective assistance of counsel. Accordingly, his conviction must be vacated, and his case remanded for a new trial.⁷

Reichenbach, supra.

III. MR. HAYTER'S CONVICTION WAS ENTERED IN VIOLATION OF HIS 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

⁷ A new trial will not restore Mr. Hayter his right to a speedy resolution of his case; however, remand for a new trial is the remedy prescribed for violations of the right to the effective assistance of counsel. *Reichenbach, supra.*

(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.⁸ *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.⁹

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

⁸ 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).

⁹ 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*.

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).

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.¹⁰

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. Thus, common law and state constitutional history favor the interpretation urged by Mr. Hayter.

4. Pre-existing state law.

¹⁰ 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.

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.” *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*, 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 Mr. Hayter’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.¹¹

¹¹ 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 *Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be reconsidered.

- B. The record does not affirmatively establish that Mr. Hayter waived his state constitutional right to a jury trial with a full understanding of the right.

Mr. Hayter's written waiver did not make any reference to his right to participate in selecting jurors, his right to a fair and impartial jury, or his right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt. Waiver of Trial by Jury, Supp. CP. Nor did the court's colloquy with Mr. Hayter address these rights. *See* RP (8/20/09) 4-6.

In the absence of an affirmative showing that he understood these rights, Mr. Hayter's waiver is invalid under the state constitution. His conviction must be vacated and the case remanded to the superior court for a jury trial.

IV. THE SENTENCING PROCEEDING VIOLATED MR. HAYTER'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)).

- A. The trial court violated Mr. Hayter's right to remain silent by forcing him to acknowledge criminal history.

At sentencing, the trial court asked "Mr Hayter, do you believe that [the prosecutor's statement] correctly sets forth your criminal history?"

RP (11/16/09) 2. Mr. Hayter was not advised that he could decline to answer. Under these circumstances, the trial court violated his constitutional right to remain silent. *Post, supra*. Accordingly, his sentence must be vacated, his response to the court's question suppressed, and the case remanded for a new sentencing hearing.

- B. The 2008 Amendments to the SRA unconstitutionally shift the burden of proof at sentencing.

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Id.*, at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Id.*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW

9.94A.500(1), “[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is “acknowledged in a trial or at the time of sentencing,” and “[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).¹²

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

Here, the prosecutor failed to present any evidence that Mr. Hayter had criminal history, beyond that established at trial. Instead, the prosecutor submitted a document captioned “Statement of Prosecuting Attorney,” which merely alleged six prior adult felonies (in addition to the one established at trial). Statement of Prosecuting Attorney, Supp. CP. Under these circumstances, Mr. Hayter should have been sentenced with

¹² Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

an offender score of three, because the 1989 rape conviction scored as three points. *See* RCW 9.94A.525.

Instead, however, the trial judge relied on the prosecutor's assertions and Mr. Hayter's forced acknowledgment (apparently without the assistance of counsel) and sentenced Mr. Hayter with an offender score of nine. CP 8. This violated the rule set forth in *Ford, supra*.

The prosecutor failed to prove Mr. Hayter's criminal history, and the trial court failed to properly determine his offender score. The sentence must be vacated and the case remanded for sentencing with an offender score of three. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Hayter's conviction must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial.

If the conviction is not reversed, the sentence must be vacated, and the case remanded for resentencing with an offender score of three.

Respectfully submitted on June 15, 2010.

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COURT OF APPEALS

10 JUN 16 AM 11:00

STATE OF WASHINGTON

CERTIFICATE OF MAILING

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

Jerald Hayter, DOC #954742
Airway Heights Corrections Center
Post Office Box 1899
Airway Heights, WA 99001-1899

↓
Corrected copy
JB

and to:

Grays Harbor County Prosecutor
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

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

All postage prepaid, on June 15, 2010.

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 June 15, 2010.



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

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COURT OF APPEALS

10 JUN 18 PM 12:30

STATE OF WASHINGTON

BY _____
DEPUTY

No. 40018-9-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

State of Washington)

vs.)

Jerald Hayter)

) Declaration of Service

Jodi R. Backlund declares as follows:

Yesterday I was informed that I had misdirected the Grays Harbor County Prosecuting Attorney's copy of Appellant's corrected copy of the Opening Brief, and that therefore it was not delivered on the date that it was supposed to be. I have therefore mailed a copy of the brief to the prosecutor on today's date, accompanied by this Declaration and the Motion for Permission to File Corrected Brief which was filed with the brief.

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

Signed June 17, 2010 at Olympia, Washington.



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

Declaration of Service

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